



17 June 2016

Mr Garry Clements
Chair
Consumer Affairs Australia and New Zealand

By email ACLReview@treasury.gov.au

Confidential

Dear Mr Clements

The Australian Consumer Law Review Issues Paper

1 Introduction

- 1.1 Thank you for the opportunity to make a submission in response to the Australian Consumer Law (**ACL**) Review Issues Paper (**Issues Paper**).
- 1.2 Prolegis Lawyers is a legal practice established in 2001 that exists to provide legal advice to charities, not-for-profits and philanthropists. All of our clients are either charities or individuals or businesses seeking to establish philanthropic or fundraising vehicles.
- 1.3 Although based in Sydney and Melbourne, our clients are located across all of the States and Territories in Australia, and overseas.
- 1.4 Consequently, we are frequently requested to advise on the regulation of charitable fundraising across Australia, including how the current laws apply in respect of the different activities and innovative ways charitable fundraising is now carried out. We believe our experience qualifies us to comment on the Issues Paper in relation to the activities of charities and philanthropists, and therefore the regulatory burden imposed on them.

2 Executive Summary

- 2.1 We have confined the scope of our comments to those issues which we identify as relating to charities.
- 2.2 Given that the ACL already applies to many activities carried out by charities, it is an appropriate legislative instrument to govern the conduct of fundraising campaigns by charities. Harmonising the existing State and Territory fundraising legislation and including specific provisions in the ACL to govern the conduct of charities would provide certainty for charities, corporations and consumers where fundraising is concerned.
- 2.3 We support the comments made in the following other submissions made in response to the Issues Paper:
 - (a) Justice Connect;
 - (b) Australian Institute of Company Directors; and
 - (c) The Law Council of Australia Not-for-Profit Legal Practice and Charities Committee.

3 Background

- 3.1 The Issues Paper has raised the following questions as to whether or not the ACL should apply to charities¹:
- (a) question 7 in the Issues Paper: whether the ACL's treatment of 'consumer' is appropriate;
 - (b) page 11 of the Issues Paper, whether the ACL should apply to charities and not-for-profit groups.
 - (c) Question 11 in the Issues Paper: Whether there are any changes that could be made to improve their effectiveness [the ACL's specific protections], or address any of the issues raised in section 2.3'
 - (d) at section 2.3.5, at page 26, the Issues Paper: whether the unsolicited consumer agreement provisions in the ACL should be extended to apply to commercial companies collecting donations on behalf of charities².

4 Current application of the Australian Consumer Law to charities

- 4.1 There are situations in which activities conducted by charities are already governed by the ACL, and others where the activities are not. The ACL does not currently apply to situations where donations are solicited without any other benefit conferred on the donor³. Donations are regarded as gifts for the purposes of personal property laws. It follows that where a donor neither receives a good or service in exchange for their donation, the making of a donation is not an act 'in trade or commerce'. Therefore, to the extent that the conduct of a charity involves accepting and/or soliciting donations only, such actions are not 'in trade or commerce' and section 18 does not apply to those activities.
- 4.2 At present, the determination as to whether the core parts of the ACL may apply (e.g. sections 18, 29, and the consumer guarantee provisions in sections 51 to 62 inclusive) turn on the question of whether an action occurs 'in trade or commerce'.
- 4.3 Under this test, there are a number of circumstances where the conduct of a charity may fall within the purview of the ACL already. For example, charities partner with corporations to undertake fundraising campaigns through product sales.⁴ There are also many national fundraisers run by major charities that involve the sale of tokens (badges, pens and the like). These examples are addressed in more detail below.
- 4.4 However, each State and Territory has specific but differing legislation⁵ guiding the operation of fundraising activities in that jurisdiction, and in many cases, that legislation mirrors requirements under section 18 of the ACL with respect to ensuring that the solicitation of donations does not mislead or deceive any donor or potential donor.
- 4.5 For example, section 7 of the *Fundraising Act 1998 (Vic)* prohibits making representations as part of a fundraising appeal that mislead or deceive, or are likely to mislead or deceive.

¹ In this submission, a reference to 'charity' or 'charities' includes the different definitions of applying to fundraising activity across the States and Territories, especially in relation to whether or not the ACL is applicable to fundraising activities conducted by either type of entity.

² The current position is that donations are not sales, so the provisions in respect of unsolicited consumer agreements not apply.

³ Federal Commissioner of Taxation v. McPhail (1968) 117 CLR 111

⁴ Such as campaigns where suppliers offer to donate a fixed sum or a certain percentage of sales over a set period to a particular charity.

⁵ Charitable Collections Act 2003 (ACT); Charitable Fundraising Act 1991 (NSW); Collections Act 1966 (QLD); Collections for Charitable Purposes Act 1939 (SA); Collections for Charities Act 2001 (TAS); Fundraising Act 2009 (VIC); Charitable Collections Act 1946 (WA).

While the particulars of this section are laboured in more detail than section 18 of the ACL,⁶ the net effect is very similar.

