Fundraising Legislation in Australia: The Exemptions and Exceptions Maze

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Introduction

Any attempt to rationalise, harmonise or unify fundraising regulation requires a common understanding of what is the fundamental characteristic that will trigger application of the provisions. The current definitions of fundamental characteristics are diverse and when combined with the significant exempted purposes and organisations make for a bewildering patchwork of complexity.

This paper first examines each jurisdiction in turn in relation to their fundamental definitional starting point and exemptions. It then tries to map the similarities and differences between all the jurisdictions and make a judgment about patterns of convergence or divergence of provisions in relation to both the fundamental starting points and exemptions.

New South Wales

Definition of fundraising

The operative Act is the Charitable Fundraising Act 1991 (NSW). Section 5 of the Act defines fundraising as a ‘fundraising appeal’. The definition is (emphasis added):

For the purposes of this Act, the soliciting or receiving by any person of any money, property or other benefit constitutes a fundraising appeal if, before or in the course of any such soliciting or receiving, the person represents:
(a) that the purpose of that soliciting or receiving, or
(b) that the purpose of an activity or enterprise of which that soliciting or receiving is a part, is or includes a charitable purpose.

It does not matter if the money is received in person, by mail, telephone or fax, or as a donation or in some other form, such as a art union, lottery, competition, walkathon, telethon, or in conjunction with the provision of food, entertainment or a commercial undertaking : section 5(2).

1 There is no substantive legislation in relation to fundraising in the Northern Territory.
The soliciting or receiving of money, property or other benefit must be for or include a charitable purpose. The definition of charitable purpose in section 4 of the Act is ‘any benevolent, philanthropic or patriotic’ purpose which is wider than the technical legal term.²

Thus, the Act applies to the conduct of a fundraising appeal, and applies to those who conduct a fundraising appeal: section 6. Such a person must hold an authorisation to conduct a fundraising appeal: sections 9, 13A.

**Exceptions**

There are exceptions to the Act listed in section 5(3). These are:

(a) a request for, or the receipt of, an amount required in good faith as the fee for renewal of membership of an organisation,
(b) an appeal by an organisation to (or the receipt of money or a benefit from) members of the organisation,
(c) a request that any property be devised or bequeathed, or the giving of any information as to the means by which any property may be devised or bequeathed,
(d) an appeal conducted exclusively or predominantly among persons sharing a common employer or place of work by one of those persons (being an appeal for a charitable purpose connected directly with another of those persons or any such other person’s immediate family) and the receipt of money or a benefit from any such appeal,
(e) an appeal to (or the receipt of money or a benefit from) any Commonwealth, State or local government authority,
(f) anything prescribed by the regulations.

In respect of section 5(3) (f), the *Charitable Fundraising Regulation 2008* (NSW) at Reg. 4 additionally excepts any request for or receipt of money by:

(a) educational facilities or services, or
(b) child-minding services, or
(c) goods or services supplied through a supported employment service for people with disabilities, or
(d) nursing or medical services, or
(e) other care or welfare services.

These exceptions refer to the payment of ‘a genuine fee or charge for the provision of’ the services listed, and not to any other solicitations for money unless they fall within the other subsections of section 5.

² See further page 18 ff.
In her second reading speech to the *Charitable Fundraising Bill* in the Legislative Assembly, the then responsible Minister, Ms Anne Cohen, said in relation to these exceptions (emphasis added):³

‘The definition of the appeals which are to be subject to this Act is found in clause 5. These are described in the bill as fundraising appeals. The clause begins with the basic proposition that the *soliciting of any money or property for a charitable purpose is a fundraising appeal*. The clause then provides a *limited class of exceptions*. The first exception is membership renewal fees. The original membership drive for an organisation having a charitable object is to be made subject to this Act because of the increasing tendency of organisations to style requests for donations as invitations to pay a membership fee. Membership renewal fees are exempted because existing members are able to invoke the protection given to them by the constitution of the organisation. Similarly, appeals to the members of an organisation are excluded from the definition. Advice as to how bequests may be made is also to be excluded. Bequests lack the immediacy of direct appeals to the public. A donor has the time to consider the potential bequest, is able to seek professional advice and is able to alter his or her decision at a later date. Another exemption concerns appeals made at a workplace to raise funds to assist a colleague or his or her family. This is consistent with the approach taken with respect to appeals to members of an organisation. An appeal at a workplace is able to be overseen by the persons who made the donations.’

The Minister appears to have used the terms exception, exclusion and exemption interchangeably in this speech, but in effect, the collections of money she is referring to are *exceptions* to the definition of a fundraising appeal. As exceptions, they are not regarded as fundraising at all.

**Exemptions**

Under section 7(1) of the *Charitable Fundraising Act 1991* (NSW), religious organisations are exempted from the provisions of the Act⁴ as follows:

(a) a religious body or a religious organisation in respect of which a proclamation is in force under section 26 of the Marriage Act 1961 of the Commonwealth or a religious body, or an organisation or office, within a denomination in respect of which such a proclamation is in force, or

(b) a religious body or religious organisation prescribed by the regulations, or

(c) any body or organisation that is certified in writing by the principal or executive officer of a body or organisation referred to in paragraph (a) or (b) to be affiliated with and approved by the organisation or body so referred to, or

(d) a member or employee of a body or organisation referred to in paragraph (a), (b) or (c), or any other person, who is acting with its authority.

Under section 7(2), the Minister may declare that, despite subsection (1), the Act and the regulations do apply to a religious organisation.

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⁴ Except for section 48 of the Act which relates to remuneration of board members of charitable organisations.
With respect to paragraph (a) of section 7(1), the proclamation in force under section 26 of the *Marriage Act 1961* (Cth) is the *Marriage (Recognised Denominations) Proclamation 2007* (Cth). Schedule 1 of the Proclamation lists 133 denominations recognised for the purposes of solemnization of marriage in Australia. In addition, in relation to section 7(1)(b), the *Charitable Fundraising Regulation 2008* (NSW) in Reg. 6 lists 32 other religious bodies exempted by regulation from the operation of the Act. Regulations 7 and 8 go on to exempt local councils, committees and certain trusts of councils, and universities within New South Wales from the need for an authority to conduct fundraising under the Act.

Section 9(3) of the Act also exempts the following from the need to obtain and authority to fundraise:

- an organisation established by an Act and subject to the control and direction of a Minister,
- a member, employee or agent of any such organisation who is authorised by the organisation or other person to conduct the appeal,
- a person who, in accordance with section 11, conducts the appeal in conjunction with the holder of an authority.

Section 11 refers to ‘traders’, who cannot fundraise unless in conjunction with the holder of an authority. In that case, any advertising or information material must identify the trader and the authority holder, and give details of how proceeds will be distributed.\(^5\) The Minister has discretion to attach further conditions to such an appeal.\(^6\)

Section 25 allows for an exemption under the regulations from the record-keeping provisions of the Act, but there are currently no relevant regulations to this effect.

In the second reading to the *Charitable Fundraising Bill* in the Legislative Assembly, the then Minister, Ms Anne Cohen, said (emphasis added):\(^7\)

> ‘The requirement that a person or organisation conducting an appeal for a charitable purpose hold a fundraising authority is found in clause 9. An exemption to this basic requirement is provided to organisations which are established by another Act of Parliament and are already subject to the direction and control of a Minister... Another important exemption relates to religious bodies, which are to be exempt from the provisions of the Act under clause 7. The advancement of religion is included under the common law definition of "charity". On a strict reading of the charity laws, this would mean that all of the activities of any church or religious body would be subject to the charity laws. The purpose of

\(^5\) *Charitable Fundraising Act 1991* (NSW) s 11(2)(b)-(c).

\(^6\) *Charitable Fundraising Act 1991* (NSW) s 11(3).

\(^7\) Hansard, New South Wales, Legislative Assembly, 17 October 1991, pages 2493-2494.
charity laws has not been and should never be to enable the State to control the administration and operation of churches and other religious bodies. Under the current law, an exemption is afforded to collections for religious activities, and the churches have steadfastly argued that the exemption should be preserved. However, the distinction between religious and other charitable activities is, at times, artificial and impossible to administer. Many churches claim all of their activities are religious. The bill strikes a balance between the right for churches to operate free of control and the need for some supervision of charitable collections from the public. Should the need arise, the Minister may by ministerial order declare the Act or part of it to apply to a specific group or organisation within a denomination. It is not expected that recourse to the ministerial order provisions will be required. The major churches have agreed to comply with the spirit of the Act. A significant feature of the bill is its emphasis on disclosure to the public - the requirement for the public to be fully informed of who is to benefit from an appeal. Clause 11 contains one of the provisions which demonstrates this principle. It requires a person who, or an organisation which, conducts an appeal in circumstances whereby that person or organisation may derive a personal profit or benefit from the appeal to disclose that interest. It is unfortunate that there have been occasions where the public has not been informed that a private benefit is to be received by an organisation or individual. Clause 11 applies to persons who conduct an appeal. A private benefit may also be derived by persons who participate in an appeal - the most obvious example being that of the paid charity collector. The Government believes a member of the public has a right to know when a percentage of any donation is to be retained by the collector by way of wage or commission, and similar disclosure provisions are to be made in the regulations concerning participants in an appeal.’

