



Australian Government



Australian
Charities and
Not-for-profits
Commission

27 May 2015

Our ref: EXT2016/18

Mr Garry Clements
Chair
Consumer Affairs Australia and New Zealand

Submitted online

SUBMISSION TO THE AUSTRALIAN CONSUMER LAW REVIEW

The Australian Charities and Not-for-profits Commission (**ACNC**) welcomes the opportunity to comment on the Australian Consumer Law (**ACL**) Review Issues Paper. This submission outlines the role of the ACNC as relevant to charities and not-for-profits (**NFPs**), and provides our recommendations in relation to the paper.

Recommendations

1. The ACL should explicitly state whether or not its general and specific protections apply to charity and NFP fundraising activity.
2. The ACL's general protections should be extended to cover fundraising by charities and NFPs, in consultation with the sector.
3. Any changes to the ACL that affect charities and NFPs should respect the important role played by state and territory government agencies in regulating fundraising, and consultation with these agencies should be undertaken.
4. Consideration should be given to extending the unsolicited agreements provisions of the ACL to cover commercial companies collecting on behalf of charities and NFPs.
5. Consideration should be given to arrangements under the ACL that would direct surplus funds arising from breaches of the ACL towards programs that support charity and NFP governance.
6. Any proposed changes to the ACL regulatory framework relevant to charities and NFPs should be undertaken in consultation with the sector.
7. If the ACL is extended to charities and NFPs, the ACNC and ACCC should formalise an information sharing and co-operation agreement through a Memorandum of Understanding.





The ACNC's role

The ACNC was established on 3 December 2012 by the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) (**ACNC Act**). The objects of the ACNC Act are to:

- maintain protect and enhance public trust and confidence in the Australian not-for-profit (NFP) sector;
- support and sustain a robust, vibrant, independent and innovative Australian NFP sector; and
- promote the reduction of unnecessary regulatory obligations on the Australian NFP sector.

The ACNC's regulatory responsibility currently extends to registered charities only¹. However, because of the objects of the ACNC Act, the ACNC has a broader interest in any improvements to the regulatory framework for all NFPs that would reduce duplicative regulatory obligations or contribute to public trust and confidence.

This submission draws on our experience as well as three significant pieces of research that the ACNC has commissioned – the *Australian Charities 2014* report², the Deloitte Access Economics report on options for regulatory reform³, and research into public trust and confidence⁴.

The charities and NFP sector

NFPs are estimated to comprise some 600,000 organisations⁵, 53,434 of which are charities registered with the ACNC. Registered charities employ over 1.1 million Australians, or approximately 9.7% of the Australian workforce⁶. Charities and NFPs make an invaluable contribution to our community, providing vital services, engaging volunteer effort, and helping beneficiaries all over Australia.

The income of Australia's registered charities in 2014 exceeded \$103 billion⁷. Of this, donations and bequests accounted for \$6.8 billion. Almost a quarter of charities received the majority of their income from donations and bequests, with 65% of charities receiving at least some of their income from these sources. Fundraising is therefore of great

¹ Charities eligible for registration with the ACNC are those that meet the definition of 'charity' in the *Charities Act 2013* (Cth). Organisations must be not-for-profit, have only charitable purposes that are for the public benefit, not have a disqualifying purpose (among other requirements).

² Cortis, N., Lee, I., Powell, A., Simnett, R. and Reeve, R. (2015) *Australian Charities Report 2014*. Centre for Social Impact and Social Policy Research Centre, UNSW Australia.

³ Deloitte Access Economics (2016) *Cutting Red Tape: Options to align state, territory and Commonwealth charity regulation*.

⁴ Chantlink Market Research (2015), *ACNC 2015 Research: Public trust and confidence in Australian charities*.

⁵ Productivity Commission (2010), *Contribution of the Not-for-Profit Sector*, Research Report, Canberra.

⁶ Above, at 2. Page 41

⁷ Above, 2.



significance to the sector. In the ACNC's experience, any public concern about fundraising practices has the potential to damage public trust and confidence in charities and NFPs.

Should the ACL apply to charities and NFPs? (Recommendations 1, 2, 3, 6 & 7)

The Issues Paper (page 11) asks whether the ACL should apply to charities and NFPs. We note that this question implies that the ACL does not currently apply, whereas we believe that there is in fact some uncertainty among stakeholders about whether or not the ACL does apply to fundraising activities. This uncertainty should be clarified within the ACL.

