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Your Ref:

9 December 2016

Mr Simon Cohen  
Consumer Affairs Australia and New Zealand

Submitted electronically: [acfeedback@treasury.gov.au](mailto:acfeedback@treasury.gov.au)

Dear Mr Cohen

**ACL interim report October 2016: submission**

Thank you for inviting written submission to the Australian Consumer Law ("ACL") Interim Report October 2016 ("the Interim Report") prepared by Consumer Affairs Australia and New Zealand ("CAANZ")

Our submission will make suggestions regarding item 1.2.3 of the Interim Report ("further regulator guidance").

It is necessary to first introduce ourselves and offer some "background" comments.

We will for convenience use the term "ACL Regulators" in this submission. That term is intended to cover all agencies that have jurisdiction to commence proceedings under the ACL.

**1. Who we are**

We are a boutique law practice that specialises in charity and not for profit law.

Prior to establishing the practice, I was engaged on contract around 2006 by the ( ) as "Executive Officer". Reporting to the CEO, that position required me to research, consult and draft the code of practice, fundraising complaints process and code of acceptance and refusal of donations. Part of that work involved presenting in public forums on unconscionable and oppressive conduct in relation to fundraising.

The code and complaints process is now independently regarded as being a benchmark of not for profit fundraising best practice.

In another role, I prepared a bequest strategy for the \_\_\_\_\_ that particularly took account of laws around unconscionable and oppressive conduct.

Whilst this submission is in our law practice's name, I also founded and currently chair the Law Institute Victoria *Charities and Not for profit Law Committee*. That Committee includes legal practitioners from the ACNC and Justice Connect. I also sit on the ACNC Professional Users' Group.

## **2. Background**

### **2.1 Status of Justice Connect "fix fundraising" proposal**

We note the Interim Report states at page 18, that:

CAANZ therefore considers that the current definition [of "in trade and commerce"] does not need be reviewed at this time.

We understand that CAANZ intends by this statement that it does not propose to support certain recommendations by Justice Connect in its "fix fundraising campaign" including:

- Amend the definition on "in trade or commerce" in the ACL
- Add a definition of "fundraising activities" to the ACL.

If CAANZ does have a mind however to invite further discussion on the Justice Connect recommendations, we would appreciate being included in that discussion.

We do understand from item 1.2.3 of the Interim Report however, that CAANZ is receptive to suggestions as to publicly available "guidance" on operation of the ACL as applied to fundraising. It is this aspect of the Interim Report that forms the basis of this submission.

### **2.2 Reform of state fundraising legislation**

We appreciate that the CAANZ terms of reference are not so wide as to include reform of state based fundraising legislation. The point however has been made during the ACL review, and we make it again here, that state based fundraising legislation should be simplified either by "harmonisation" of existing laws or by some form of "uniform law" applicable across all jurisdictions.

As most ACL Regulators also regulate state based fundraising, we understand this long held view about the need for state based fundraising reform is at the least, well understood.

### **2.3 Concrete Constructions<sup>1</sup>: the Interim Report view**

Unfortunately, it is necessary to discuss *Concrete Constructions* at some length. The discussion we believe, may assist ACL Regulators to develop "regulator guidance".

The Interim Report helpfully mentions *Concrete Constructions* as High Court binding authority regarding the ACL phrase "in trade or commerce". Whilst *Concrete Constructions* did not relate directly to a not for profit organisation, it is not controversial that the decision will apply to not for profit organisations.

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<sup>1</sup> *Concrete Constructions Pty Ltd v Nelson* (1990) 169 CLR 594.

The Interim Report at page 17 describes the majority view in *Concrete Constructions*:

... the High Court applied a narrow interpretation of the phrase ‘in trade or commerce’. The focus must be on the *particular* activities or transaction in question, rather than whether the entity is generally engaged in trading or commercial activities.

Also important is the *nature of the relationship* between the entity engaging in the conduct or making the representation, and the persons to whom the conduct was directed or the representations made. That relationship must be of a trading or commercial nature, and the conduct of the entity must have occurred *in the course of that relationship*.