Religious bodies had had an exemption under the previous legislation the Charitable Collections Act 1934 (NSW). This exemption, in section 2(2), read (emphasis added):

‘This Act shall not extend to any activity of any church where such activity is wholly intended for the advancement of religion but shall extend to any activity of a church wholly or mainly intended for any other charitable purpose.’

It can be seen from the Minister’s speech that religious bodies were keen to obtain an even wider exemption under the provisions of the new Act. This was agreed to by the then Coalition government in New South Wales as a matter of striking ‘a balance’ between a free for all for church fundraising and some control over fundraising in the public interest. However, the latter means the Minister must make a specific ministerial order in respect of a church fundraising effort, but this power has never been exercised.8 The provisions in section 7(2) and (3) about possible Ministerial control seem therefore to be mere window-dressing. During the passage of the Bill in the Legislative Council, the Labor Opposition, the Australian Democrats and independents all supported the Bill.

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8 Personal communication from Steve Blackburn, Manager, Charities Licensing, Office of Liquor, Gaming and Racing, Communities New South Wales, 15 February 2011.
without raising any objections to, or indeed even mentioning, the exceptions and exemptions it contained.⁹

**Victoria**

**Definition of fundraising**

The operative Act in Victoria is the *Fundraising Act 1998* (Vic). Section 5 of the Act defines a ‘fundraising appeal’. This definition is (emphasis added):

A fundraising appeal occurs if a person solicits or receives money or a benefit on the basis of a representation that the soliciting or receiving is not solely for the profit or commercial benefit of the person or any other person, cause or thing on whose behalf the person is soliciting or receiving the money or benefit.

Section 5(2) provides *inter alia* that it does not matter if the representation is direct or indirect, or if the person who receives the money or benefit does not make the representation, or is a volunteer. The Victorian Act does not refer directly to charitable purposes. The purposes referred to in the Act are ‘non-commercial purposes’, and are therefore wider than charitable purposes. Section 1 provides (emphasis added):

‘The purpose of this Act is to regulate the raising and application of money and other benefits for non-commercial purposes from the public.’

In addition, section 5(1) defines a fundraising appeal as the soliciting or receiving of money or other benefits that is *not solely for profit or commercial benefit*.

However, section 2A of the Act, in listing the objects of the Act, refers to purposes which would be regarded as ‘charitable’ (emphasis added):

The object of this Act is to facilitate—

(a) transparency and public confidence in the fundraising industry and in not-for-profit organisations that conduct fundraising; and
(b) the protection of members of the public from whom money or a benefit is solicited for beneficial or benevolent purposes in the course of fundraising; and
(c) the protection of the public interest in relation to fundraising.

The purposes at (b) would be regarded as ‘charitable’ in a general sense, although ‘beneficial or benevolent purposes’ might not be ‘charitable’ in the technical and legal meaning of that word. Nevertheless, the Act applies to any person who conducts or participates in a fundraising appeal as defined: section 6.

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Exclusions

Section 5(3) provides that certain activities are not fundraising appeals. These are:

- (a) fundraising for a patriotic fund – this falls under the **Veterans Act 2005**
- (b) raffles, lotteries of other activities permitted under the **Gambling Regulation Act 2003**
- (c) membership or joining fees of an organisation
- (d) solicitation of money from within an organisation, even if it is for purposes other than the benefit of the organisation
- (e) solicitation of money from among employees at a workplace for the benefit of a workmate or a workmate’s family
- (f) solicitation from or receiving money or benefits from any level of government
- (g) solicitation from or receiving money or benefits from corporations, partnerships or trusts that are permitted by their constitutive documents to donate to nonprofit or non-commercial purposes
- (h) soliciting or receiving donations for the family of the deceased, or another person or organisation in lieu of sending flowers to a funeral or the family of the deceased
- (i) any other activity that the regulations state is not a fundraising appeal.

In relation to section 5(3)(g), the *Fundraising Regulations 2009* (Vic) Reg. 6 states that soliciting or receiving donations for the family of the deceased, or another person or organisation, in lieu of sending flowers to a funeral or the family of the deceased is not a fundraising appeal.

Exemptions

Section 16 of the Act contains exemptions to the Act as follows:

- (a) a Government school, a school council or a non-Government school within the meaning of the **Education and Training Reform Act 2006**;
- (b) a university, TAFE institute or other tertiary educational institution;
- (ba) a kindergarten that employs a pre-school teacher (as defined in the **Pre-school Teachers and Assistants (Leave) Act 1984**);
- (c) a registered funded agency within the meaning of the **Health Services Act 1988**;
- (d) a religious organisation;
- (e) a political party registered under section 50 of the **Electoral Act 2002**;
- (f) a trade union registered under the **Trade Unions Act 1958**;
- (g) an organisation registered under the **Fair Work (Registered Organisations) Act 2009** of the Commonwealth.

Religious organisation in this listing has the same meaning as in section 26 of the **Marriage Act 1961** (Cth): section 3 (see above). Other exemptions are provided for in section 16A, and require a Ministerial Order. Under section 16B, exemptions do not extend to commercial fundraisers irrespective of whether the commercial fundraiser is acting as an agent of an otherwise exempt person or organisation.

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10 *Fundraising Act 1998* (VIC) s 5(3)(g).
In her second reading speech to the Fundraising Appeals Bill (as it was originally called), the then Attorney-General, Jan Wade, spoke about the exemptions in the Bill (emphasis added):\(^\text{11}\)

‘The [previous] act [the Financial Appeals Act 1984] currently exempts a large range of bodies and persons, including schools, churches and hospitals, from most of the provisions of the act. This exemption includes the requirement to keep records for inspection by the public and inspectors appointed by the minister under the act. **Although the differentiation between exempt and non-exempt persons and bodies is maintained in this bill, the number of groups exempted has been reduced.** The bill will make a number of bodies, previously exempt under the current act, subject to reporting and record-keeping requirements. These groups include incorporated associations, sporting bodies, companies and organisations for which the $2 tax deductibility on donations applies. Some of these bodies have caused problems under the existing act and pose an unnecessary risk to the donating public because they are not required to record the receipt or expenditure of donations. It is therefore considered appropriate to tighten the safeguards and impose more stringent record-keeping requirements on such bodies to ensure public accountability in this area. **The new reporting and record-keeping requirements are a balance between providing sufficient information to the public as to where their donations have gone without unduly burdening fundraisers.**’

Although there were several amendments to the Bill, the Bill was supported by the then Labor opposition in the Legislative Assembly. The second reading speeches in the Legislative Assembly concentrated at length on actual cases of charity fraud, financial scandal and abuse of position reported by members and the emphasis was entirely on overcoming such situations and ensuring transparency and accountability.\(^\text{12}\) In the Legislative Council, the same issues were central to the debate. All parties supported the Bill and no issues were raised as to any exclusions or exemptions within the Bill.\(^\text{13}\)

The Attorney-General’s reference to exemptions in the previous Act, the Fundraising Appeals Act 1984 (Vic) points out that there was a much larger pool of exempt bodies under that Act. Section 6(1) of the 1984 Act lists 18 exemptions from the Act.\(^\text{14}\) These were:

(a) a State school, council or registered school under the Education Act 1958;
(b) an institution or benevolent society registered under the Hospitals and Charities Act 1958;
(c) a State Agricultural College carried on under the Victorian College of Agriculture and Horticulture Act 1982;
(d) the trustees or committee of management of any free library, reading room, mechanics’ institute or trades hall to whom or to which lands have been granted by the Governor in Council;
(e) a bona fide political party;
(f) a trade union registered under the Trade Unions Act 1958;

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\(^\text{11}\) Hansard, Victoria, Legislative Assembly, 30 April 1998, pages 1426-1427.
\(^\text{12}\) Hansard, Victoria, Legislative Assembly, 3 September 1998, pages 169-175; 180-189.
\(^\text{13}\) Hansard, Victoria, Legislative Council, 27 October 1998, pages 442-449.
\(^\text{14}\) These exemptions applied except for sections 20, 22, 36 and 37 of the Act.
(g) an association registered under the Industrial Relations Act 1979;
(h) an organization registered under section 132 of the Conciliation and Arbitration Act 1904 of the Commonwealth as amended and in force for the time being;
(i) a fund, authority or institution to which, by virtue of section 78 of the Income Tax Assessment Act 1936 of the Commonwealth as amended and in force for the time being and the regulations and notices made thereunder, a gift of the value of two dollars and upwards is an allowable deduction;
(j) a religious body or religious organization in respect of which a Proclamation is in force under section 26 of the Marriage Act 1961 of the Commonwealth as amended and in force for the time being;
(k) a company registered under section 66 of the Companies (Victoria) Code or a corresponding previous enactment;
(l) an association incorporated under the Associations Incorporation Act 1981;
m) a co-operative society which is a community advancement society for the purposes of the Co-operation Act 1981;
(n) a body or institution established by an Act which by the provisions of that Act has or includes objects which include the relief of poverty, the advancement of education, the advancement of religion, or any benevolent, philanthropic or patriotic purpose;
o) an organization which exists exclusively or primarily for the purpose of providing or promoting sporting activities or facilities;
p) the governing body of any person referred to in this sub-section;
(q) subject to sub-section (3), an auxiliary, branch, sub-branch, sub-committee or subsidiary of a person referred to in this sub-section authorized in that behalf by that person; or
(r) a prescribed person or a person included in a prescribed class of persons...