- 4.6 Sections 18 and 29 of the ACL apply to all conduct engaged in by corporations 'in trade or commerce' and operate to ensure that false, misleading and/or deceptive representations are not made to consumers. It is established in case law that gratuitous services provided by corporations are not actions 'in trade or commerce'.⁷
- 4.7 Many charities do engage in certain activities in trade or commerce, or engage commercial partners to assist with larger fundraising campaigns. It appears that under the present system, both the ACL and the State/Territory fundraising laws would apply to these situations. For example, a charity partners with a major FMCG company in a campaign where the FMCG company will donate a set sum from every sale of a certain product to its charity partner. The complex layers of potential liability, exposure and regulation make it difficult for such partnerships to function effectively.
- 4.8 There are other examples of significant, national, annual campaigns undertaken by major charities that involve raising funds by selling tokens (badges, pens, pins, etc). Again, the status quo is that in such circumstances the State and Territory fundraising laws would apply insofar as the sale of tokens is comprised of both a component covering the cost of the good, and a component that forms a donation to the charity, and the ACL would apply insofar as the sale would both comprise an act 'in trade or commerce' and therefore sections 18 and 29 would apply, and the consumer guarantee provisions would apply with respect to the item received by the donor/purchaser.

5 Reducing Regulatory Obligations for Charities and Not-For-Profit Groups

- 5.1 Charities are burdened by State and Territory legislation in relation to their conduct of fundraising activities, and in certain circumstances, it is apparent that the ACL would apply to some of those activities as well. We advocate for a simplification of laws in relation to the conduct of fundraising and for harmonisation of State and Territory legislation in that area in a similar manner in which the ACL itself harmonised State and Territory based fair trading laws.
- 5.2 For many years, the federal government has been aware of the significant obstructions caused by State and Territory fundraising legislation in a nationalised, and indeed globalised, operating environment that exists today. In 2008, the Australian Government Senate Standing Committee on Economics issued its report *Disclosure regimes for charities and not-for-profit organisations* which found that:

*Organisations which fundraise nationally have particularly been disadvantaged in the past, with the same fundraising activity potentially regulated in different ways in each state and territory. It is the committee's opinion that a change to current fundraising legislation is required...The committee considers that, as with the numerous legal structures available for use, Not-For-Profit Organisations would be best served by the single national piece of legislation.*⁸

- 5.3 In 2010, the Australian Government Productivity Commission released its Report on the Contribution of the Not for Profit Sector (**Productivity Commission Report**). The Productivity Commission Report identified that two of the current issues faced by the not-for-profit sector, of which charitable organisations are a sub-set, were increased demand for accountability from governments and the community, and cross jurisdictional

⁶ Section 7 of the *Fundraising Act 1998* (Vic) includes penalties of up to 240 penalty units for breaches, or jail time for persons who breach. It also includes a defence provision for persons who are effectively acting under the instruction of the charity when soliciting donations, in circumstances where that person had no reasonable grounds to assume the information they were using was misleading or likely to mislead or deceive.

⁷ See *E v Australian Red Cross Society & Ors* [1991] 27 FCR 310 at paragraph 157 (Wilcox J).

⁸ Australian Government Senate Standing Committee on Economics, *Disclosure regimes for charities and not-for-profit organisations*, 2008, p 97.

differences imposing unnecessary burdens and therefore compliance costs⁹. In relation to the specific problems, it reported that:

... participants identified differing state and territory fundraising legislation as a major problem for the sector. Differences cited by participants included variations in jurisdictions' definitions of 'fundraising activities', reporting requirements, registration requirements and exemptions.

- 5.4 The Productivity Commission Report considered the burden and cost effect on charities and also noted these burdens were likely to grow because of a trend to merge state organisations into larger national charities, and as a result of technological change¹⁰. It also noted that failure to address the consistency issues regarding reporting requirements for fundraising activities could even erode public confidence and trust in fundraising¹¹, which if true, would contradict the objectives of the State and Territory legislation to improve public confidence.
- 5.5 Charities need certainty from the Commonwealth Government as to what legislative instruments apply to their operation and conduct and when. As the laws of the Commonwealth, States and Territories of Australia stand, there is considerable duplication and crossover with respect to the governance of the manner in which charities structure and carry out their fundraising activities.
- 5.6 Charitable fundraising regulation needs to be reformed. The Issues Paper is a timely catalyst to explore the potential to permanently ease the regulatory burden that charities face when seeking to raise funds to support their causes. Given that, generally speaking, donations form a minor portion funding for charities,¹² the current regulatory obligations can be a detractor from undertaking fundraising campaigns. Reducing this red tape should be a key focus for national review.