Applying the general protections of the ACL to cover fundraising by charities and NFPs would increase public trust and confidence in the sector and enable reduction in regulatory burden, and accordingly we recommend that the ACL be extended to cover these activities. Any changes should be made in consultation with the sector and state and territory consumer affairs agencies to avoid unintended consequences.

Current application of the ACL to charities and NFPs

Charities and NFPs currently operate within the ACL framework as consumers of goods and services. Charities and NFPs are also significant providers of goods and services themselves. Many sell goods and services to consumers in competition with private providers in the marketplace. It is unambiguous that the ACL currently applies to charities and NFPs in relation to these activities.

The Issues Paper notes (page 11) that some ACL provisions apply to different classes of persons and things, and that there is no single overarching definition of 'consumer' that applies to the entire ACL. When charities and NFPs undertake fundraising activities, their donors provide funds with no expectation of material benefit in return. No exchange of goods and services takes place (except perhaps a token one). The relationship between the donor and charity is different to a standard consumer transaction, and it is not clear whether or not a donor is a 'consumer' for the purposes of the ACL legislation. Notwithstanding, a donor has a reasonable expectation that their donation will be used for charitable purposes.

Also, the ACL's general prohibitions on misleading or deceptive conduct and unconscionable conduct are specified to apply to conduct in 'trade or commerce'. The definition of 'trade or commerce' in the ACL is broad and includes any business or professional activity. It is not clear whether the conduct of charities or intermediary companies in undertaking fundraising could be considered to be in 'trade or commerce'. Because of these definitional matters, there is currently uncertainty about whether or not the ACL extends to fundraising activities undertaken by charities and NFPs. In the



interests of providing certainty to the sector and its donors, we recommend that the ACL should explicitly specify whether each of its protections apply to fundraising.

Trust and confidence benefits

As stated in the Issues Paper (page 4), the protections in the ACL help give consumers confidence that markets are fair, and that they have adequate rights, protections and access to remedies in situations where they suffer harm. Similarly, donors to charities and NFPs have an interest in protection from unfair fundraising practices. Research undertaken by the ACNC found that concerns about sector fundraising methods are negative influences on trust and confidence, and that fundraising methods viewed as inappropriate were the single largest cited reason for rejecting a request for donation⁸.

The extension of the ACL's general protections against misleading conduct, unconscionable business conduct and unfair contract terms to fundraising would provide a national and consistent protection against the worst fundraising practices. These protections would give the public greater trust and confidence in the sector⁹.

Potential for reduction in regulatory burden

Deloitte Access Economics has estimated that the cost to registered charities of complying with state and territory fundraising regulation is in excess of \$15 million per year.¹⁰ Each state and territory (except for the Northern Territory) has specific fundraising regulation, which can differ considerably between jurisdictions. The ACNC has been working with states and territories to harmonise and streamline reporting and regulatory practices, including in the area of fundraising. For example, the South Australian Government has introduced legislation that will exempt charities registered with the ACNC from the need to have a separate fundraising licence¹¹.

Consumer protection is an element of all state and territory fundraising legislation, which aligns with the policy objective of the ACL. Extending the ACL to cover fundraising would initially complement the existing state and territory legislation, and provide an alternative source of protections and remedies to donors. Once a national framework of protections was in place for fundraising, in time this may enable states and territories to reduce the scope of their own regulation, with associated benefits for charities and NFPs.

⁸ Above, at 4, pages 11 and 37.

⁹ Above, at 4. Page 13: The ACNC's market research into trust and confidence found that knowledge of a charity regulator significantly improved trust and confidence in Australian charities, and that 'policing charity fundraising' was seen as an important function.

¹⁰ Above, 3, page 5.

¹¹ *Statutes Amendment (Commonwealth Registered Entities) Bill 2015 (SA)*



For example, the cost of applying for and maintaining fundraising registration under state and territory legislation is currently a significant source of regulatory burden¹². Confirmation and clarification that the ACL protections apply to fundraising may enable these processes and reporting requirements to be further harmonised either within a national framework, or within existing state and territory regulatory structures. This, of course, would be a matter for the states and territory regulators and consultation as to the opportunities and impacts should be held with those regulators.

The general protections of the ACL would merely require charities to refrain from certain types of conduct, and so the extension of these general protections to fundraising should not add additional reporting or regulatory obligations to the sector.