It could be argued that the updated listing in the 1998 Act merely subsumed several of these within more general descriptions (for example, (f), (g) ad (h)), but there are several differences, particularly at (i),(k), (l), (m), and (o)-(q).

**Queensland**

**Definitions**

The relevant Act is the *Collections Act 1966* (Qld). Any organisation that wishes to publicly fundraise in Queensland must be either:

- registered as a charity under section 10 (1);
- fundraising for a sanctioned community purpose under section 10(2); or
- authorised by a registered charity or sanctioned organisation to fundraise on its behalf.

The Act applies to ‘appeals for support’ for various purposes listed in section 9. These purposes are not limited to charitable purposes:

(a) any **charity**;
(b) any **charitable purpose** other than a charity;
(c) any charitable purpose joined with any other purpose, whether community purpose or not;
(d) any community purpose;
(e) any community purpose joined with any other purpose, whether a charitable purpose or not;
(f) any commercial undertaking or purpose of private gain joined with any purpose as aforementioned;
(g) any fund by whatever name called, established or to be established for the payment therein of moneys collected or of moneys received upon the disposal of articles collected and for the payment thereout, whether at times certain or uncertain, of moneys for any purpose or purposes as aforementioned.

Definitions of charity, charitable purpose, community purpose, appeal for support and collection are contained in section 5 of the Act. A ‘charity’ is established for a ‘charitable purpose’. A ‘charitable purpose’ means:

(a) a purpose which is exclusively charitable according to the law (other than statute law) of Queensland;
(b) the supplying of help, aid, relief, or support to, or the education or instruction (whether spiritual, mental, physical, technical, social, or otherwise) of, or the care, housing, or assistance otherwise of, any persons in distress;
(c) the aiding in any manner howsoever, of any hospital or ambulance or nursing service in the State, whether established or proposed to be established;
(d) any charity;
(e) any purpose which, pursuant to subsection (2), the Minister determines to be a charitable purpose;
(f) a purpose declared under a regulation to be a charitable purpose for this Act.

Organisations established purely for a one-off fundraising appeal are not considered charities: section 5. However, these sorts of collections may fall under the definition of a community purpose. A ‘community purpose’ means any purpose that is devoted or directed to the promotion of the general welfare of the public, at large or in a particular locality. This includes activities such as constructing and maintaining buildings, parks and other places for the enjoyment of the public. The regulations or the Minister may also declare a purpose to be community purpose: section 5.

An appeal for support means:

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—

(a) any collection for that purpose;
(b) any advertisement of any art union or the selling or offering for sale of any ticket or chance in any art union promoted or conducted for that purpose;
(c) any notification to the public expressly or impliedly indicating that any proceeds of, or any moneys from, or any collections at, any dance, concert, social entertainment, bazaar, fair, fete, carnival, show, sport, game, or other diversion, activity, or function
(whether of the classes previously enumerated or not) are intended or are to be appropriated for that purpose;
(d) the holding of any dance, concert, social entertainment, bazaar, fair, fete, carnival, show, sports, game, or other diversion, activity, or function (whether of the classes previously enumerated or not) any proceeds of which, or any moneys from which, or any collections at which are appropriated or intended for that purpose;
(e) any notification to the public expressly or impliedly indicating that any proceeds of, or any moneys from, the sale of any articles or the supplying of any service are intended or are to be appropriated for that purpose;
(f) the sale of any articles or the supplying of any service, any proceeds of, or any moneys from which are appropriated or intended for that purpose;
(g) any notification to the public, expressly or impliedly indicating that the whole or part of any fees for membership of any association are intended for or are to be appropriated for that purpose;
(h) anything prescribed to be an appeal for support.

Thus, there is a wide application of the Act to fundraising measures, which include collections as one aspect of fundraising.

Exclusions

The Act does not apply to appeals for support made solely for the purpose of advancement of religion, or for a charitable or community purpose, by or on behalf of a religious denomination recognised under the Marriage Act 1961 (Cth): sections 6(2)-(3), 9. This means that the prohibition on collections without sanction does not apply to appeals for support from religious denominations, except in relation to door-to-door or street collections: section 14A.

Under the Act, all appeals must be for the support of a registered charity, or be ‘sanctioned’. Purposes may be sanctioned as the Minister sees fit, for such duration as the Minister chooses: section 12(1)-(5). Sanctions may be revoked at the Minister’s discretion: section 12(8). Thus, a body not registered as a charity, or a body with a purpose not otherwise sanctioned by the Act is excluded from conducting appeals. This means that if a charity cannot gain registration under the Act, it cannot conduct or benefit from appeals: Sections 10, 19.

Exemptions

Section 19 deals with registration of charities for the purposes of the Act. Charities are classed as either exempt of non-exempt charities: section 19(2). The exemption here relates to the information that must be supplied under the Act.
South Australia

The applicable Act is the *Collections for Charitable Purposes Act 1939* (SA). This Act is currently under review (see below).

The Act applies to any person who is a collector: section 6. A collector is defined in section 4 as a person who collects or attempts to collect money wholly or partly for a charitable purpose, or who does so by the sale of badges, tokens, ribbons etc, or who does so by asking for bequests.

A ‘charitable purpose’ is defined in section 4 as follows:

- (a) the affording of relief to diseased, disabled, sick, infirm, incurable, poor, destitute, helpless, or unemployed persons, or to the dependents of any such persons;
- (b) the relief of distress occasioned by war, whether occasioned in South Australia or elsewhere;
- (c) the affording of relief, assistance, or support to persons who are or have been members of the armed forces of Australia or to the dependents of any such persons;
- (d) the provision of welfare services for animals;

This definition is narrower than the common law definition of charitable purpose. Subsections (c) and (d) were repealed in 1995, whilst subsection (f) was added in 1999. The repealed parts were described as no longer of ‘any relevance’ and ‘anachronistic’. The additional charitable purpose relating to animal welfare was added in 1999, although not without some controversy. The definition of charitable purpose in the Act is subject to review (see below).

Fundraising activities for a charitable purpose covered by the Act are wider than those specified in section 4 and include doorknock appeals, telemarketing, donations to clothing bins, sale of goods at second hand shops, seeking bequests, badge days, and public appeals. Lotteries are not included and are covered by other legislation.

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15 These were ‘the supply of equipment to any of His Majesty’s naval, military, or air forces, including the supply of ambulances, hospitals and hospital ships’; and ‘the supply of comforts or conveniences to members of said forces’.
16 Hansard, South Australia, House of Assembly, the Hon. S J. Baker, Treasurer, page 2272.
19 *Lottery and Gaming Act 1936* (SA)
Exemptions

Under section 18 of the Act, the Minister may exempt a person, society, body or association from compliance with specified provisions of the Act. This power has never been exercised.\(^{20}\)

Organisations not collecting for a charitable purpose as defined do not require a licence under the Act – examples given in Office of the Gaming and Liquor Commissioner materials are religious organisations, environmental organisations, and educational institutions.\(^{21}\) No specific listing of such organisations is maintained, and organisations must self-identify as collecting for a charitable purpose and obtain a licence accordingly.\(^{22}\)

Exclusions

A collection can only be conducted by a person who holds a licence. If a person does not hold a licence, then the person cannot act as a collector: section 6(1). This section does not apply if:

(a) the person—
   (i) only collects or attempts to collect money or property from persons known to the person or with whom the person regularly associates; and
   (ii) provides all of the money or property so collected to the holder of a section 6 licence; and
   (iii) is not a paid collector; or

(b) the person—
   (i) only collects or attempts to collect property for the purpose of affording relief to a particular person or to the dependants of a particular person; and
   (ii) provides all of the property so collected to that person or to those dependants; and
   (iii) is not a paid collector.

In addition, if a charity wishes to conduct an entertainment for fundraising purposes a section 7 licence is required.

