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23 December 2016

Mr Simon Cohen
Chair
Consumer Affairs Australia and New Zealand
c/o The Treasury
Langton Crescent
Parkes ACT 2600

By email: ACLReview@treasury.gov.au

Dear Mr Cohen,

Australian Consumer Law Review Interim Report

The Law Institute of Victoria (LIV) welcomes the opportunity to comment on the Australian Consumer Law Review Interim Report (the Interim Report).

The LIV appreciates the extension of time to provide its response, which has allowed the opportunity to properly consider submissions made by Justice Connect and the Law Council of Australia (LCA).

The LIV endorses Justice Connect's submission and, as a constituent body of the LCA, the LIV also endorses the LCA's submission. It would, however, like to provide further comments below.

The LIV's submission is informed by contributions from the LIV's Competition & Consumer Law Committee and Charities & Not for Profit Committee.

Fundraising activities

Having considered Justice Connect's submission on the Interim Report, the LIV would like to commend Justice Connect on its ongoing advocacy around fundraising law reform. It continues to support its fundraising reform campaign.

In its submission on the ACL Review Issues Paper (the Issues Paper), the LIV supported Justice Connect's recommendation to explicitly apply sections 18, 20 and 50 of the ACL to fundraising activities by adding a reference to "fundraising activity" to these sections. It noted that:

> '*…making sections 18, 20 and 50 of the ACL explicitly applicable to fundraising activities…may further assist in ensuring fundraising activities are regulated in a clear and streamlined manner.*'[1]

The LIV's submission on the Issues Paper is enclosed for your reference.

It is acknowledged that the Interim Report categorically states there is limited opportunity to address the definition of "in trade or commerce" in the current ACL Review. Nonetheless, the LIV remains supportive of expanding the "in trade or commerce" threshold to cover fundraising activities as it is desirable for the purposes of clarifying and harmonizing fundraising law in Australia. Therefore, the LIV would welcome the opportunity for further engagement in respect of this issue.

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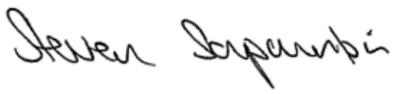
[1] Law Institute of Victoria, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Issues Paper*,

If you have any questions in relation to the above, please contact Barton Wu, LIV Commercial Law Section lawyer, at bwu@liv.asn.au or on (03) 9607 9357.

Yours sincerely,



Steven Sapountsis
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Encl.

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Date 8 July 2016

Mr Gary Clements
Chair
Consumer Affairs Australia and New Zealand
c/o The Treasury
Langton Crescent
PARKES ACT 2600
Via email: ACLReview@treasury.gov.au

Dear Mr Clements

Please find enclosed the LIV's submission in response to the Australian Consumer Law Review Issues Paper (Issues Paper) released on 31 March 2016. The submission has been prepared jointly by the Competition and Consumer Law, Business and Corporate Law and Not-for-Profit and Charities Law Committee within the Commercial Section of the Law Institute of Victoria (**LIV**).

The LIV understands that the Law Council of Australia (LCA) has provided at least two relatively comprehensive submissions in respect of the review and has foreshadowed that in the interests of providing a diversity of views other submissions may be provided through other Sections or interest groups within the LCA.

In a similar vein, we understand through the stakeholder consultation process undertaken by CAANZ, that Treasury is interested in receiving a diverse range of views in relation to the Issues Paper. In light of this, the LIV now also provides its view in respect of the Issues Paper. The LIV does not propose to respond directly to each question raised by the Issues Paper, but to raise a number of specific issues viewed by the contributing committee members as being important to bring to Treasury's attention. The issues raised in the LIV's submission reflect the majority of the issues discussed with CAANZ during the LIV's stakeholder consultation meeting with them on 10 May 2016.

The LIV welcomes the opportunity for further engagement in respect of the Australian Consumer Law Review and looks forward to being involved in any further consultation processes as they arise.

Yours faithfully,

Steven Sapountsis
President
Law Institute of Victoria

Australian Consumer Law Review – response to Issues Paper

LAW INSTITUTE OF VICTORIA

Date: 8 July 2016

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1. Supplier's liability for consequential loss

The issue of suppliers' liability for consequential losses on products they sell which do not meet the consumer guarantees within the ACL, can give rise to a range of practical problems particularly in relation to scope of the suppliers' liability and ability to recoup costs in circumstances where the cause of the fault stemmed from another supplier. The issue would benefit from further clarification in the ACL.

For example, if a light manufacturer produces a light fitting for a customer and that the customer picks it up in store in Melbourne and installs in Perth, and there is a relevant fault with that light, is the supplier liable for:

- The costs of uninstalling the light fitting by an electrician (and if so, does the supplier have the right to select the tradesperson or is it bound to pay the costs of the customer's electrician no matter the cost)? If the customer can select the electrician, can the customer only seek "reasonable reimbursement of a usual electrician" or the full cost of the electrician (even if the electrician has significantly higher charges than a standard electrician)?
- The costs of installing the light fitting if a replacement is provided by the supplier due to the fault and if so, does the supplier have the right to select the tradesperson?
- The costs of shipping to and from Perth even though the product was collected in Melbourne?

In the scenario above, what is to occur if the cause of the fault was wiring provided by the supplier's supplier. Can the supplier recover all costs paid to the customer from its supplier? The supplier has two arguments to have:

- One with the customer as to what is the appropriate compensation payable to the customer for consequential loss (i.e. the reasonableness of the electricians costs and shipping); and
- One with the supplier's supplier as to whether or not the compensation payable to the customer for consequential loss was reasonable.

This has implications for both supplier and the supplier's supplier as the supplier might be more generous by way of compensation to its customer if it can simply on charge the compensation to the supplier's supplier, which takes away rights of the supplier's supplier.