For convenience (and paraphrasing the High Court’s own description) we will describe this majority view as “the central conception of trade and commerce test”.

We presume that ACL Regulators do at the least, take the central conception of trade and commerce test into account when they consider complaints under the ACL.

To illustrate how the central conception of trade and commerce test might work in relation to not for profit fundraising, we provide three “problem scenarios” below:

1. *Reference to a not for profit organisation constitution or reference to actual transaction?*

*Habashy v Relpar Australia Pty Ltd & Anor* [2006] VCAT 1912

In this case VCAT struck out a claim against a not for profit incorporated community health service (Health Service) in proceedings commenced by the applicant (H) against Health Service and the first respondent (R).

An occupational therapist was employed or engaged by Health Service. The occupational therapist made written recommendations as to the features of a new wheelchair for H, a client of Health Service.

It could not be confirmed whether H paid a fee for the occupational therapist’s recommendations. The wheelchair was supplied by R. Not satisfied with the wheelchair, H by application to VCAT, sought its replacement from either H or R.

VCAT Senior Member Vassie was required to consider if Health Service by way of the occupational therapist’s written advice, had supplied a service “in trade or commerce”. Senior Member Vassie did so by reference to *Concrete Constructions* and then stated at [17]:

In my opinion, ... the activities of the Health Service are not activities which, of their nature, bear any trading or commercial character. In the first place, because the Health Service is an incorporated association, it is prohibited from trading unless its predominant purpose is charitable. ... In the second place, while the purposes set out in the constitution may or may not be wholly charitable purposes, they authorize activities the nature of which are beneficent and community-protective rather than trading or commercial. That is so whether or not a fee is charged for them.

Accordingly I uphold the submission that the Health Service was not a supplier of “services” to [H], and will order that his claim as against the Health Service is struck out for want of jurisdiction.

**Comment**

This case is possibly an anomaly. H was unrepresented and had apparent difficulty with English. However, under the central conception of trade and commerce test, it would appear that reference to a not for profit organisation’s constitution and activities in general would be an irrelevant matter for a decision maker to take into account.

That is, a decision maker would need to base their decision on the *nature of the activity or relationship* between the giver and receiver (in the present case, the occupational therapist being the giver of advice, and H being the receiver of that advice).

ACL Regulator guidance may help to clarify such matters regarding service provision by a not for profit organisation.

**2. Gifts given gratuitously may fail the activity/relationship test**

Under Taxation Ruling TR 2003/13 (Income tax: tax deductible gifts – what is a gift?) paragraphs 37-39 paraphrased say:

In order to constitute a gift, the giver must not receive a benefit or an advantage of a material nature or a right or privilege by way of return.

The Taxation Ruling is based on 78A(2)(c) of the *Income Tax Assessment Act 1936* which says:

(2) Subject to this section, a gift of money, or of property other than money, made by a person (in this section referred to as the donor) ... is not an allowable deduction under Division 30 of the *Income Tax Assessment Act 1997* where: ...

(c) the donor or an associate of the donor has obtained, will obtain or may reasonably be expected to obtain any benefit, advantage, right or privilege ... .

**Comment**

It would appear that a person (giver) who elects to make a tax deductible donation to an eligible DGR endorsed entity (receiver) and who felt aggrieved by the receiver’s representations about how that gift was to be applied, could not engage the “in trade or commerce” provisions of the ACL. This is because the Ruling and tax legislation effectively prevent the giver from asserting that the central conception of trade and commerce test applies to their circumstances.

That is, the gratuitous giving of a tax deductible gift “without benefit by way of return” cannot by operation of tax law, be a trade or commerce activity or relationship between the giver and receiver.

ACL Regulator guidance may help to clarify whether a person who makes a gratuitous gift to a DGR on the basis of false representations by the DGR may be prevented from commencing proceedings under the ACL.