The Minister has discretion to grant or refuse a licence to any applicant: section 11(3). There is no clear indication as to why a licence would be refused in the Act, but section 11(2) provides that the Minister must consider whether, having regard to the objects of the applicant, those objects would

\(^{20}\) Personal communication from Janet Ward, Senior Consultant, Office of the Liquor and Gaming Commissioner, 23 February 2011.


\(^{22}\) Personal communication from Janet Ward, Senior Consultant, Office of the Liquor and Gaming Commissioner, 23 February 2011.
be more effectively or economically carried out by some other person or body which is the holder of a licence under the Act. Licences can be revoked at any time on various grounds such as mismanagement, misappropriation, and excessive remuneration paid to organisers: sections 12(3) and 12(4). A list of organisations whose licence has been revoked is maintained by the Office of the Liquor and Gambling Commissioner on its website.23

**Review of the South Australian Act**

The *Collections for Charitable Purposes Act 1939* (SA) has recently been reviewed, and amendments are proposed.24 The Final Report of the review noted that at its meeting in April 2010, the Council of Australian Governments agreed to an implementation plan for a nationally consistent approach to fundraising regulation, which would result in significant changes to the Act from 2012.25

Of most interest in the current context is the proposal to amend the definition of ‘charitable purpose’. The Issues Paper outlined changes to the definition of charitable purpose,26 and submissions to the review supported the adoption of the definition of charitable purpose set out in the report of the Charities Definition Inquiry of 2001.27 The 2001 inquiry chose the following definition, where the term ‘advancement’ is taken to include protection, maintenance, support, research, improvement or enhancement:28

‘Charitable purposes shall be:

- the advancement of health, which without limitation includes:
  - the prevention and relief of sickness, disease or of human suffering;
- the advancement of education;
- the advancement of social and community welfare, which without limitation includes:
  - the prevention and relief of poverty, distress or disadvantage of individuals or families;
  - the care, support and protection of the aged and people with a disability;
  - the care, support and protection of children and young people;

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- the promotion of community development to enhance social and economic participation; and
- the care and support of members or former members of the armed forces and the civil defence forces and their families;

- the advancement of religion;
- the advancement of culture, which without limitation includes:
  - the promotion and fostering of culture; and
  - the care, preservation and protection of the Australian heritage;
- the advancement of the natural environment; and
- other purposes beneficial to the community, which without limitation include:
  - the promotion and protection of civil and human rights; and
  - the prevention and relief of suffering of animals.’

The South Australian Final Report notes that there may be concerns about the application of the ‘advancement of religion’ and ‘advancement of education’ purposes in relation to collections from the members of a church or school to cover the costs of running the church or school. The Final Report states that:

‘One approach to addressing these concerns is to exempt organisations collecting for the purpose of the ‘advancement of religion’ or ‘advancement of education’ from the obligation to be licensed. It is possible to limit the exemption so it only applies where collections are from a person associated with the organisation. Alternatively, it is possible to apply some of the regulatory framework, e.g. collection hours and locations and disclosure requirements, to those organisations which are exempt from licensing but collect from the public.’

The Final Report of the review notes that a change to the definition of charitable purpose in the Act will be considered as part of the implementation plan for nationally consistent fundraising legislation. Therefore, there will no change to the definition until after that process is commenced in 2012.

**Western Australia**

The applicable Acts are the *Charitable Collections Act 1946* (WA) and the *Street Collections (Regulation) Act 1940* (WA). The former Act is subject to the latter, and is very similar to the South Australian legislation. The *Charitable Collections Act* applies to collections for a charitable purpose: section 6(1). Charitable purpose is defined in section 5 as follows:

(a) the affording of relief to diseased, sick, infirm, incurable, poor, destitute, helpless or unemployed persons, or to the dependants of any such persons;
(b) the relief of distress occasioned by war, whether occasioned in Western Australia or elsewhere;
(c) the supply of equipment to any of His Majesty’s naval, military, or air forces, including the supply of ambulances, hospitals and hospital ships;
(d) the supply of comforts or conveniences to members of the said forces;  
(e) the affording of relief, assistance or support to persons who are or have been members of the said forces or to the dependants of any such persons;  
(f) the support of hospitals, infant health centres, kindergartens and other activities of a social welfare or public character;  
(g) any other benevolent, philanthropic or patriotic purpose.

This definition has not been amended since the Act was first passed.\textsuperscript{29}

A collection is defined as including the soliciting of funds or contributions and the selling or offering for sale of any button, badge, token, or similar thing for the purpose of raising funds or contributions.\textsuperscript{30} Collections for a charitable purpose and other specified activities by charities require a licence under section 6. Thus, a charity must first be licensed by application to the Charitable Collections Advisory Committee (the Committee), and can then make collections. If an organisation does not intend to raise funds by the methods defined in the Act, then it does not require a licence.

The decision of the Minister to grant or refuse a licence is final and not appealable: section 11(3). The Minister may revoke a licence at any time: section 12(3). In addition, the Minister may request the Committee to inquire as to whether a licence should be revoked: section 13(1).

The Committee may recommend revocation of a licence if it is of the opinion that:

- the money or goods are mismanaged or are substantially applied other than for the purpose for which they were collected: section 13(2)(a);
- the amount of money or goods received and applied for the charitable purpose(s) is inadequate when compared to the total amount received: section 13(2)(b);
- excessive remuneration is or will be paid to any person from the money or goods received: section 13(2)(c);
- the charitable purpose is no longer carried out effectively: section 13(2)(d); or,
- for any other reason, the licence should be revoked section 13(2)(e).

The Street Collections Act applies to a holder of a permit under section 3(1) of the Act. Any person, whether or not licensed under the Charitable Collections Act, who conducts a collection in a public street in the Perth and Fremantle metropolitan areas, needs a separate street collection permit.

\textsuperscript{29} Charitable Collections, 10 and 11 Geo. VI., XXIX, section 5.  
\textsuperscript{30} Charitable Collections Regulations 1947 (WA), Regulation 2.
under the *Street Collections (Regulation) Act*. The term ‘collection’ is defined similarly in both Acts. However, the *Street Collections (Regulation) Act* provides that collections in public streets within the metropolitan area of Perth and Fremantle must be authorised in writing by the Minister. In practice, the Committee regulates street collections in the relevant metropolitan areas. When organisations apply for permits to conduct a street collection, the Committee recommends these applications to the Minister for Commerce for approval. The Committee consists of 5 members appointed by the Governor upon the recommendation of the Minister: s 10. Street collections outside the Perth metropolitan area are regulated by local councils.

**Exclusions**

Religious purposes are not directly included in the definition of charitable purposes used in the Act, and therefore fundraising or collecting for religious purposes appears to be excluded from the requirements of the Act. However, if a religious organisation collected money for a defined charitable purpose outside of its religious ‘identity’ then it would require a licence under the Act.  

**Exemptions**

There are no specific exemptions in any of the Acts or Regulations.

**Tasmania**

The relevant legislation is the *Collections for Charities Act 2001* (Tas). This Act applies to any soliciting for a charitable purpose. ‘Charitable purpose’ is defined in section 3(1) as including a benevolent, philanthropic or patriotic purpose and any purpose for the protection of the environment or the welfare of animals. ‘Solicit’ is defined in s 3(1) to mean to seek a donation by a request in any form (e.g. in person, by mail, by fax, by telephone, by email, by internet, by a document left on premises, by an appeal through the media).

Collections must be conducted by approved organisations formed under approved statutes. An organisation is defined in s 3(1) to be a group or persons or bodies formed for the purpose of achieving a common goal. The relevant approved statutes are the *Corporations Act 2001* (Cth) and each state/territory *Associations Incorporation Act*: s 3(2). Permission to solicit for charitable

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31 Personal communication from Donna Gorton, Coordinator, Charitable Collections, Consumer Protection, Department of Commerce, Western Australia, 24 February 2011.
donations is not required if the organisation is incorporated in Tasmania or is a corporation whose principal office is located in Tasmania. Permission is required for:

- An organisation incorporated in another state/territory;
- A corporation whose principal office is located in another state/territory;
- A unincorporated group or association;
- An individual wishing to collect for a charitable purpose by him or herself, rather than on behalf of a charitable organisation.

**Exclusions**

An organisation cannot solicit for a charitable purpose unless it is:

(a) an incorporated association or a corporation under an approved statute in the State or Territory in which the principal office of that organisation is located; or
(b) an organisation that is approved by the Governor by an order-in-Council for the purposes of this Act or a member of a class of organisation that is so approved; or
(c) an organisation that is approved by the Commissioner in writing for a specified period: section 5.

Soliciting for a charitable purpose does not include:

(a) a request for the renewal of membership; or
(b) an appeal by an organisation to its members; or
(c) an appeal within premises that are used by a club; or
(d) an appeal within premises that are used by a religious organisation; or
(e) an appeal to a Commonwealth, State or local authority; or
(f) for the sale of goods or services; or
(g) for a raffle; or
(h) soliciting for an activity to which the *Gaming Control Act 1993* applies; or
(i) for a prescribed organisation or an organisation of a prescribed class; or
(j) soliciting of a type authorised by the regulations: section 4.