6 When should the ACL apply to charities?

- 6.1 The question of whether charities should be caught by the ACL and in what circumstances must be resolved.
- 6.2 It would make sense for the ACL to be the **only** legislation governing the conduct of campaigns that clearly occur as part of a trading/commercial activity, and especially so in circumstances where fundraising is the secondary purpose (as sale of goods remains the primary purpose). This would provide charities and their corporate partners with certainty as to regulatory burden that a campaign as described above would have for both parties.
- 6.3 The State and Territory based fundraising laws should be wound back in order to allow the ACL to function properly in this space and remove duplication with the ACL. We advocate for the harmonisation and rationalisation of fundraising laws to ensure a legislative framework that simplifies the management and operation of broad reaching charitable fundraising activities where charities may act more confidently in approaching and engaging corporate partners to undertake significant campaigns.
- 6.4 As recommended above, in these situations, it would be prudent for the ACL to be the **only** legislation that governed those campaigns (to the extent that the ACL and State/Territory fundraising laws overlap). With such a change, there would be no compelling reason for State and Territory fundraising laws to apply in these circumstances because those laws add nothing more than heightened administrative burdens and risk of penalties for non-compliance for charities.

⁹ Productivity Commission Report: Overview, at pp xxx- xxxiii.

¹⁰ Productivity Commission Report: 6.5 Fundraising regulation, p 138.

¹¹ Productivity Commission Report: 6.5 Fundraising regulation, p 143

¹² See http://australiancharities.acnc.gov.au/wp-content/uploads/2015/11/js36755_ACNC-Charity-Report_infographic_updated-APRIL-2016.pdf: donations and bequests account for approximately \$6.8 billion out of a total income of \$103 billion for charities.

- 6.5 Charities are also increasingly conducting fundraising campaigns using online mechanisms. The governance of those campaigns can be complex, especially where third parties (such as crowdfunding websites) are involved. It would be prudent to have a legislative framework that allowed the ACL to govern these campaigns to ensure a simplified arrangement between charities and commercial entities that engage exclusively in fundraising campaigns for charity and not-for-profit groups. If the ACL was the prevailing legislation for online fundraising campaigns, it would remove significant roadblocks (such as the requirement for third party operators to hold fundraising licences from State/Territory departments) and allow campaigns to be managed more effectively.
- 6.6 An example of a current roadblock is section 16B of the *Fundraising Act 1998* (Vic), which requires a ‘commercial fundraiser’ to hold the appropriate government approvals to run a campaign on behalf of an organisation. The definition of ‘commercial fundraiser’ in section 3 of that Act is so broad as to effectively catch any corporation that coordinates or participates in a fundraising campaign for a charity. If the purpose of this regulation of ‘commercial fundraisers’ is to ensure accountability to the standards set out in the Act, then it would follow that abolishing these laws in favour of the application of the ACL to these situations would significantly reduce the regulatory and administrative burden of fundraising partnerships for charities and their corporate sponsors.

7 Extending the scope of the Australian Consumer Law

- 7.1 This review offers the opportunity for the Federal government to adopt a new ACL provision to replace the existing State/Territory burdens on charities. A new section could be brought in under section 18 of the ACL that specifically applies to the conduct of charities in their activities that are **not** in trade or commerce, primarily soliciting donations.
- 7.2 In such legislation, charities could be defined as those registered with the Australian Charities and Not-For-Profits Commission (**ACNC**) in accordance with the *Australian Charities and Not-For-Profits Commission Act 2012* (Cth), and a section could read:
- As part of any fundraising activity a charity must not engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*
- 7.3 This type of provision would provide charities, corporations and consumers with a far more clear idea of what is expected in relation to their conduct, especially with respect to the management of broad, national, multi-platform fundraising campaigns.
- 7.4 In its submission to this review, Justice Connect offers a definition of ‘fundraising activity’ as follows:
- “Fundraising activity” includes any activity the purpose or effect of which is the donation of money, goods or services by persons, but does not include the receipt of funds as consideration only for goods and services supplied through a business or professional activity (whether or not carried on for profit). An activity can be a fundraising activity even if nothing is received by the fundraiser”.*
- 7.5 We think this is an appropriate way to define “fundraising activity” and support the implementation of this definition in the ACL.
- 7.6 Of course, this would be a major overhaul of the current regime, and the introduction of such a section should only occur with the agreement and consent of all States and Territories to wind back the current mirroring provisions in their own fundraising legislation to allow this to be governed in a more streamlined and effective manner.

8 Unsolicited Consumer Agreements

- 8.1 Consistent with our proposals above, this review provides a timely opportunity to consider incorporating the governance of certain charitable fundraising activities within the



unsolicited consumer agreement provisions of the ACL through harmonisation of the various State and Territory legislation that currently applies to those types of fundraising (and to third parties engaged by charities to enter into those agreements with donors).

- 8.2 Similar to the proposal in relation to section 18 made above, we advocate for specific and clear guidance for charities that engage in fundraising where tactics such as cold calling are used. Because the ACL generally applies to activities conducted 'in trade or commerce', and because the contractual arrangements between a donor and a party seeking a donation fall outside that definition, a specific section(s) or subsection(s) should be introduced to govern these activities and those additional provisions should sit behind section 69 of the ACL. We agree that donations should not be considered in the same category as sales. However, the reduction in regulatory burden on charities in having to comply only with the ACL rather than eight separate legislative instruments would be welcomed by the sector.

Yours faithfully
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