The LIV recommends that the ACL provide that the supplier to the customer can refer the matter to the supplier's supplier who provided the faulty component to take responsibility for the losses and take over the claim within 7 days of a request. If the claim is not assumed, then the supplier to the customer can come to an agreement on compensation with the customer and then claim the compensation amount as a debt from the supplier's supplier.

Complex issues can also arise in relation to a supplier's rights and liabilities in relation to manufacturing faults.

The definition of 'manufacturer' under s 7 of the ACL is broad. It includes a person or business that:

- makes or assembles goods;
- holds themselves out as the manufacturer of the goods;
- has its brand name applied to or included in the goods; or
- imports the goods if the actual importer does not have an office in Australia.

Suppliers are 'deemed' to be manufacturers unless the supplier (1) identifies the person who manufactured or supplied them with the good and (2) that identified person is available as a defendant in Australia. Unless suppliers can fulfill these conditions, they may be liable for defaults for which they are not responsible. The ACL Review is an opportune time to review the supplier's liability for manufacturing faults.

At present, suppliers are able to limit liability for defectively manufactured goods using contractual terms. It may be better if these contractual protections became statutory protections under the ACL. In addition, it is not practical for a supplier to list the individual component manufacturers of all components of a product. This then leads to the same two arguments the supplier faces in the supplier to supplier example used above.

2. Status of abandoned chattels – commercial leases

The LIV believes that a common issue which arises in the context of commercial/retail leases is when a tenant vacates the premises (or is locked out by the landlord) and fails or refuses to collect its chattels left behind. There is a lack of clarity regarding the interplay between the requirements under the ACL and the contents of any lease agreement as illustrated below.

Section 56(4) of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) (ACLFTA) provides:

(4) This Part applies to the disposal of uncollected goods—

(a) if there is no agreement between the provider and the receiver about their disposal; or

(b) if there is an agreement about their disposal, only in respect of matters not dealt with by the agreement.

An example of an agreement for the purpose of subsection 4 is the Law Institute of Victoria Lease (LIV Lease) which provides (as section 5):

5.1 When the term ends, the tenant must -

5.1.1 return the premises to the landlord clean and in the condition required by this lease, and

5.1.2 remove the tenant's installations and other tenant's property from the premises and make good any damage caused in installing or removing them.

If the tenant leaves any tenant's installations or other tenant's property on the premises after the end of the lease, unless the landlord and tenant agree otherwise -

5.1.3 all items of tenant's installations and tenant's property will be considered abandoned and will become the property of the landlord, but the landlord may

remove any of the tenant's installations or other property of the tenant and recover the costs of removal and making good as a liquidated debt payable on demand; and

5.1.4 *the parties intend that clause 5.1.3 operate in relation to tenant's installations and tenant's property in place of any legislation that might otherwise apply to goods remaining on the premises.*

The LIV submits that subsection 4(b) of the ACLFTA set out above should either be deleted or should include reference to the matters an agreement must cover.

For example, the above clause of the ACLFTA is silent on whether notice is required to be provided to the tenant. On one view the clause in the LIV Lease would dictate that notice is not required and the goods are automatically abandoned, however it is not clear whether the ACL would override this clause and require notice.

A landlord may be required to pay compensation to the tenant for loss and damage as a result of the disposal of goods and if the procedure set out in the ACLFTA is not applied and any 'unreasonable action' is taken by the landlord, that may amount to conversion of the tenant's property and expose the landlord to a claim for damages at common law for the tort of conversion.

Even if the goods are abandoned, there is an argument that any party who has a valid registered security interest may have a legal right to the items secured under their registration. The ACL makes no mention of registered security interests and how these are to be dealt with. The LIV also recommends that further clarity around this is provided for in the ACL.

3. Application of ACL to charities

Recent situations such as the Shane Warne foundation and the Belle Gibson situation suggest that there is an opportunity to clarify the role ACL plays in regulating charities and not-for-profits.

In this regard, the LIV refers to the submission made by Justice Connect in respect of the ACL Issues Paper (Justice Connect Submission) and notes Recommendation 1 in that paper which suggests that government:

> *Amend the definition of "trade and commerce" to clarify whether not-for-profit activities fall within or outside the scope of this definition by including indicia against which activities undertaken by, or on behalf of, a not-for-profit can be assessed.*

Case law under fair trading and trade practices legislation suggests that uncertainty remains as to whether the ACL does or does not apply in a given transaction (for example, see the discussion of *Orion Pet Products Pty Ltd v RSPCA (Vic)* [2002] FCA 860, *E v Australian Red Cross Society* [1991] 27 FCR 310, and *David & Anor v Roberts, Allen & Anor* [1997] FCA 439 at page 4 of the Justice Connect submission).

Clarifying the circumstances in which not-for-profit activities fall within the scope of this definition (as suggested at page 6 of the Justice Connect submission) will help to remove uncertainty within the sector.

In the Charitable Fundraising Regulation Reform discussion paper released in 2012, the Australian Treasury noted that extending some of the generic provisions in the ACL to fundraising activities may be an effective and efficient way to regulate fundraising.[1]

It is noted in the discussion paper that applying the ACL to charities is unlikely to impose significant additional costs on the sector. Misleading or deceptive conduct, unconscionable conduct, false or misleading representations and harassment and coercion provisions do not require any positive action by regulated entities, instead involving the avoidance of certain behaviors and therefore involve a very minor or no compliance burden.[2]

Accordingly, making sections 18, 20 and 50 of the ACL explicitly applicable to fundraising activities (as also suggested at page 11 of the Justice Connect submission) may further assist in ensuring fundraising activities are regulated in a clear and streamlined manner.

The Justice Connect submission is annexed to this submission as **Annexure A.**

4. Inclusion of 'lemon' laws provision

The LIV believes that the ACL would benefit from a 'lemon' laws provision. In the context of defective motor vehicles, consumer rights as they currently exist discourage consumers from exercising their rights under the ACL. Since the onus is on the consumer to prove that a 'major failure' has occurred, it can be difficult for consumers to prove their claim before a court or tribunal. Consumers may need to obtain expert evidence regarding the issue with their vehicle to prove their claim, which may cost more than the amount of money they are seeking to recover.