Under the *Collections for Charities Regulations 2003* (Tas), Regulation 4 provides that for the purposes of section 4(j), soliciting by a religious organisation, by way of an appeal to its adherents or any other person who has attended a religious service held by that organisation, is authorised.

**Exemptions**

There are no specific exemptions under the Act or the Regulations.
Australian Capital Territory

The applicable Act is the *Charitable Collections Act 2003* (ACT). The object of the Act is to promote the proper management and administration of collections, including proper record-keeping and accounts. This Act applies to a collection of money or a benefit for a charitable purpose: section 7. A charitable purpose includes any benevolent, philanthropic or patriotic purpose.

A person conducting a collection under the Act must hold a licence: section 14(1).

**Exclusions**

Types of collections excluded from the section 7(1) definition are listed in section 7(3). This section provides that a collection does not include:

1. soliciting or receiving money or a benefit from the carrying out of an approved lottery or exempt lottery, other than an exempt lottery for a charitable purpose (the *Lotteries Act 1964* (ACT) applies);
2. soliciting or receiving a bequest under a will;
3. soliciting a person to become a member of an entity or to pay the joining or membership fee of an entity;
4. soliciting or receiving money or a benefit by, or on behalf of, an entity on premises owned or leased by the entity from members and guests solely or mainly for the entity’s purposes;
5. soliciting or receiving money or a benefit solely or mainly from people sharing a common employer, principal or workplace by one of those people for a purpose connected directly with another of those people or with a relative or domestic partner of another of those people;
6. soliciting or receiving money or a benefit from an Australian government (including a local government) or a public entity created by, or that represents in any capacity, an Australian government (including a local government);
7. receiving money or a benefit by an entity that—
   a. is not solicited by the entity, or
   b. is not received by the entity because of a collection conducted by the entity;
8. anything else declared under the regulations not to be a collection.

**Exemptions**

In relation to paragraph (h) of section 7(3), Regulation 6 of the *Charitable Collection Regulation 2003* (ACT) declares that the following are exempt collections:

1. the soliciting or receiving of money by a school if the money is—
   a. a genuine fee or charge by the school for educational purposes; or
   b. a voluntary contribution to the school for educational purposes that is solicited or received from a person with parental responsibility for a child who is enrolled at the school;
(b) the soliciting or receiving of money by a body affiliated with a school for the educational purposes of the school;
(c) the soliciting or receiving of money or a benefit by an entity if the proceeds received from collections conducted by the entity is less than $15,000 in a financial year;
(d) the soliciting or receiving of money or a benefit by a non-government organisation accredited with the Australian Agency for International Development (AusAID) (whether or not the money or benefit is used, or intended to be used, solely for aid in a foreign country);
(e) the solicitation or receipt of sponsorship from a corporation;
(f) the soliciting or receiving of money by a trustee corporation for administering a trust fund for a charitable purpose;
(g) the soliciting or receiving of money by, or on behalf of, an entity if the proceeds received from collections conducted by, or on behalf of, the entity are for a trust fund for a charitable purpose administered by a trustee corporation.

The notable exemption in the ACT is an exemption for collections of less than $15,000 per year. This represents a form of tiered system for the application of fundraising legislation.

ANALYSIS

Definitions of charitable purposes in fundraising legislation

What is exempted or excluded depends on what the primary definition covers and the way in which it is constructed. At the heart of all the definitions (except Victoria) is the definition of charitable purposes. This section examines the role of charitable purposes and its variations in the primary definition.

In all jurisdictions except Victoria, the fundamental definition of ‘charitable purposes’ has the common element of the legal or technical definition of charity. New South Wales, Queensland, Tasmania and the Australian Capital Territory have ‘charitable purposes’ as their common definitional starting point. The term ‘charitable purposes’ as used in a statute is assumed to have a technical legal meaning - that is, the meaning as defined by Lord Macnaghten in Commissioners for Special Purposes of the Income Tax v Pemsel by reference to the spirit and intendment of the preamble to the Statute of Charitable Uses 1601. This includes relief of poverty, advancement of

32 [1891] UKHL 1; [1891] AC 531
33 The list of charitable uses in the preamble to the Statute of Charitable Uses 1601 was: ‘The relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; the repair of bridges, ports, havens, causeways, churches, seabanks, and highways; the education and preferment of orphans; the relief, stock, or maintenance of houses of correction; marriage of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes.’ This statutory interpretation
education, advancement of religion, and other purposes beneficial to the community for the public benefit. South Australia and Western Australia have similar definitions, but restrict the charitable purposes to the relief of poverty head viz. ‘relief to diseased, disabled, sick, infirm, incurable, poor, destitute, helpless or unemployed persons’.

In all these charity law jurisdictions, apart from Queensland and South Australia, the term ‘any benevolent, philanthropic or patriotic purposes’ is added, which is the standard formulation for widening the technical definition of charity to include like purposes which might otherwise be excluded because of the finer legal and technical issues of the charity definition. Benevolent purposes are seen as going beyond the meaning of charitable purposes to include acts of goodwill to a single individual. This result is reached in Queensland by a slightly different set of words, but the words used are clearly designed to catch purposes directed to a single person.

Philanthropic purposes have a narrower meaning than benevolent purposes. The term ‘philanthropic’ is probably wide enough to encompass purposes which are not technically charitable. An example would be the purposes of Amnesty International, which essentially seeks to secure the observance of human rights throughout the world. These purposes are not technically charitable, but indicate ‘goodwill to mankind at large’. Hence the inclusion of benevolent, philanthropic and patriotic purposes in the definition of charitable purposes broadens the notion of charity.

The use of the term patriotic purposes probably stems from an initial need for regulation to control fundraising abuses during the first and second world wars. Some of what is patriotic will also be

approach to the definition of charity was confirmed by the High Court in the case of Central Bayside General Practice Association Limited v Commissioner of State Revenue [2006] HCA 43.


36 Collections Act 1966 (Qld) the section 5 definition of charitable purpose includes: ‘the supplying of help, aid, relief, or support to, or the education or instruction (whether spiritual, mental, physical, technical, social or otherwise) of, or the care, housing, or assistance otherwise of, any persons in distress’.


charitable.³⁹ Both South Australia and Western Australia add ‘relief of distress occasioned by war’ to the definition of charitable purposes, and Western Australia includes ‘the supply of equipment’ and ‘the supply of comforts or conveniences’ to the military, which may also be charitable. In South Australia and Tasmania, animal welfare is specifically mentioned which would usually be catered for under the definition of charity.

In Queensland and Western Australia, the scope of the definition is widened by the naming of institutions (hospitals, health centres, ambulances), rather than purposes and may include organisations outside the nonprofit sector. In Queensland and Western Australia the word ‘hospital’ is used which could well mean that government-operated, and perhaps even for-profit entities, are included.

The outlier to the charity-based definitions is Victoria. Victoria throws its definitional net wide with a negative formulation which catches all fundraising activities which are not solely for the profit or commercial benefit of the solicitor or his or her principal. As we will see shortly, this leads to extensive exemptions.

Table 1: Fundraising legislation in Australia – definitions of charitable purposes

<table>
<thead>
<tr>
<th>Charity/charitable purposes (common law meaning)*</th>
<th>New South Wales</th>
<th>Victoria</th>
<th>Queensland</th>
<th>South Australia</th>
<th>Western Australia</th>
<th>Tasmania</th>
<th>Australian Capital Territory</th>
</tr>
</thead>
<tbody>
<tr>
<td>Relief to diseased, sick, infirm, incurable, poor, destitute, helpless or unemployed</td>
<td>section 4(1) definition; section 5(1) application</td>
<td>section 4 definition at (a)</td>
<td>section 4 definition at (b) and (e)</td>
<td>section 5 definition at (a)</td>
<td>section 5 definition at (a)</td>
<td>section 5 definition at (b)</td>
<td>section 3 and dictionary to the Act definition</td>
</tr>
<tr>
<td>Relief of distress of war</td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Provision of equipment or comforts to military</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Support for hospitals, infant health centres, kindergartens and other activities of a social welfare or public character</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Any benevolent, philanthropic or patriotic purpose</td>
<td>section 4(1) definition</td>
<td>section 5 definition at (g)</td>
<td>section 3(1) definition</td>
<td></td>
<td></td>
<td>section 3 and dictionary to the Act definition</td>
<td></td>
</tr>
<tr>
<td>Provision of welfare services to animals</td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Non-commercial purposes</td>
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<td></td>
<td></td>
<td></td>
<td>section 4(1) definition</td>
</tr>
<tr>
<td>Aid to hospital, ambulance or nursing services</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>section 5 definition at (c)</td>
</tr>
<tr>
<td>Help (whether spiritual, mental, physical, technical, social or otherwise) for any person in distress with respect to education, instruction, housing or other assistance</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>section 5 definition at (b)</td>
</tr>
</tbody>
</table>

*Includes relief of poverty, advancement of education, advancement of religion, other purposes beneficial to the community for the public benefit.