3. *For profit vendor advertising that they support a not for profit organisation*

In his Honour's dissenting judgment in *Concrete Constructions* McHugh J observed at [12] that the narrow (central conception of trade and commerce test) approach adopted by the majority would:

... unduly limit the operation of s52 [of the *Trade Practices Act* regarding misleading and deceptive conduct] if a corporate shopkeeper was liable for the misleading statement that its products were safe but not for the misleading window sign that it financially supported the Australian Olympic team.

**Comment**

If we replaced the phrase "the Australian Olympic Team" in his Honour's example, with the name of a certain not for profit organisation, would a similar issue arise as identified by McHugh J? That is, would the ACL be "unduly limited" because a misleading shop sign about the vendor's purported financial support for a not for profit organisation was not related to the actual transaction between the vendor and purchaser?

ACL Regulator guidance may help to clarify whether false statements about a vendor's support for a not for profit organisation could be caught by the ACL.

**3. Guidance on operation of the ACL as applied to fundraising**

We now turn to the type of "regulator guidance" that in our respectful submission, ACL Regulators should consider.

**3.1 Our Suggestions in brief**

In brief, ACL Regulators should provide the following public guidance ("Our Suggestions"):

1. Guidance as to how ACL Regulators might consistently apply the central conception of trade and commerce test across all jurisdictions;
2. Generic examples (with appropriate disclaimers if needed) illustrating how the central conception of trade and commerce test might work ie guidance as to whether the ACL may apply in a certain fundraising circumstance;
3. Publicly and internally confirming that ACL Regulators are (effectively) the national regulator of not for profit fundraising insofar as that fundraising engages the ACL; and
4. Take a public leadership role in cases of fundraising scandal and subsequent media attention, where there is a reasonable basis that the scandal may contravene the ACL.

We also respectfully suggest that ACL Regulators liaise with:

- their constituent parts (ie between the "ACL home regulators")
- with other regulators involved in regulation of not for profit organisations (eg the ACNC and self-regulators such as the FIA).

### 3.2 Independent observations to support Our Suggestions

In relation to points 1-2 of Our Suggestions above, we discussed the type of “regulator guidance” regarding not for profit fundraising at section 2.3 of this submission.

Points 3-4 of Our Suggestions above are based on independent observations:

- The **attached** Charity Commission of England and Wales report *Public Trust and Confidence in Charities 2016* (evidence that trust and confidence primarily decreases due to scandals and media reports, and evidence that the public appreciates the existence of a regulator, even if the public is not aware how a regulator works)
- Acceptance in the Interim Report itself that “the ACL is likely to already cover a range of fundraising activity”
- Opinion of Justice Connect’s legal counsel (Norman O’Brien AM QC) that “organised fundraising by charities falls within the definition of ‘trade or commerce’ in the Consumer Law”: <https://www.youtube.com/watch?v=0gHhly9ltw>

### 3.3 Our comment on the independent observations

Given that the ACL is likely to cover most not for profit fundraising activities already, there is substance to the proposition that ACL Regulators are effectively the “National Regulator of Not for profit Fundraising”. We doubt however if ACL Regulators are currently perceived that way, both internally and by the public.

Based on the Charity Commission of England and Wales report findings, ACL Regulators in our opinion, should clearly communicate their role as national regulators of not for profit fundraising, as a priority. This is important due to the myriad regulators and self-regulators intersecting not for profit law generally.

In addition, due to the detrimental effect of fundraising scandals on public trust and confidence, it is important in our view, for ACL Regulators to “step up” in one way or another during these times of scandal. We commend Consumer Affairs Victoria in its role as an ACL Regulator for example, for its media release into proceedings against and her now discredited

In our view, these forms of public communication are *just as important* as regulator guidance on how the ACL may apply to not for profit fundraising.

This concludes our submission. Naturally if you are of a mind to further discuss this submission with us, please feel free to contact myself.

Yours faithfully

**DF MORTIMER & ASSOCIATES**

Derek Forbes Mortimer

Derek Mortimer  
Principal

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