The LIV suggests that a 'lemon' laws provision could reverse the onus of proof in certain circumstances. For example, where the respondent is a professional car dealership and the claim is for a relatively small amount of money, the onus could be on the dealership to prove that a vehicle is not defective.

5. Definition of 'financial service'

The Issues Paper asks whether the current approach of defining a 'financial service' in the ASIC Act creates unnecessary complexity in determining if certain conduct falls within the scope of the ACL or the ASIC Act.

Committee members of the LIV consider that defining 'financial services' in the ASIC Act and exempting 'financial services' and 'financial products' from the scope of the ACL (and therefore splitting consumer protection laws between the two) does create unnecessary complexity.

The LIV considers that it would be beneficial to remove this exemption to the ACL's scope and allow the ACCC to have jurisdiction in respect of consumer law matters regardless of the types of goods and services provided (i.e. including financial services and financial products).

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[1] Australian Government, Charitable Fundraising Regulation Reform Discussion Paper 2012, page 11
[2] Australian Government, Charitable Fundraising Regulation Reform Discussion Paper 2012, page 12

6. Definition of 'unconscionable'

Particular committee members hold the view that the definition of 'unconscionable' in the ACL ought not be further clarified. The LIV believes that having a broad definition of 'unconscionable' is more practicable as it provides greater discretion for the decision maker. The LIV further believes that the meaning of 'unconscionable' in the ACL can be adequately clarified with reference to case law. Any uncertainties around the meaning of 'unconscionable' would be best resolved through generating guidelines based on existing case law rather than implementing statutory changes.

7. Inconsistent proportionate liability provisions

The LIV believes that the interaction between the proportionate liability provisions under the ACL and the *Wrongs Act 1958* (Vic) (*Wrongs Act*) is confusing. It is unclear how the provisions under the two pieces of legislation intersect and which would take priority over the other.

The *Wrongs Act* allows defendants to plead proportionate liability. Proportionate liability operates to apportion liability for an 'apportionable claim' between 'concurrent wrongdoers'. 'Apportionable claims' are defined in the *Wrongs Act* to be either claims for economic loss or damage to property in an action for damages (in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care, or a claim for damages for a contravention of the misleading or deceptive conduct provisions in section 18 of the ACL.[3] A 'concurrent wrongdoer', in relation to a claim, is a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.[4] The liability of a defendant who is a concurrent wrongdoer in relation to a claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just, having regard to the extent of the defendant's responsibility for the loss or damage.[5]

One issue with the *Wrongs Act* is the extent to which it applies to causes of action arising under the consumer guarantees in the ACL. The *Wrongs Act* extends to actions arising from a failure to take reasonable care but it is unclear whether this covers only those causes of action arising from the consumer guarantees that require due care and skill to be taken (eg section 60 of the ACL). That is, it is unclear whether such a cause of action would extend to breaches of other consumer guarantees which may not specifically mention "due care and skill" but which may be breached because of factual circumstances that amount to a failure to take reasonable care. For example, the guarantee as to supply by description in section 56 of the ACL does not mention "due care and skill", but one can envisage how the guarantee may be breached by facts that amount to a failure to take reasonable care. Suppose that a gardening supply business supplies loam based on a description to the consumer of "good quality loam", but then supplies loam which is riddled with nails due to the failure of the business to adequately screen its product. Section 56

[3]See s 24AF(1) of the *Wrongs Act* (Vic)
[4]See s 24AH(1) of the *Wrongs Act* (Vic)
[5]See s 24AH(1) of the *Wrongs Act* (Vic)

would appear to have been breached and the breach appears to be due to facts which amount to a failure to take reasonable care by the gardening business.

Since the *Wrongs Act* proportionate liability clauses are broader than the ones under the ACL, they could potentially apply in circumstances where the ACL provisions would not apply. The LIV believes that the interaction between the two Acts should be clarified in the context of the ACL Review.

8. Product's useful life

Suppliers and manufacturers will often provide an express "warranty against defects" for a specific period of time.[6] The price the consumer pays for the good will cover the cost of repairs for the specified period. Warranty periods are usually much shorter than the ordinary life of the product.

Consumers also enjoy statutory protection for defective goods. Section 54(1) of the ACL provides a guarantee of 'acceptable quality'.[7] The definition of acceptable quality is subject to a reasonable consumer test. It is already possible that the reasonable consumer would not consider goods to be of 'acceptable quality' unless they lasted for their ordinary useful life, however currently any views of what would be considered an 'ordinary useful life' are subjective and would rely on the consumer's (potentially relatively uninformed) view about what the 'ordinary useful life' of a product would be.

A third form of protection is an 'extended warranty' which retailers will sell to consumers for extra cost. However, these extended warranties arguably cover the period of time during which the consumer enjoys protection under section 54(1) of the ACL. Section 29(1)(n) of the ACL prohibits making a false or misleading representation concerning a requirement to pay for a contractual right that is wholly or partly equivalent to a consumer guarantee.[8]If an extended warranty covers the period of time covered by section 54(1), a supplier of an extended warranty would appear to be contravening section 29(1)(n).

The LIV believes that the ACL Review is an opportune time to consider whether suppliers should have to specify what the 'ordinary useful life' of a good is so as to ensure that extended warranties do not overlap with statutory protections under section 54(1) of the ACL. Specifying ordinary useful life would mean that suppliers are in less danger of contravening section 29(1)(n), and consumers are less likely to purchase unnecessary warranties that cover periods of time where they already enjoy statutory protection.