³⁹ Re Tetley; National Provincial Union Bank of England v Tetley [1923] 1 Ch.258.
As it can be seen from the above table, no two definitions in the various jurisdictions are the same. South Australia currently has the narrowest definition, relating to limited subsets of the relief of poverty, and the welfare of animals. Western Australia also lists several subsets of the relief of poverty, but adds in any other benevolent, philanthropic or patriotic purposes, which is a broader conception of the definition of charitable purpose. The Australian Capital Territory and Tasmania have the broad conception, with Tasmania adding the welfare of animals as a separate category of purpose.

The wider constructs are seen in New South Wales and Queensland which include general charity purposes, plus the broader notion of benevolent, philanthropic or patriotic purposes, or specified purposes respectively. Victoria has the broadest concept.

**Are the fundamental definitions converging or diverging across jurisdictions?**

**Charitable purposes**

The definition of charitable purpose is in general based on the English common law. The *Report on the Definition of Charities and Related Organisations* 2001 stated:

> ‘A survey of the use of the term ‘charity’ in Commonwealth and State Acts confirms the reliance on the common law. However, there are instances where the legislation adds to or subtracts from the entities that would normally be caught by the common law meaning. This suggests that the common law meaning of charity does not suit all purposes of public policy.’

It appears that there has been little fundamental legislative reform across Australian jurisdictions in relation to the definition of charitable purposes. The Western Australian definition of charitable purpose has not altered since its legislation was first passed in 1946. In Queensland, the definition of charitable purpose in the *Collections Act 1966* (Qld) was amended in 1988 and 1995, with the latter amendment also embracing a redefinition of the term charity and the addition of ‘community purpose’ to the legislation. The New South Wales reforms of 1990, which led to the *Charitable...*
Fundraising Act 1991 (NSW),\textsuperscript{44} appear to have been incorporated into the more recent legislation in the Australian Capital Territory\textsuperscript{45} and Tasmania.\textsuperscript{46} The South Australian definition was amended in 1995 (by deleting old parts of the relief of poverty subsets),\textsuperscript{47} and in 1999 to add the welfare of animals.\textsuperscript{48} The Victorian concept of non-commercial purposes is completely different from the other States, and continues from the same wording in the Fundraising Appeals Act 1984(Vic).

The common law based definitions were legislated before pressures to reform the definition of charity emerged from the Charities Definition Inquiry of 2001.\textsuperscript{49} The Issues Paper produced in South Australia for its proposed reforms took up this theme, outlining changes to the definition of charitable purpose.\textsuperscript{50} Submissions to the review supported the adoption of the definition of charitable purpose set out in the Charities Definition Inquiry.\textsuperscript{51} The definition chosen in the 2001 Inquiry was (where the term ‘advancement’ is taken to include protection, maintenance, support, research, improvement or enhancement):\textsuperscript{52}

‘Charitable purposes shall be:

\begin{itemize}
  \item the advancement of health, which without limitation includes:
    \begin{itemize}
      \item the prevention and relief of sickness, disease or of human suffering;
    \end{itemize}
  \item the advancement of education;
  \item the advancement of social and community welfare, which without limitation includes:
    \begin{itemize}
      \item the prevention and relief of poverty, distress or disadvantage of individuals or families;
      \item the care, support and protection of the aged and people with a disability;
      \item the care, support and protection of children and young people;
      \item the promotion of community development to enhance social and economic participation; and
      \item the care and support of members or former members of the armed forces and the civil defence forces and their families;
    \end{itemize}
  \item the advancement of religion;
\end{itemize}

\textsuperscript{44} This Act commenced on 1 September 1993. The definition of charitable purpose in New South Wales has not been amended since the Act was passed.
\textsuperscript{45} The definition of charitable purpose in the Charitable Collections Act 2003 (ACT) has not been amended since the Act was passed. The previous Act, the Collections Act 1959 (ACT) did not mention charitable purpose, but was solely concerned with regulation of collections.
\textsuperscript{46} The Tasmanian legislation was drafted with charitable purpose extending to the environment and the welfare of animals. There has been no subsequent amendment.
\textsuperscript{47} Collections for Charitable Purposes (Licensing and Miscellaneous) Amendment Act 1995 (SA).
\textsuperscript{48} Collections for Charitable purposes (Definition of Charitable Purposes) Amendment Act 1999 (SA).
• the advancement of culture, which without limitation includes:
  - the promotion and fostering of culture; and
  - the care, preservation and protection of the Australian heritage;
• the advancement of the natural environment; and
• other purposes beneficial to the community, which without limitation include:
  - the promotion and protection of civil and human rights; and
  - the prevention and relief of suffering of animals.’

The Final Report of the South Australian review noted that the South Australian government would amend the definition of charitable purposes, but that this was subject to the ongoing national review of fundraising legislation, via the Council of Australian Governments (COAG). The Final Report stated that:

‘While the Issues Paper identified some potentially significant changes to the definition of charitable purpose, it is not proposed to implement these changes at this time. Instead, changes to the definition of charitable purpose will be considered as part of the implementation plan for nationally consistent fundraising regulation.’

There is at present no draft legislation arising from the South Australian review.

Exemptions and exclusions

It is notable that the Acts are aimed at regulation and control of fundraising, rather than the facilitation of fundraising for charitable purposes. All jurisdictions require licences, permits, authorities, registration or sanctions in order to commence fundraising, and they have differing and complicated exclusion and exemption provisions. Religious organisations and purposes are the most common exclusion from the Acts, but there are numerous others in most jurisdictions.

Table 3: Fundraising legislation in Australia – exclusions and exemptions

<table>
<thead>
<tr>
<th></th>
<th>New South Wales</th>
<th>Victoria</th>
<th>Queensland53</th>
<th>South Australia54</th>
<th>Western Australia55</th>
<th>Tasmania56</th>
<th>Australian Capital Territory</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fundraising appeals by</td>
<td>Section 5(3)(e);</td>
<td></td>
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<td>Section 4(e)</td>
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<tr>
<td>Local Government</td>
<td>Reg 7</td>
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<tr>
<td>Fundraising appeals by</td>
<td>Section 5(3)(e)</td>
<td></td>
<td></td>
<td>Section 4(e)</td>
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<tr>
<td>State Government</td>
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<tr>
<td>Fundraising appeals by</td>
<td>Section 5(3)(e)</td>
<td></td>
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<td>Section 4(e)</td>
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<tr>
<td>Commonwealth Government</td>
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<tr>
<td>Council trustees of trusts</td>
<td>Reg. 7</td>
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<tr>
<td>Common employer/ place</td>
<td>Section 5(3)(d)</td>
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<td>Section 7(3)(e)</td>
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<td>of work</td>
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<tr>
<td>Company sponsorships</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Section 7(3)(h), Reg. 6(1)(e)</td>
<td></td>
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</tr>
</tbody>
</table>

