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Chair
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SUBMISSION TO THE AUSTRALIAN CONSUMER LAW REVIEW INTERIM REPORT

The Australian Charities and Not-for-profits Commission (**ACNC**) welcomes the opportunity to comment on the Australian Consumer Law (**ACL**) Review Interim Report (the **Interim Report**). This submission outlines the ACNC's views on the questions raised under section "1.2.3 Fundraising activities and the ACL" of the Interim Report, and is in addition to ACNC's earlier submission to the Issues Paper. The ACNC's response to the issues raised in the Interim Report draws upon the ACNC's experience regulating the charity sector, as well as research commissioned by the ACNC – the *Australian Charities 2014* report¹, the Deloitte Access Economics report on options for regulatory reform², and research into public trust and confidence.³

The ACNC acknowledges that the ACL covers a broad range of issues affecting consumers and businesses across a range of industries. As a result, the ACNC recognises that it may be challenging for the ACL to incorporate amendments that would fully protect against risks associated with fundraising activities, given the current interpretation of 'trade and commerce'. Nevertheless, this review of the ACL presents a rare opportunity to explore avenues for reforming the existing inconsistent and sometimes burdensome state-based fundraising regulation with a modernised framework. The ACNC is keen to offer its support to CAANZ to provide advice on potential options in regard to reforms in this area.

Clarifying the current application of the ACL

The Interim Report presents the following option as a means to address the concerns raised in a number of submissions around the ACL's application to the not-for-profit (**NFP**) sector, including the ACNC's submission, that there is uncertainty around how the ACL currently applies to fundraising activities:

¹ 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.

² Deloitte Access Economics (2016), *Cutting Red Tape: Options to align state, territory and Commonwealth charity regulation*.

³ Chantlink Market Research (2015), *ACNC 2015 Research: Public trust and confidence in Australian charities*.





Option 1 – Clarify the current application of the ACL to activities of charities, not-for-profits and fundraisers, and investigate whether there are regulatory gaps that warrant intervention.

The Interim Report also identifies specific questions relating to this option:

- 1. Would further regulator guidance on the ACL’s application to the activities of charities, not-for-profits and fundraisers help raise consumer awareness and provide greater clarity to the sector?**
 - **If so, what should be included in this guidance?**

The ACNC supports this option to clarify the application of the ACL to fundraising. The ACNC also supports any other action to investigate and address regulatory gaps affecting charities and the NFP sector. Through better understanding of the ACL, government, charities, fundraisers, professionals and the public (including donors) will be able to navigate the consumer protection framework more effectively. The guidance should build greater knowledge about obligations and protections under the ACL framework, and provide greater confidence for charities and the public to fundraise and donate.

As noted in the Interim Report, there is an evident lack of understanding around how the ACL applies to the NFP sector. Guidance is critical in assisting stakeholders understand how the ACL applies and how it affects them. The ACNC has played a key role in issuing guidance to the charities and the public to increase awareness of issues impacting the charitable sector. For example, the ACNC has recently published guidance on charities engaging in political advocacy and how to interpret charity financials such as administration costs. The ACNC has found that equipping charities with the necessary information to meet their obligations and expectations assists to build capacity and supports a robust, vibrant, independent and innovative sector. Publishing information to help donors and consumers understand the regulation applying to charities is also an important element in fostering greater public confidence in the charitable sector.

Guidance would be equally beneficial for consumers to inform them of their rights and protections in relation to charities and NFPs. The recent Australian Consumer Survey 2016 has found that awareness of consumer protection laws and dispute resolution services under the ACL has improved since its introduction.⁴ Building upon this high level of awareness among the public by clearly explaining how the ACL applies to fundraising by the NFP sector will encourage public confidence. Maintaining and improving public trust and confidence in charities is important for the sustainability of the sector, and the opposite can be severely damaging. Experiences overseas have shown the impact poor public perception can have on the broader charitable sector due to fundraising scandals and the perceived lack of appropriate protection for donors.⁵

⁴ The Australian Government the Treasury and EY Sweeny (2016), *Australian Consumer Survey 2016*.

⁵ The Charity Commission (UK), *Public trust and confidence in charities 2016*, available at: <https://www.gov.uk/government/publications/public-trust-and-confidence-in-charities-2016>, and *The 2015 charity fundraising controversy: lessons for trustees, the Charity Commission, and regulators*, available at: <http://www.publications.parliament.uk/pa/cm201516/cmselect/cmpubadm/431/431.pdf>.



The benefits of improving guidance extend to state and territory governments and regulators. With greater clarity on the ACL's application to the NFP sector, government concerns around protecting consumers against risks are alleviated as it becomes clear that protections are already in place. Clarity as to the ACL's current scope would also highlight areas in which the ACL and state-based legislation overlap on these risks. These are important considerations in providing government with the confidence that substantial consumer detriment in the NFP sector would not occur, even if states and territories were to repeal their fundraising legislation.