Suppliers are in the best position to set out the "ordinary useful life" of their own product and it can provide greater certainty and confidence for consumers when purchasing goods. For example, if a customer has the option to purchase a toaster for $200 with an ordinary useful life of 1 year or a $15 toaster with an ordinary useful life of 1 year they can make a commercial decision. Whilst consumers currently have this choice with manufacturer stated

[6]See s 102(3) of the ACL for a definition of 'warranty against defects'.
[7]See s 54 ACL
[8]See s 29(1)(n) ACL

warranties, the ACL actually broadens the consumers rights by peeling away the 'voluntary warranty' and imposing obligations on the manufacturer beyond the warranty period.

For example, under the ACL a person who purchases a $200 toaster might have rights that the toaster operate for a period of say 3 years notwithstanding the voluntary warranty is only 1 year. However, if a manufacturer disagrees with a customer's position on the "ordinary useful life" of a product, it is potentially cost prohibitive for the customer to take the matter any further. Further, it is not appropriate for Government to set "ordinary useful life" for products as products vary too greatly. Instead, the ACCC should be provided powers to prosecute manufacturers/suppliers who do not include information regarding the "ordinary useful life" with a product.

9. Centralised administration

The ACL is currently administered and enforced jointly by the ACCC and the State and Territory protection agencies, with ASIC being involved in financial services matters. The LIV believes that it would be simpler for consumers if the ACL were administered by a centralised body.

10. Exercise of consumer rights

Consumer rights are most useful to people when they can be easily exercised. The LIV believes that a consumer ombudsman or similar type of conciliation service for small consumer law claims should be set up so that consumers have a clear port of call when they have low cost consumer law claims.

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Submission to the Australian Consumer Law Review Issues Paper

About Not-for-profit Law

About our submission

Part 2:

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The following are the recommendations made in our submission.

Recommendations

Recommendation 1: Amend the definition of "trade and commerce" to clarify whether not-for-profit activities fall within or outside the scope of this definition by including indicia against which activities undertaken by, or on behalf of, a not-for-profit organisation can be assessed.

Recommendation 2: ACL regulators should undertake and support a nationally coordinated and tailored education program focussed on the application of the ACL to the activities undertaken by, or on behalf of, not-for-profit organisations. Funding for the extra resources required for this education program can come, at least in part, from pecuniary penalties issued for any breaches of the ACL in relation to not-for-profit activities.

Recommendation 3: ACL regulators should issue a joint interpretation statement about the application of the ACL to activities undertaken by, or on behalf of, not-for-profit groups. In light of this statement, the ACL regulators should consult with the not-for-profit sector and the public on their proposed regulatory approach to the enforcement of the ACL, and then publish their agreed, nationally consistent approach in a timely manner.

Recommendation 4: Explicitly apply sections 18, 20 and 50 to fundraising activities by adding a reference to "fundraising activities" to these sections.

Recommendation 5: Add a definition of "fundraising activities" to the ACL, for example:

> *"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.*

Part 1. Unacceptable uncertainty – to what extent does the ACL regulate activities of not-for-profits?

Terminology – not-for-profit, charity

Please note: in this submission we refer to 'not-for-profit organisations' and 'not-for-profits'. The primary distinguishing feature of a not-for-profit organisation (compared with a 'for profit' business) is that any profits made by the organisation must be used for its mission (purposes) and cannot be distributed to its members (known as the non-distribution constraint). Although not well understood by the general public, only about 10% of not-for-profits meet the legal definition of a 'charity'. That is, all charities must be not-for-profits, but not all not-for-profits are charities – this is why we have used the broader term of 'not-for-profit' in this submission

1.1. Context – the not-for-profit sector

For not-for-profits operating in Australia, working out whether or not the ACL applies to regulate their conduct causes unacceptable confusion and concern. We are not aware of any government

guidance tailored to the not-for-profit sector about the types of conduct that are, and are not, regulated by the ACL.

Not-for-profits contribute enormously to Australia from economic and social perspectives, yet many laws are framed without consideration of the not-for-profit context. The Issues Paper itself makes little reference to activities except those undertaken for a profit, and consistently uses the language of "business" to describe entities regulated by the ACL when in fact, the ACL applies far more broadly (albeit to an uncertain extent).

Contribution of the not-for-profit sector in Australia

- There are around 57,000 economically significant NFPs in Australia.
- The direct value that NPIs [non-profit institutions] add to the economy is measured in NPI gross value added (GVA). NPI output that is sold in the market is valued by sales, whilst the non-market output is valued at cost. In 2012-13, NPIs accounted for $54,796m or 3.8% of total GVA. This is an increase on the revised 2006-07 NPI contribution to GVA (3.2%).
- Gross domestic product (**GDP**) measures the value of production inclusive of product taxes. NPI GDP in 2012-13 is $57,710m. The revised NPI GDP for 2006-07 is $34,662m.
- NFPs employ over 1 million Australians.
- 3.9 million NPI volunteers contribute an economic value of $17.3b per annum.

Most recent ABS Satellite Account for the not-for-profit sector (2012-13) available at: http://www.abs.gov.au/ausstats/abs@.nsf/mf/5256.0

Not-for-profits provide a huge number of goods and services in Australia. At times, not-for-profits are operating very much like a business. At other times they offer goods and services for free or at a discount in furtherance of their mission, or are engaged to deliver services as a funded government service provider, virtually as an extension of 'the crown'.

Australian society and the organisations operating within it are increasingly complex, with many organisations straddling 'for-profit' (business), not-for-profit, and government realms; traditional demarcations between sectors are increasingly blurred. The failure of business and consumer regulation to address this complexity causes inefficiencies, costs and concerns for those involved in running not-for-profits, especially when they are often volunteers and rarely have funds to spend on specialist consumer law advice to clarify the application of laws to their organisation or its activities.