Suitability of the ACL model for fundraising

The ACL's 'multiple regulator' framework is reflected in legislation by each state and territory, and is well-established. The framework offers an effective and efficient model for ensuring a nationally consistent baseline of fundraising protection. Its national application also positions the ACL well to provide protection for donor transactions that extend beyond one state or territory jurisdiction. This is particularly relevant and important in the context of online fundraising and the emergence of alternate models such as crowd sourced funding. Approximately 13% of charities already operate in more than one state or territory¹³, with many others soliciting donations online, including through social media.

We note that the ACL framework has an objective of promoting proportionate, risk-based enforcement, and that there are a variety of remedies and offences available to allow flexibility and proportionality. The imposition of penalties on charities and NFPs should remain consistent with the extent of wrongdoing and also account for the fact that any penalties may divert funds away from charitable purposes. The ongoing availability of flexible remedies is necessary if the ACL is extended to cover fundraising by charities and NFPs. Particularly, it would be helpful to provide assurances that any remediation for breaches will recognise that charities and NFPs do not operate with a profit motive, and that pecuniary penalties may be less appropriate.

Cooperation and information-sharing between regulators

If the ACL was extended to charity and NFP fundraising, the framework should continue to be enforced by ACCC and state and territory regulators for all entities including charities and NFPs. Where fundraising legislation currently operates, it would continue to apply, with the ACNC continuing its role in working with states and territories to harmonise and streamline regulatory requirements.

In instances of apparent breaches of the ACL, the ACNC may consider its own compliance action where the behaviour leading to the breach indicates poor governance

¹² Above, at 3, Page 19

¹³ Above, at 2, Page 22.



within the charity. The ACNC may also take action where a breach of the ACL raises concerns about the charity's entitlement to registration or compliance with the ACNC Act. Should the ACL be confirmed as covering fundraising by charities and NFPs, or if its scope was extended, the ACNC would seek to enter into a Memorandum of Understanding with the ACCC to facilitate cooperation and information-sharing.

Should the specific protections against unsolicited consumer agreements apply to companies collecting on behalf of charities? (Recommendation 4)

The Issues Paper notes (page 26) that the unsolicited consumer agreement protections in the ACL currently operate to protect consumers in circumstances where they might be subject to additional vulnerability or disadvantage due to the nature of the sales process. The same factors that might put a member of the public at a disadvantage during a sales process for goods and services would also apply to requests for donations from companies collecting on behalf of charities, and so we believe the extension of the ACL to fundraising companies would have merit.

As noted above, concerns about fundraising practices have a negative impact on public trust and confidence in charities. Extending the unsolicited consumer agreements protection to companies collecting on behalf of charities would increase public trust and confidence. Consultation should be undertaken with the sector to determine the thresholds and circumstances in which the provisions should apply before any changes were made.

Managing surplus funds from court-ordered ACL remedies (Recommendation 5)

The Issues Paper (page 45) notes that courts have the power to make orders about where funds gained through breaches of the ACL should be directed. The Paper cites the example of the Victorian Consumer Law Fund, which holds undistributed funds that can be used for other purposes, such as grants for improving consumer well-being. There are currently no arrangements for managing surplus funds in a number of states or territories, or in the Commonwealth.

Providing a portion of these surplus funds to programs that help charities and NFPs achieve and maintain good governance would be an effective use of these funds, as it would help organisations achieve their socially beneficial purposes. Using funds in this way would be particularly appropriate in the case of any penalties levied against charities or NFPs for fundraising breaches under a potential extension of the ACL.

Conclusion

As discussed above, the ACNC recommends that the ACL should clearly specify which (if any) of its protections currently apply to fundraising by charities and NFPs. If the ACL does not apply to fundraising, we recommend that its scope be expanded to provide the general protections of the ACL to charity donors, in consultation with the sector and state,



territory and Commonwealth regulators. Consideration should also be given to extending the unsolicited agreement provisions to companies fundraising on behalf of charities.

This review of the ACL is an excellent opportunity to consider the ACNC's recommendations, which have the potential to both increase public trust and confidence in charities and NFPs, as well as to reduce duplicative regulatory obligations for the sector. The ACNC would welcome the opportunity to work with the ACCC and other regulators in relation to any changes in the regulation of charities arising from the review.

Contact: Ross Gillott, Policy Manager
 ross.gillott@acnc.gov.au