53 There are no specified exemptions in the Act.
54 Section 18 of the Collections for Charitable Purposes Act 1939 (SA) provides for exemptions to the Act, but this section has never been exercised by the Minister. Organisations not collecting for a charitable purpose as defined do not require a licence under the Act – examples given by the Office of the Gaming and Liquor Commissioner are religious organisations, environmental organisations, and educational institutions. However, there are no formal exemptions.
55 There are no specified exemptions in the Act.
56 There are no specified exemptions in the Act.
<table>
<thead>
<tr>
<th>New South Wales</th>
<th>Victoria</th>
<th>Queensland</th>
<th>South Australia</th>
<th>Western Australia</th>
<th>Tasmania</th>
<th>Australian Capital Territory</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trustee companies</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Section 7(3)(h), Reg. 6(1)(f)</td>
</tr>
<tr>
<td>Family / close associates</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Section 6(2)(a)</td>
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<tr>
<td>Funeral flowers (in lieu of)</td>
<td></td>
<td></td>
<td>Reg. 6(a)</td>
<td></td>
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<tr>
<td>Membership fees</td>
<td>Section 5(3)(a)</td>
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<td>Section 7(3)(c)</td>
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<td>Commercial fee for service</td>
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<td></td>
<td>Section 4(f)</td>
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<tr>
<td>Nonprofit organisation internal soliciting</td>
<td></td>
<td></td>
<td>Section 5(3)(b)</td>
<td></td>
<td></td>
<td>Section 7(3)(d)</td>
</tr>
<tr>
<td>Nonprofit gaming</td>
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<td></td>
<td>Section 7(3)(a)</td>
</tr>
<tr>
<td>Licensed clubs</td>
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<td></td>
<td>Section 4(c)</td>
</tr>
<tr>
<td>Supported employment for the disabled</td>
<td>Reg. 4(c) (genuine fees or charges only)</td>
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<td></td>
</tr>
<tr>
<td>Nursing or medical/health services</td>
<td>Reg. 4(d) (genuine fees or charges only)</td>
<td></td>
<td>Section 16(c)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other welfare services</td>
<td>Reg. 4(e) (genuine fees or charges only)</td>
<td></td>
<td></td>
<td></td>
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<td></td>
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<tr>
<td>Non-government aid organisations accredited with AUSAID</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Section 7(3)(h), Reg. 6(1)(d)</td>
</tr>
<tr>
<td>Trade unions/associations</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Section 16(f), (g)</td>
</tr>
<tr>
<td>Employer associations</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Religious organisations/purposes</td>
<td>Section 7(1); Reg. 6</td>
<td>Section 16(d)</td>
<td>Section 6(2)</td>
<td>Generally exempt. There is no specific section reference, and exemption depends on interpretation.</td>
<td>Sections 4(d), 4(j) and Reg. 4</td>
<td></td>
</tr>
<tr>
<td>Political parties</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Section 16(e)</td>
</tr>
<tr>
<td>Universities</td>
<td>Reg. 8</td>
<td></td>
<td>Section 16(b)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TAFE</td>
<td>Reg. 4(a) (genuine fees or charges only)</td>
<td></td>
<td>Section 16(b)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Government schools</td>
<td>Reg. 4(a) (genuine fees or charges only)</td>
<td></td>
<td>Section 16(a)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>School councils, parents associations/school fees</td>
<td>Reg. 4(a) (genuine fees or charges only)</td>
<td></td>
<td>Section 16(a)</td>
<td></td>
<td></td>
<td>Section 7(3)(h), Reg. 6(1)(a)</td>
</tr>
<tr>
<td>Kindergartens/child minding</td>
<td>Reg. 4(b) (genuine fees or charges only)</td>
<td></td>
<td>Section 16(ba)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bequests</td>
<td>Section 5(3)(c)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Section 7(3)(b)</td>
</tr>
<tr>
<td>Annual collections under $15000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Section 7(3)(h), Reg. 6(1)(c)</td>
</tr>
<tr>
<td>Organisations incorporated within the State</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Sections 6(1), 5(2) and section 3(2)</td>
</tr>
</tbody>
</table>

57 All the exceptions under Regulation 4 refer to the payment of ‘a genuine fee or charge for the provision of’ the services listed, and not to any other solicitations for money unless they fall within the other subsections of section 5.
Finding patterns of exemptions across the jurisdictions is as challenging as divining the fundamental definitional starting points in fundraising legislation. To some extent the exclusion and exemptions depend on the ‘activity’ which is nominated to trigger the need for licensing or compliance with the provisions. Clearly some of the exemptions are probably the result of compromise after representations by affected interests. Some areas of activity which can be discerned as groupings include:

- **Minor activity**

A category can be made around matters which are properly seen as minor in nature or private family or domestic matters. South Australia exempts matters kept within family or close associates and Victoria exempts appeals such as requesting donations rather than funeral wreaths. It is surprising that the approach taken in the ACT has not recommended itself more widely. The Australian Capital Territory has adopted a tiered activity test applying as one of its exemptions. Fundraising under $15,000 per year is exempt from the provisions of the *Charitable Collections Act 2003* (ACT).

- **Non-public internal fundraising**

Where fundraising takes place largely within a community of interest such as a workplace, common employer, association, trade union, employer association, and schools, some jurisdictions have provided exemptions. Also membership fees falls within this classification.

*Regulation to avoid unintended Consequences*

Some exemptions may be rationalised on the basis that they are specifically excluded where a wide fundamental definition of fundraising was used in the provisions and it was not intended to extend to certain activities. Others may be placed in the legislation out of an abundance of caution to ensure that there are no unintended consequences. For example the Australian Capital Territory exempts trustee companies and NSW the trustees of Council trusts.

- **Regulation under other statutory provisions**

It could be argued that organisations such as government schools and their councils, universities and TAFEs, political parties, licensed gaming clubs, trustee companies and various organs of local, state of federal government are regulated already and do not require this overlapping regulation. Whether in fact there is similar regulatory supervision is difficult to establish for each of these exemptions.
As governments and their hybrid agencies at all levels encroach into or expand activities that would have once been considered as nonprofit organisations’ space, then perhaps competitive neutrality (level playing field) concerns may arise. This can be found in government operated natural disaster appeals, hospitals and medical research facilities, increasing corporate sponsorship arrangements by government hybrids and government-owned utility corporations seeking customer support for public services such as helicopter rescue services and other public benefit activities.

- **Religion**

Religious organisations are specifically exempt in New South Wales, Victoria, Queensland, and Tasmania. Western Australia and South Australia do not include religious organisations as exemptions, and licensing requirements in those States will depend on whether the religious organisation is collecting money for charitable purposes outside the religious sphere. There are no specified exemptions to the Act in the Australian Capital Territory.

Section 7 of the New South Wales exempts religious organisations, defining these as religious bodies or organisations which are proclaimed under section 26 of the *Marriage Act 1961* (Cth), or which are prescribed by the Regulations to the Act. With respect to paragraph (a) of section 7(1), the proclamation in force under section 26 of the *Marriage Act 1961* (Cth) is the *Marriage (Recognised Denominations) Proclamation 2007* (Cth). Schedule 1 of the Proclamation lists 133 denominations recognised for the purposes of solemnization of marriage in Australia. In addition, in relation to section 7(1)(b), the *Charitable Fundraising Regulation 2008* (NSW) in Reg. 6 lists 32 other religious bodies exempted by regulation from the operation of the Act.

The Victorian and Queensland Acts also uses the proclamation in force under section 26 of the *Marriage Act 1961* (Cth), the *Marriage (Recognised Denominations) Proclamation 2007* (Cth), as the source of their exemptions of religious organisations.

- **Market-based fees and charges**

Fundraising legislation seeks to exclude market-based transactions where there is only a minor element of philanthropic intent in the transaction. For example, in New South Wales, where a health or child-minding service charges a genuine fee for service, this is not classed as fundraising. However, a corporate sponsorship is usually caught except where explicitly excluded in the

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58 At section 3.
59 At sections 6(2)-(3).
Australian Capital Territory. In other jurisdictions, such as Queensland\textsuperscript{60} and New South Wales,\textsuperscript{61} approval provisions apply to such relationships.

- **Stand-alone exemptions**

  There are some other isolated exemptions in various jurisdictions including:
  
  - Kindergartens and child-minding
  - Nursing or medical/health services
  - Other welfare services
  - Company sponsorships
  - Bequests

**Divergence and convergence over time of exemptions and exclusions**

**Convergence issues in exemptions**

Religion, education and Ministerial discretion are the three elements attracting the most convergence in exemptions from the need to be licensed, sanctioned, approved or authorised.

In New South Wales, religious bodies and organisations are exempt from the requirements of the *Charitable Fundraising Act 1991* (NSW), so long as they are:\textsuperscript{62}

- A recognised denominations under the Commonwealth *Marriage Act 1961*
- A member of such a denomination
- A body or organisation certified in writing by the head of a denomination or denomination member as affiliated
- A member or employee of any of the above, acting under their authority

In Victoria, religious organisations recognised under the *Marriage Act 1961* (Cth) are similarly exempted from the requirement to register as a fundraiser.\textsuperscript{63} Queensland has a similar provision, but in its **exclusion** provisions.

Universities are exempt from certain elements of the relevant Act in New South Wales and Victoria while schools and school councils are also exempt in Victoria.\textsuperscript{64} The Australian Capital Territory

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\textsuperscript{60} At section 12.

\textsuperscript{61} At section 11.

\textsuperscript{62} *Charitable Fundraising Act 1991* (NSW) s 7(1); *Marriage Act 1961* (Cth) section 26.

\textsuperscript{63} *Fundraising Act 1998* (VIC) sections 3, 16.
considers soliciting for school fees or voluntary educational contributions to be ‘exempt collections’, while in Queensland, Parents and Citizens associations are deemed sanctioned bodies for the purposes of the Act.

Ministerial discretion to either declare a body exempt or strip an otherwise exempt body of its status is also common. The responsible Victorian, Queensland and South Australian Ministers have the power to bestow exemption. New South Wales gives this power to the relevant Minister too, albeit indirectly in the power to give exemptions through the regulations. In Victoria and New South Wales, Ministers also have the power to exclude particular bodies from the exemption provisions.

**Convergence issues in exclusions**

It is difficult to argue true convergence in relation to exclusions from fundraising legislation across Australia. There are some recurrent themes however. Fundraising that constitutes gaming already regulated elsewhere, non-charitable soliciting, fundraising appeals by government and membership appeals are recurrent exclusions, most particularly in Victoria, Tasmania and the Australian Capital Territory.