1.2 Are the activities of not-for-profits in "trade or commerce"?

The ACL uses the criterion that conduct be "in trade and commerce" as a threshold for determining the application of many of its provisions to conduct, and to draw a line between conduct that falls within and outside of the policy objectives of the ACL. Although section 2 of the ACL (definition of trade and commerce) specifically includes "any business or professional activity (whether or not carried on for profit)", we do not believe this reference alone provides sufficient clarification of the meaning of "trade and commerce" for activities commonly undertaken by, or on behalf of, not-for-profit organisations.

Are activities undertaken by or on behalf of not-for-profit organisations, activities within the ACL definition of "trade and commerce"?

Within the extensive case law on the ACL definition of "trade and commerce", there are only a handful of cases that consider whether activities of not-for-profits are in "trade and commerce". These cases highlight the difficulty of making this assessment, for example:

1. *Orion Pet Products Pty Ltd v RSPCA* (Vic) [2002] FCA 860: statements made by an officer of the RSPCA in opposing the sale of electronic dog collars were held not to have been made in trade or commerce.
2. *E v Australian Red Cross Society* [1991] 27 FCA 310: the Australian Red Cross was held not to have engaged in trade or commerce by gratuitously supplying blood to a patient at a hospital.
3. *David & Anor v Roberts, Allen &* Anor [1997] FCA 43: representations made about the possible existence of Noah's Ark at a public lecture promoted through a not-for-profit unincorporated association where a small entry fee was charged were not conduct in trade or commerce:

   > *In my view, the less commercial the character and objectives of an organisation, the greater the degree of system and regularity required for the organisation's activities to be characterised as a "business". This approach, in my view, is consistent with the purposes underlying the Fair Trading Acts, namely to establish standards of conduct applicable to commercial and consumer transactions.... If the net is cast too widely, the legislation will apply to transactions that are not truly commercial in character and confer protection on persons who cannot fairly be described as consumers.* (Sackville J)

There are some activities undertaken by not-for-profit organisations that are clearly within the scope of the ACL, some that are almost certainly outside its scope, but a considerable number that are in a grey area. Where a not-for-profit is engaged in activities such as the sale or exchange of goods and services as part of an enterprise, those activities would fall within the definition of "trade and commerce", unless the price was so subsidised that it negated the commercial nature of the activity. However, activities conducted by not-for-profits that lack a business component or professional nature are unlikely to be within the definition of "trade and commerce". In the following table we have provided examples to illustrate this range.

Are the activities of not-for-profits in "trade or commerce"	
Clearly within the ACL	• a not-for-profit entity engages in the selling of products: e.g. Cancer Councils produce and sell (wholesale and retail) sun protection products such as sunscreens, sunglasses, and protective clothing at commercial rates • a not-for-profit entity delivers services: e.g. Asylum Seeker Resource Centre Cleaning provides commercial and domestic cleaning services at commercial rates in the Melbourne region as a social enterprise • a not-for-profit entity provides childcare services: e.g. a not-for profit childcare centre that operates on a fee-for-service basis
Grey area (note, the issue of whether fundraising is within "trade or commerce" is considered in more	• a not-for-profit entity provides subsidised gardening services to elderly people in a particular region. The not-for-profit is able to subsidise the price of the services as it receives a range of philanthropic and/or government grants. Are the services provided in trade or commerce? • a not-for-profit entity provides free morning meals to people experiencing homelessness in Canberra. Volunteers notice that people who are not

detail at Part 2 of this submission)	experiencing homelessness are increasingly arriving for the free breakfast, so they introduce a gold coin contribution requirement (which they waive when asked). Is the provision of this food in trade or commerce? • a not-for-profit entity charges a very significant yearly membership fee to members. Members get free access to gym facilities, car parks, and a range of discounts at affiliated businesses. Any member of the public can become a member. Is the membership provided in "trade or commerce"? Are the membership benefits provided "goods or services"? • a not-for-profit entity holds a fundraising concert in partnership with a well-known band that is donating its performance to the not-for-profit. The tickets sell out, but there is a storm the day before the concert and the concert cannot be held. Is the supply of the ticket to the concert in trade or commerce? Would consumer guarantees apply so that a refund should be offered? • a not-for-profit entity fundraises through a commercial third party provider. Is the conduct of the third party fundraiser on behalf of the charity in trade or commerce? What if the same fundraising campaign was undertaken by volunteers rather than professionals? If the volunteers engage in misleading and deceptive conduct, is this in contravention of section 18 of the ACL? • a not-for-profit entity manufactures lapel pins in China, and sells these to raise funds for delivering community programs. Many pins are faulty. Are pin purchasers entitled to a refund or replacement of their pin?
Probably outside the ACL	• an unincorporated not-for-profit group with environmental purposes cleans up beaches by picking up rubbish. Local councils have staff to do this work but they are under-resourced. The council knows that the group undertakes these activities, but has no formal arrangement in place. • a not-for-profit entity with purposes focused on providing social interaction for elderly people, offers to provide people over 65 years a companion to visit attractions such as the Botanical Gardens. • a not-for-profit entity uses volunteers to provide free house cleaning for people who are undergoing treatment for cancer.

In our view, many of the activities carried out by the estimated 600,000 not-for-profits in Australia fall into an unacceptable grey area (as illustrated by the examples above), where making an assessment about whether such activities satisfy the definition of being in trade and commerce, and therefore understanding whether or not the ACL applies to regulate that conduct, is extremely difficult for both consumers and not-for-profits.

1.3 'Consumer' in the not-for-profit context

Every Australian interacts regularly with not-for-profits and their activities, whether purchasing their products and services, as beneficiaries of support, by swimming at a patrolled beach or walking through a nature reserve. Millions of Australians are consumers of products and services provided by not-for-profits where that conduct is clearly regulated by the ACL. Virtually every Australian will also experience the conduct of not-for-profits through their fundraising activities – television appeals, social media advertisements, raffles, door knocking, phone appeals or street collections – some of which is covered by the ACL (discussed further at Part 2 of this submission). Many Australians will

also interact with not-for-profits in the grey areas described above, where the application of the ACL to the activities of the not-for-profit or the goods and services being provided is unclear.