In developing guidance for the NFP sector, consideration should be given to ensuring the guidance is tailored to reflect the sector, such as the unique voluntary nature and diversity in size, capacity, location and activities of NFPs. Clarification of the role of regulators in administering the ACL, particularly the approach to non-compliance, will be beneficial. Case studies that illustrate how the ACL would apply in practice for charities and NFPs would clearly highlight their obligations in their day-to-day work.

Current state of fundraising regulation

2. Are there currently any regulatory gaps with regard to consumer protection and fundraising activities? If so:

- i. What is the extent of harmful conduct or consumer detriment that falls within these regulatory gaps or 'grey areas', and does it require regulatory intervention?**

Rather than a regulatory gap, the most pronounced issue impacting charities is the significant duplication in fundraising regulation and the lack of a national approach. Current state-based fundraising regulation is challenging for charities to manage, particularly if they operate in more than one state or territory, because of the differing requirements in each jurisdiction.

The current fundraising regulatory framework is largely confined to state borders and does not adequately acknowledge the increasingly borderless context within which charities operate. Through the use of technology and the internet, charities are able to easily connect with people beyond their local community, and it is expected more and more charities will capitalise on this trend. As the charity and NFP sector embraces new practices, regulation of fundraising activities needs to keep pace and modernise so that it remains relevant to today's social expectations.

The case study below illustrates the issues charities face under existing fundraising regulation:

Case study one: online fundraising

A small charity, based in Melbourne (Victoria), is setting up a website to build awareness of their activities. As part of this website, they want to include a function to collect donations from supporters of their cause. They recognise that their supporters may be located outside of Victoria, and that it may be difficult to accurately ascertain where the donations on the internet are coming from prior to them being made. As a result, this



charity decides to apply for the fundraising licenses that would allow them to legitimately collect donations across Australia.

When researching the necessary requirements for fundraising across the different states and the ACT, the charity finds that each jurisdiction requests different information, have different timeframes for applications and have different exemptions. It spends a significant amount of time researching information and puts its website launch on hold.

After checking the requirements, the charity realises it cannot apply for a fundraising licence in NSW because they do not have an address in NSW to nominate on the form. In addition, they also do not meet the requirements for Queensland as the charity does not have at least three Queensland residents carrying out their activities in the state, neither do they intend to. In the remaining jurisdictions, the charity notes that there are a range of reporting requirements and varying re-application time frames to keep track of. The charity does not have the necessary resources to address all these administrative requirements and potential risks if they unknowingly receive donations from donors located in NSW or Queensland. After considering all these factors, the charity removes the function to collect donations on its website and decides to only solicit donations in its local area as this will be much more manageable.

As the case study above illustrates, the current fundraising regulatory system does not comprehensively cover the reality of online fundraising. Other popular emerging forms of giving through the internet, such as crowdfunding, also lie in a potential 'grey area'. A cohesive regulatory environment that captures online fundraising activities ensures donors in these situations have adequate protection and that charities can operate with confidence. The flexibility of the ACL is ideal for addressing these 'grey areas' as it is able to, in the words of the Interim Report, "capture a broad range of transactions and to respond to emerging issues and business models".⁶

ii. Would generic protections, such as the ACL, provide the level of regulatory detail necessary to address identified areas of detriment? What would be the benefits and costs of this approach?

Fundraising regulation, and the requirements they impose, can vary greatly between the state and territories (with the Northern Territory having no regulation at all). For example, all jurisdictions have differing requirements for what must be included on a fundraiser's identification badge. Notwithstanding these differences, the intention and effect of fundraising regulation in each jurisdiction aims to achieve the same outcome – to ensure that donations are used for the charitable purpose they are raised for and that fundraisers behave in an appropriate manner when soliciting the public for these donations. With its consumer protection focus, the ACL's framework is highly aligned to the objectives of existing fundraising regulation. If current fundraising legislation were repealed protections for donors against much of the potential mischief would still be available under the ACL or the criminal law.

Harmonisation of fundraising regulation under the ACL would provide significant regulatory reduction benefits to the NFP sector. Analysis from Deloitte Access Economics

⁶ CAANZ (2016), *Australian Consumer Law Review Interim Report*, p. 189.



estimates that charities spend around \$15.08 million a year due to fundraising regulation.⁷ Much of this is associated with the ongoing reporting and operating requirements that charities must adhere to across different jurisdictions. Deloitte Access Economics also estimated that a saving of \$10.81 million per year could be achieved if state and territory fundraising regulation was removed and replaced with a single regulatory framework under the ACNC. This is a similar solution to harmonising fundraising regulation under the ACL, and it is expected similar levels of savings for charities could also be achieved through this approach.

Case study two: fundraising nationally

A large charity is registered with each state and territory (except for the Northern Territory) fundraising regulator to enable it to solicit donations that support its national network. The charity is required to employ a number of dedicated staff that can ensure fundraising requirements are met and monitor for any changes to fundraising legislation in the states and territories.