Legislation in Victoria, Tasmania and the Australian Capital Territory excludes games and/or lotteries which are already regulated under charitable gaming legislation, as well as fundraising appeals by government, membership drives, and appeals to members. Non-charitable soliciting, by traders or otherwise, is also excluded in New South Wales and Tasmania.

In addition to the above, Tasmania and the Australian Capital Territory also exclude appeals within an organisation’s premises (clubs and religious organisations only in Tasmania, and for its own benefit in the Australian Capital Territory).

There is also a growing policy of exempting or excluding government or bodies closely associated from government as these organs of government appear to entry in greater number and significance into the fundraising space. The Queensland and Victorian disaster appeals operated with

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64 *Charitable Fundraising Act 1991* (NSW) s 7(1); *Charitable Fundraising Regulation 2008* (NSW) Reg. 8; *Fundraising Act 1998* (VIC) sections 3, 16.

65 *Charitable Collections Regulation 2003* (ACT) Reg. 6(1).

66 *Collections Act 1966* (Qld) section 13A.

67 *Charitable Fundraising Act 1991* (NSW) section 9(3); *Fundraising Act 1998* (VIC) section16A; *Collections Act 1966* (Qld) sections 12(1)-(5), 19(1)-(3); *Collections for Charitable Purposes Act 1939* (SA) section 18.

68 *Charitable Fundraising Act 1991* (NSW) section 7(2); *Fundraising Act 1998* (VIC) sections16A(2)(b)-(3).
government control were some of the largest appeals in recent history as well as government departments and government owned corporate ‘utilities’ operating community benefit funds which seek private contributions (for example, rescue helicopters and environmental projects).

**Conclusion**

As noted in the introduction, the rationalisation of exemptions and exclusions will be critical for any standardised reform of fundraising legislation. This depends on the starting point of the primary definition. A wider primary definition may require more specified exemptions and exclusions while a narrower definition may require less.

The development of principles to assist in identifying the exemptions and exclusions from the provisions would logically flow from the primary definition and the objectives of the regulation. However, there are some observations that can be made now that may assist the development process.

There is very little use made of the size of the fundraising activity to provide proportional regulation which may avoid regressive compliance costs on small organisations or fundraising activities.

In some jurisdictions there is a pattern of leaving control and sanction of fundraising activities to the governance of the organisation where the appeal is to the membership, constituents or closed community. It is left to the internal entity governance mechanisms to regulate behaviours in this space. Examples are schools, clubs and religious bodies in various jurisdictions. If this avenue is to be pursued, should there be some control of what constitutes appropriate internal governance process in dealing with such matters?

There is the issue of organisations which may engage in significant fundraising which are outside the present regulations on the basis that they are supervised by government through other government agencies or government itself. Is the policy faith in their specific regulatory mechanisms warranted? Is this a breach of the oft touted principle of ‘competitive neutrality’ where by small organisations seeking to raise funds are put at a competitive disadvantage?

Blended transactions also pose issues. Where the transaction is part gift and part quid pro quo, does an exemption apply? It can often be difficult to ascertain to what extent the philanthropic motivation is a significant factor in the transaction decision.
## Appendix: Fundraising legislation in Australia – selected comparators

<table>
<thead>
<tr>
<th>New South Wales</th>
<th>Victoria</th>
<th>Queensland</th>
<th>South Australia</th>
<th>Western Australia</th>
<th>Tasmania</th>
<th>Australian Capital Territory</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulations</td>
<td>Charitable Fundraising Regulation 2008</td>
<td>Fundraising Regulations 2009</td>
<td>Collections Regulation 2008</td>
<td>N/A</td>
<td>Charitable Collections Regulations 1947; Street Collections Regulations 1999</td>
<td>Charitable Collections Regulation 2003</td>
</tr>
<tr>
<td>Objects</td>
<td>To ensure proper and efficient management and administration of fundraising for charity; to prevent deception of the public.</td>
<td>To regulate the raising of money from the public for non-commercial purposes; to facilitate transparency and public confidence/public interest.</td>
<td>To ensure the registration of charities and the sanction of collections for the purposes listed in section 9.</td>
<td>To control collectors collecting for charitable purposes.</td>
<td>To regulate and control the collection of money or goods for charitable purposes; to regulate street collections.</td>
<td>To regulate the collection of donations for charities.</td>
</tr>
<tr>
<td>Charitable purposes mentioned?</td>
<td>Yes, defined section 4; applied section 5.</td>
<td>No – the term used is non-commercial purpose.</td>
<td>Yes, defined section 5; applied section 9.</td>
<td>Yes, defined section 5; no specific application.</td>
<td>Yes, defined section 5; applied section 6.</td>
<td>Yes, defined section 3; applied section 5.</td>
</tr>
<tr>
<td>Charitable purposes different from common law meaning?</td>
<td>Wider: adds benevolent, philanthropic or patriotic.</td>
<td>N/A. 'Beneficial or benevolent purposes’ mentioned in objects: section 2A(2).</td>
<td>Yes, narrower: section 5.</td>
<td>Yes, narrower (refers only to the relief of poverty, but also includes animal welfare): section 4.</td>
<td>Yes, wider, as refers to benevolent, philanthropic or patriotic, as well as the relief of poverty: section 5.</td>
<td>Yes, wider: section 3.</td>
</tr>
<tr>
<td>Who applies</td>
<td>A person or an entity –</td>
<td>A person:</td>
<td>A charity</td>
<td>A person, a person,</td>
<td>An</td>
<td>An entity –</td>
</tr>
</tbody>
</table>

### Objects

- **New South Wales**: To ensure proper and efficient management and administration of fundraising for charity; to prevent deception of the public.
- **Victoria**: To regulate the raising of money from the public for non-commercial purposes; to facilitate transparency and public confidence/public interest.
- **Queensland**: To ensure the registration of charities and the sanction of collections for the purposes listed in section 9.
- **South Australia**: To control collectors collecting for charitable purposes.
- **Western Australia**: To regulate and control the collection of money or goods for charitable purposes; to regulate street collections.
- **Tasmania**: To regulate the collection of donations for charities.
- **Australian Capital Territory**: To promote proper management and administration of collections, including record-keeping and accounts; and public access to information.

### Charitable purposes mentioned?

- **New South Wales**: Yes, defined section 4; applied section 5.
- **Victoria**: No – the term used is non-commercial purpose.
- **Queensland**: Yes, defined section 5; applied section 9. The Act also applies to collections for community purposes: section 5 definition, applied section 9 (d), (e).
- **South Australia**: Yes, defined section 5; no specific application.
- **Western Australia**: Yes, defined section 5; applied section 6.
- **Tasmania**: Yes, defined section 3; applied section 5.
- **Australian Capital Territory**: Yes, section 7(1)."
<table>
<thead>
<tr>
<th>New South Wales</th>
<th>Victoria</th>
<th>Queensland</th>
<th>South Australia</th>
<th>Western Australia</th>
<th>Tasmania</th>
<th>Australian Capital Territory</th>
</tr>
</thead>
<tbody>
<tr>
<td>for licence, registration or sanction?</td>
<td><strong>organisation:</strong> section 9(1).</td>
<td>section 18 (1).</td>
<td>which must first be registered; or an <strong>association with a community purpose</strong> as defined in section 9.</td>
<td><strong>society, body or association:</strong> section 8(1).</td>
<td><strong>society, body or association:</strong> section 6(1).</td>
<td>organisation, or a person authorised in writing: section 5(1).</td>
</tr>
<tr>
<td></td>
<td>Section 18(2) refers to differing information requirements for persons who are natural persons, corporations, incorporated associations or unincorporated associations (the latter is referred to as a person).</td>
<td>In both cases the purpose must be <strong>sanctioned</strong> under the Act: section 10(1).</td>
<td></td>
<td></td>
<td></td>
<td>An organisation must be formed under an <strong>approved statute</strong>, or otherwise approved: section 5(2).</td>
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<td></td>
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<td></td>
<td></td>
<td></td>
<td>Approved statutes are the <strong>Associations Incorporation Acts</strong> of each state and territory and the <strong>Corporations Act 2001</strong> (Cth).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Exclusions?</th>
<th>Yes, section 5(3) and Regulation 4</th>
<th>Yes, section 16 and Regulation 6.</th>
<th>Yes, section 6.</th>
<th>Yes, section 6(2).</th>
<th>Yes, fundraising for religious purposes (no specific section reference; depends on interpretation).</th>
<th>Yes, section 4 and Regulation 4.</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Exemptions?</th>
<th>Yes, sections 7(1) and 9(3).</th>
<th>Yes, section 16A.</th>
<th>No specified exemptions in the Act, except for a partial exemption for some charities in section 19(2).</th>
<th>Section 18 provides for exemptions but has never been used.</th>
<th>None specified.</th>
<th>Yes, Regulation 6.</th>
</tr>
</thead>
</table>