This state of uncertainty is detrimental to consumers who are the intended beneficiaries of the ACL. It is unreasonable and totally impractical that, in order to understand whether consumer protections apply to the conduct of a not-for-profit, a consumer must investigate and understand whether the organisation they are interacting with is doing so in a way that attracts the operation of the ACL: surely a consumer cannot be expected to understand whether goods or services are being provided to them at such a discount that the provision could not be said to be in "trade or commerce", or the goods or services are being supplied to them by a volunteer rather than a professional so that they are not being provided in "trade or commerce", or whether the relationship between a member and a not-for-profit could be said to be in "trade or commerce"?

1.4 Recommendations – removing current uncertainty about application of ACL to not-for-profits

Recommendation 1:

Amend the definition of "trade and commerce" to clarify whether not-for-profit activities fall within or outside the scope of this definition by including indicia against which activities undertaken by, or on behalf of, a not-for-profit organisation can be assessed.

The definition of "trade and commerce" must be clarified so that not-for-profit organisations, consumers and regulators can understand when and how the ACL regulates activities of not-for-profits, including activities undertaken to raise funds on their behalf.

To achieve this clarification, we recommend that further indicia be added to the definition of "in trade or commerce". In particular, guidance is required about:

- gratuitous or heavily subsidised supply of goods or services, or inflated priced good as part of fundraising
- activities carried on by not-for-profits that are fully government funded
- services or benefits available to members of not-for-profits
- non-commercial activities carried on by volunteers or semi-professionals at not-for-profits
- advocacy by not-for-profits.

Recommendation 2:

ACL regulators should undertake and support a nationally coordinated and tailored education program focussed on the application of the ACL to the activities undertaken by, or on behalf of, not-for-profit organisations. Funding for the extra resources required for this education program can come, at least in part, from pecuniary penalties issued for any breaches of the ACL in relation to not-for-profit activities.

We urge a coordinated approach from ACL regulators in the conduct of education programs to help both not-for-profits and consumers to understand where the ACL regulates activities of not-for-profits, and where it does not. Support should also be provided to appropriate sector intermediaries

to deliver independent education programs about the application of the ACL to not-for-profits, as they are often better placed to tailor the message and reach particular segments of the not-for-profit sector.

Recommendation 3:

ACL regulators should issue a joint interpretation statement about the application of the ACL to activities undertaken by, or on behalf of, not-for-profit groups. In light of this statement, the ACL regulators should consult with the not-for-profit sector and the public on their proposed regulatory approach to the enforcement of the ACL, and then publish their agreed, nationally consistent approach in a timely manner.

Following clarification of the application of the ACL to not-for-profits, it is our view that there needs to be a transition period for the not-for-profit sector in which the primary focus is education, with enforcement for only the most blatant, deliberate and serious of breaches. In respect of our Recommendation 3, we commend the regulatory approach adopted by the Australian Charities and Not-for-profits Commission as a useful starting for developing a regulatory approach for the not-for-profit sector.

Part 2. Reforms to ensure explicit application of the ACL to fundraising activities

2.1. The critical need for fundraising reform

> *Fundraising legislation differs significantly between jurisdictions, adding to costs incurred by the NFP sector. Harmonisation of fundraising legislation through the adoption of a model act should be an early priority for governments.*
>
> Australian Productivity Commission Contribution of the Not-for-profit Sector 2010 p xxiv

Not-for-profit Law (and many other sector bodies that we work with) considers fundraising regulatory reform should be a critical law reform priority for state, territory and federal governments, and that the ACL is the platform to facilitate that reform.

Appropriate and efficient regulation of fundraising is essential underpinning for the Australian not-for-profit sector. The current, fragmented regulatory landscape is ineffective at regulating fundraising, and compliance with it is burdensome in the extreme. This is a well identified area of red tape that acts as a barrier to not-for-profits getting their important work done (see Appendix 1 for some of the relevant inquiries that have identified this issue and recommended reform). Fundraising regulation is in a very similar state to that of consumer law prior to the reforms that led to the creation of the ACL.

2.2 Why the ACL is suitable as a platform for reform of fundraising regulation

Not-for-profit Law submits that there are many reasons why the ACL is an appropriate vehicle for fundraising regulation:

a. The ACL represents a modern, principles-based approach to regulation of people and organisations.

b. The policy objectives of the ACL are congruent with the policy objectives of fundraising regulation, including the prevention of practices that are unfair or contrary to good faith; that are unconscionable or deceptive; to help people make informed decisions and protect them when have been treated unfairly, and to penalise those have acted unfairly. [1] Fundraising laws are also primarily concerned with fairness. For example, when introducing the then Fundraising Appeals Bill in Victorian Parliament in 1984, the then Premier John Cain said its main purpose was to provide protection to the public and respectable fundraising organisations against fraud and malpractice in fundraising appeals.[2]

c. The ACL works through a cooperative regulatory framework applied uniformly in all jurisdictions of Australia. Through jurisdictional cooperation, the ACL can, in its current form, apply to any person (natural or corporate) in Australia. This means an application of provisions of the ACL to fundraising will encounter no jurisdictional or constitutional barriers.

d. The ACL is a well-understood piece of law, and an extension of the ACL to explicitly cover fundraising would be easy to explain to fundraisers and donors, and likely to impact upon fundraiser behaviour and public trust and confidence in a short time frame.

e. The minor amendments to the ACL proposed in this submission would be cost effective to implement.

f. The ACL contemplates the development of voluntary industry codes, which would be appropriate and helpful in the fundraising context, and could be developed by existing fundraising self-regulatory bodies.[3]

g. The reasons for changing to the one national consumer law from a fragmented approach, as stated by the Hon Joe Ludwig, Special Minister for the State and Cabinet Secretary on the Second Reading Speech on the ACL, apply equally to the fundraising context:

> *"While these laws may work well for many purposes, each of them differs—to the cost of consumers and business. Australian consumers deserve laws which make their rights clear and consistent, and which protect them equally wherever they are. At the same time, Australian businesses deserve simple, national consumer laws that make compliance easier. A single national consumer law is the best means of achieving these results."*[4]

h. The regulators with oversight of consumer law are the same regulators concerned with fundraising laws, and therefore the institutions involved in regulating fundraising activity could largely remain unchanged if regulation of fundraising derived from the ACL alone, ensuring existing experience regulating not-for-profits can be retained.

i. The current regulatory approach of the ACCC and state-based regulators of the ACL is a risk-based, proportionate approach that we consider is appropriate for the regulation of fundraising.