While the charity is always looking for opportunities to minimise costs, the charity recognises that it would be placed in significant risk from regulatory non-compliance without its fundraising team. The risk is particularly high due to the inconsistent fundraising requirements across all the jurisdictions. There are a number of ongoing regulatory requirements that the team is responsible for tracking to ensure the charity is compliant in each state and territory:

- Reapplication timeframes (e.g. fundraising licenses are valid for three years in Victoria in contrast to ACT where licenses are valid for 5 years).
- Ensure material issued for each fundraising campaign is compliant with the regulations (e.g. the correct registration number is included on advertising material for the jurisdiction).
- Funds are managed appropriately (e.g. funds are directed into a separate bank account).
- Annual reporting requirements are met (e.g. submitting audited financial reports and jurisdiction-specific forms).

The charity decides that it must maintain its compliance team, despite the associated administration costs, to manage its compliance with fundraising regulation.

Although many aspects of the ACL and existing fundraising regulation overlap, the ACNC acknowledges that the ACL would not regulate all aspects of fundraising currently covered by state and territory legislation, particularly where jurisdictions impose detailed requirements. Regulation from local governments, however, offers another level of

⁷ Deloitte Access Economics (2016), *Cutting Red Tape: Options to align state, territory and Commonwealth charity regulation*.



protection for the community, particularly through their permit processes for face-to-face fundraising. Other forms of protection can also be found under other pieces of legislation, such as the Crimes Act and the relevant Incorporation Acts.

Potential regulatory gaps after extension of the ACL

iii. Would there be any unintended consequences, risks and challenges from extending the application of the ACL to address regulatory gaps for fundraising activities? If so, how could they be addressed?

The response to this question will assume that an extension of the ACL to address fundraising activities will occur in tandem with repealing state and territory fundraising legislation, otherwise there would be greater duplication in fundraising regulation. Where it would remove state and territory fundraising requirements, extending the ACL to fully cover fundraising activities would significantly benefit charities and the NFP sector. Not only would it remove red tape, it would create a nationally consistent framework for fundraising regulation that is easily accessible. Accessibility is critical in ensuring charities are able to understand what their obligations are, regardless of where they operate.

While it is preferable to consolidate fundraising legislation under the ACL's single framework, the treatment of volunteers within the ACL remains an issue. The Interim Report notes that while third-party fundraisers and employees of a charity are likely to be considered as engaging 'in trade or commerce' when soliciting donations, it is difficult to extend this interpretation when a volunteer is fundraising. For charities and the NFP sector, there is often little distinction between a volunteer, employee or contractor in the fundraising context. Further, a consumer or donor would generally expect the same level of protection, regardless of who approaches them to conduct the fundraising. The ACNC acknowledges the concerns raised by CAANZ on extending the definition of 'in trade or commerce' as it may have wide-spread implications, and would support alternative approaches that would achieve the same outcome of including volunteers and holistically capturing fundraising under the ACL.

Role of the ACL in facilitating red tape reduction

3. Would extending the ACL to all fundraising activities be necessary or desirable to facilitate potential reforms of state and territory fundraising regulation?

The ACL is a nationally well-accepted framework by consumers, businesses and government. This is most clearly reflected by the positive results from the Australian Consumer Survey 2016.⁸ Commonwealth and state governments have collaborated effectively in administering the ACL, and mechanisms exist to update the ACL so that emerging issues are addressed in a timely manner. Using this existing framework is an effective and efficient option to resolve fundraising regulation in Australia.

Fundraising regulation has been an ongoing issue and has been raised publicly on a number of occasions by the NFP sector and within government inquiries. In preparing the research report, 'Contribution of the Not-for-Profit Sector', the Productivity Commission received a number of submissions from the NFP sector that raised their concerns and

⁸ Above, at 4.



frustrations with fundraising regulation.⁹ More recently, a coalition of influential bodies from the NFP sector (including peak bodies such as the Australian Institute of Company Directors, the Governance Institute of Australia, the Community Council for Australia, CPA Australia, Chartered Accountants Australia and New Zealand, Philanthropy Australia and Justice Connect: Not-for-profit Law) have advocated for reform to fundraising regulation through the ACL. Further information on this coalition and its proposal is available through the 'Joint statement on fundraising reform'.¹⁰

To date, meaningful reform has been challenging, particularly given the fragmented state of fundraising regulation. This review of the ACL presents a rare opportunity to initiate reform to fundraising regulation. If this review is not used to bring about these necessary changes, then it will be a lost opportunity to achieve significant regulatory savings for charities.

Conclusion

The ACNC would welcome the opportunity to discuss any aspects of our submission (including our earlier submission to the Issues Paper) or support the work of the ACCC and other regulators in relation to any regulation changes for charities arising from the review.

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⁹ Productivity Commission (2010), *Contribution of the Not-for-Profit Sector*, Research Report, Canberra.

¹⁰ See the 'Joint Statement on fundraising reform' here: <http://www.justiceconnect.org.au/fundraisingreform>.