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[1] Australian Government, The Treasury, *The Australian Consumer Law: A framework overview* (January 2013); Productivity Commission*, Review of Australia's Consumer Policy Framework*, Report, No. 45, 30 April 2008; Standing Committee of Officials of Consumer Affairs, *An Australian Consumer Law Fair markets — Confident consumers*, 17 February 2009

[2] Victoria, Parliamentary Debates, Legislative Assembly, 3 September 1998, Mr Robert Hulls, p 170

[3] Note ACCC guidance on voluntary industry codes at https://www.accc.gov.au/business/industry-codes/voluntary-codes

[4] Commonwealth, Parliamentary Debates, Senate, 24 June 2010, the Hon Senator Joe Ludwig, p 4283

2.3. The current application of the ACL to fundraising activities is unclear

Fundraising is a specific example of the difficulties described in Part 1 of this submission regarding uncertainty about applying the ACL to activities carried on by not-for-profits. While we submit that the ACL regulates much fundraising, the following table highlights some of the varying opinions, including from within government about the existing application of the ACL to fundraising. This may be why, as far as we are aware, the ACL is rarely enforced against fundraisers even where there is evidence of misconduct.

Does the ACL regulate fundraising? Examples of the differing interpretations.	
Australian Productivity Commission Research Report - Contribution of the Not-for-Profit Sector (2010), p 136	"At the Commonwealth level, fundraising is mainly regulated under three areas of legislation: • the Corporations Act 2001, with regards to companies seeking loans from the public • the Australian Securities and Investments Commission Act 2001, where ASIC may require NFPs subject to its regulatory oversight to provide it with fundraising disclosure documents, such as prospectuses or offer information statements • the Trade Practice Act 1974 [forerunner to the ACL], insofar as it deals with misleading or deceptive information related to fundraising activities."
Department of the Treasury, Australian Government – Discussion Paper (2012)	The discussion paper authored by the Commonwealth Department of Treasury, *Charitable fundraising regulation reform: Discussion paper and draft regulation impact statement*, (February 2012)[5] (the Discussion Paper) contemplated the application of the ACL to charitable fundraising. The discussion paper stated that the application was not automatic as the provisions applied (paragraphs 35-39) only if: • there is a supply or acquisition of goods or services; • the supply or acquisition occurs in the course of trade or commerce; and • the goods or services were supplied to, or acquired by, a consumer.
New South Wales Government submission to the Discussion Paper (2012)	"NSW notes that the outline of the application of the Australian Consumer Law (ACL) to charitable fundraising in paragraphs 35 and 36 [of the Discussion Paper] is inaccurate. The prohibitions on misleading and deceptive conduct, unconscionable conduct, false or misleading representations and harassment or coercion already apply to an organisation, including a charitable fundraiser, if there is a supply of goods and services in the course of trade or commerce. The supply can be to any person, not just a consumer".[6]
Fundraising Institute of Australia submission to the Discussion Paper (2012)	In its response to the question as to whether certain provisions of the ACL apply to fundraising activities, the Institute said "No. Charities, because they are not engaged in commercial activities does not fall within the jurisdiction of the Australian Consumer Law".

[5]Available at: https://sydney.edu.au/documents/about/higher_education/2012/20120405_Charitable_fundraising_discussion_paper.pdf

[6] New South Wales Government comments on the Australian Government's *Charitable fundraising regulation reform discussion paper and draft regulation impact statement*, paragraph 3.1, page 4, available at http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2012/Charitable%20Fundraising%20Regulation%20Reform/Submissions/PDF/NSWGovernment.ashx

Various not-for profit organisations in submissions to the Discussion Paper (2012)	We note of the 92 public submissions to the Discussion Paper, two submissions stated ACL already applied to some activities; two said it clearly did not; another 36 said it should apply; and 17 thought other options were appropriate (largely self-regulation or existing laws), with the remaining not offering specific comment.
Norman O'Bryan AM SC Barrister, Melbourne Chambers. Experienced in ACL Pro bono advice provided to Justice Connect's Not-for-profit Law (May, 2016)	"The ACL applies to most ordinary not-for-profit fundraising activities. Because the definition of "business" in section 2 of the ACL includes "a business not carried on for profit" and the definition of "trade or commerce" includes "any business or professional activity (whether or not carried on for profit)", the ACL will necessarily apply to much (if not all) charitable and NFP fundraising. For example, section 18(1) of the ACL states: "A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". It plainly applies to NFPs when they are raising money. Fundraising is usually a business or professional activity, whether or not the NFP is itself (in an overall sense) operating as a business or professional activity. It is the fundraising, not the NFP that is the focus (in the application of the ACL)."

2.4 A plan for reform

Not-for-profit Law is working with a range of peak bodies including the Governance Institute of Australia, Australian Institute of Company Directors, Chartered Accountants of Australia & New Zealand and CPA Australia on the need for fundraising reform. We all share the view that small changes to the ACL accompanied by repeal of state-based fundraising laws can achieve substantive fundraising law reform for the benefit of Australians and the not-for-profit sector.

Not-for-profit Law obtained pro bono advice from Norman O'Bryan AM SC to the effect that the application of ACL provisions to fundraising activities hinges on whether the fundraising activities can be considered to be "in trade or commerce" and, for some provisions, whether the fundraising activities also involve a supply of goods or services. Based on this expert legal advice, Not-for-profit Law submits that the ACL applies to many fundraising activities as currently drafted. However, in line with our submissions in Part 1, the application of the ACL to fundraising activities, as with many other activities of not-for-profits, is misunderstood – people often do not understand the extent of its application, or how it can be used to achieve redress for fundraising misbehaviour.

If the application of the ACL to the particular type of fundraising activity depends on various technicalities (for example, the degree to which the fundraising is carried out professionally), there will be continued confusion and slow uptake of its protections and remedies.

Not-for-profit Law and the organisations listed above submit that fundraising reform could be achieved through three simple steps:

1. **minor amendments to the ACL to ensure application of certain provisions to a broad conception of fundraising activities is clear**
2. **repeal of state and territory-based fundraising laws, and**
3. **work with other regulators (for example, the Australian Charities and Not-for-profits Commission, state and territory-based regulators and self-regulatory bodies such as the Fundraising Institute of Australia and the Australian Council for International Development) to improve fundraiser conduct (for example, door-knocking, telemarketing,**

excessive spending of funds on third party services).

We stress that undertaking step 1 without also undertaking step 2 contemporaneously would amount to a failure of reform, and would mean that fundraisers need to continue complying with existing fragmented and duplicative regulation along with the amended ACL.

2.5. Recommendations – explicit application of the ACL to fundraising activities

Recommendation 4: Explicitly apply sections 18, 20 and 50 to fundraising activities by adding a reference to "fundraising activities" to these sections.

By way of example, section 18 could be amended as follows:

"18 Misleading or deceptive conduct

1. A person must not, in trade or commerce or **in relation to fundraising activities**, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
2. Nothing in Part 3-1 [unfair practices] limits by implication subsection (1)."

And section 50 could be amended as follows:

"50 Harassment and coercion

1. A person must not use physical force, or undue harassment or coercion, in connection with:

   (a) the supply or possible supply of goods or services; or …[paragraphs b,c,d]

   (e) fundraising activities."

An application of sections 18, 20 and 50 to fundraising activities would make available a broad range of remedies and enforcement actions where fundraisers contravene the requirements of these sections. Although these sections likely apply to regulate many fundraising activities already, our recommendation would make that application explicit, and broaden the application to *all* fundraising, compared to its current application to fundraising that is in trade or commerce. Importantly, by focussing on explicitly extending a small selection of principles-based provisions to fundraising activities, our recommended approach avoids issues that could arise through extending all provisions of the ACL to fundraising, or extending provisions drafted in contemplation of a contract between a consumer and a supplier or manufacturer (fundraising of its very nature does not involve a contract or bargain).

Example of conduct not currently covered by the ACL that would be covered if our recommendations are adopted

Crowdfunding is increasingly used to fundraise for people and causes, often with an element of spontaneity. For example, if a particular need arises, such as a person needing expensive medical treatment or a community hoping to raise funds urgently for equipment, a crowd funding campaign may be set up in a few minutes, shared through social networks, and completed in days. Often such campaigns raise funds from around Australia. In some jurisdictions, for example Victoria, this crowdfunding would satisfy the definition of fundraising and a licence could be required. It is unlikely

that this type of community-based crowdfunding would be considered to be in "trade or commerce" and therefore would not be regulated by the ACL currently.

Under our proposal, a crowdfunding campaign of this nature would no longer need to be concerned with applying for licenses in multiple jurisdictions of Australia and instead would simply need to meet the principles set out in sections 18, 20 and 50 (that is, the fundraising cannot involve misleading or deceptive conduct, cannot be unconscionable, and must not involve harassment or coercion).

Recommendation 5: Add a definition of "fundraising activities" to the ACL, for example:

> *"Fundraising activity" includes any activity the purpose or effect of which is to solicit a 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*.

There are benefits and downsides to defining "fundraising activity" in the ACL. As experience shows, attempts to define fundraising over the years have been fraught; fundraising practices evolve quickly, adapting to changing environments, practices and social needs. Although Not-for-profit Law accepts there is merit in leaving the concept of "fundraising law" undefined, on balance we believe that it should be defined to provide greater certainty to fundraisers. Therefore, we recommend that a broad definition of fundraising activity be added to the ACL, and we note that there is an inbuilt process for ongoing updates to the definition via the ACL review process.

We support further consultation and engagement of technical experts to refine the best approach for achieving the clear application of the ACL to fundraising activities.

In conclusion

The current review of the ACL is an opportunity to both improve the ACL for the not-for-profit sector, and to use its unique cross-jurisdictional framework to break through decades of failed attempts to harmonise and reform the regulation of fundraising in Australia.

We welcome any opportunity to discuss this submission.

Yours sincerely

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APPENDIX 1: – Regulatory reform inquiries relevant to fundraising

For submissions made by Justice Connect (formerly PILCH) to these inquiries, please go to our Fundraising Policy Page www.justiceconnect.org.au/fundraisingreform

Australian Government, *Rethink, better tax, better Australia, white paper* (2015)

Australian Government, *Charitable fundraising regulation reform Discussion paper and draft regulation impact statement* (February 2012)

Australian Government's report *Strength, Innovation and Growth: The Future of Australia's Not-for-Profit Sector* (July 2012)

Productivity Commission, *Contribution of the Not-for-Profit Sector* (2010)

Australian Government, *Australia's Future Tax System* (2010)

Senate Economics Legislation Committee, *Inquiry into Tax Laws Amendment (Public Benefit Test) Bill* (2010)

Senate Standing Committee on Economics, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001)

Senate Standing Committee on Economics, *Inquiry into the Disclosure Regime for Charities and Not for-Profit Organisations* (2008)

Senate Standing Committee on Economics, *Investing for good: the development of the capital market for the not-for-profit sector in Australia* (2012)