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Australian Consumer Law Review
Consumer Affairs Australia and New Zealand

Submitted electronically via https://aclfeedback.treasury.gov.au/

Submission to Interim Report for the Australian Consumer Law Review

Not-for-profit Law is pleased to provide a response to the Interim Report for the Australian Consumer Law Review (the **Interim Report**).

About Not-for-profit Law

Not-for-profit Law is a program of Justice Connect, providing free and low cost legal assistance to not-for-profit community organisations. Justice Connect is a registered charity and an accredited community legal centre.

Not-for-profit Law 'helps the helpers' by providing practical legal information, advice and training to not-for-profit community organisations. By helping those involved in running not-for-profits to navigate the full range of legal issues that arise during the lifecycle of their organisation, we save their time and resources. This allows them to focus on achieving their mission, whether that is helping vulnerable people, environmental conservation, or working towards social cohesion.

Not-for-profit Law advocates for an improved legal and regulatory framework for the not-for-profit sector and for law reform that takes into account the impacts of regulation on not-for-profits. Effective and appropriate regulation of not-for-profits supports efficient and well run not-for-profits and a thriving sector that benefits all Australians.

About our submission

Our submission responds to 'Further questions' 1, 2 and 3 in the Interim Report.

We are working with leading peak and sector bodies on the urgent need for fundraising reform. To this end, Justice Connect is a lead campaign partner of the *Joint Statement on fundraising reform* available at www.justiceconnect.org.au/fundraisingreform (#fixfundraising).

Part A (Further Questions 1, 3)

- We agree with the proposal for regulator guidance that clearly sets out how the Australian Consumer Law (**ACL**) currently applies to the activities of charities and other not-for-profits (in this submission, collectively, **NFPs**) including fundraising activities, and we make recommendations on how this could be achieved (pages 5-9).

- We explain how inconsistencies and out-of-date fundraising laws create regulatory gaps and we recommend minor amendments to the ACL to explicitly apply a limited number of provisions to fundraising activities (pages 9-10), as an important step in clarifying the application of the ACL to fundraising activities.

Part B (Further Question 2)

- We explain how an extended ACL could facilitate reforms of state and territory fundraising regulation, especially if supported by ACL regulator guidance and a single voluntary code applicable to all fundraisers and all types of fundraising (pages 12-20).

Below is an Executive Summary followed by our detailed responses under Part A and B as described above.

Terminology

ACCC

Australian Competition and Consumer Commission

ACL

Australian Consumer Law as enacted by the state and Commonwealth Acts

ACNC

Australian Charities and Not-for-profits Commission

CAANZ

Consumer Affairs Australia and New Zealand

NFP, NFPs

For convenience, we have used the terms 'not-for-profit' and 'NFPs' to cover both charities and other types of not-for-profit groups and organisations (whether incorporated or not). It is important to note that there are an estimated 600 000 not-for-profit organisations operating in Australia. Only a much smaller sub-set of this group (about 10 per cent) satisfy the legal definition of 'charity' and are registered with the Australian Charities and Not-for-profits Commission (ACNC).

Executive summary

We submit that the current application of the Australian Consumer Law (**ACL**) to the activities of charities and other not-for-profits (collectively, **NFP**s), including fundraising activities, is unclear. There is a widespread misconception in the NFP sector (and among some professional advisers) that the ACL does not apply to fundraising. The minor legislative amendments we recommend to the ACL would resolve this and support the repeal of the state and territory-based fundraising regimes.

Reports show that charitable giving in Australia amounts to A$8,614 million per annum (8% of total NFP sector income and 0.57% of gross domestic product)[1] within a framework that is outdated and inconsistent, and does not correspond to new fundraising methods. NFPs have to waste significant amounts of time and money (more than $15.08 million for charities alone) to meet outdated and fragmented fundraising laws across Australia. The regime is so complicated that it results in both accidental and deliberate non-compliance, with minimal resources directed to its enforcement. It creates risk for donors: they may not have a right of action, or remedy, where mischief occurs. That right of action is confirmed under the ACL.

Clarification of the current application of the ACL plus minor extensions of the ACL's current application to NFP fundraising would help drive reform in the states (and the Australian Capital Territory), and deliver a far better regulatory system that would appropriately apply to any fundraising activity anywhere in Australia. The extension of the ACL should be supported by a single, voluntary code of conduct (developed by the sector in consultation with ACL regulators) that is applicable to all fundraisers and all types of fundraising activities (providing the mechanism to maintain some of the detailed matters concerning conduct prescribed in the various current state-based laws). The ACL is better regulation, not more regulation. It offers a practical solution, balancing risk with the need for a regulatory framework that supports ethical behaviour and donor protection, whilst providing the NFP sector a means to efficiently and effectively fundraise in efforts to achieve their mission – for the benefit of all Australians.

This approach is supported by the Australian Institute of Directors, the Governance Institute of Australia, the Australian Council of Social Services, Chartered Accountants Australia and New Zealand, the Community Council of Australia, CPA Australia and Philanthropy Australia. It is also supported by an increasing number of NFPs, their professional advisers and other bodies: as at 9 December 2016, more than 170 organisations and individuals representing more than 570 charities, more than 85 legal centres and more than 3,750,000 individuals across Australia.[2]

Individuals and organisations that have specifically endorsed this submission: Community Legal Centres Queensland; Nicholsons Solicitors, Nick Miller, Principal, Hunt and Hunt Lawyers; Michael Eastgate, Hon Director and Treasurer, EPIC Assist; CBM Australia; Ninti One; Add-Ministry Inc; Noel Harding; The Peshawar School for Peace Inc and Tim Parkes.

[1] Australian Bureau of Statistics, 'Australian National Accounts: Non-Profit Institutions Satellite Account, 2012–13' (Catalogue No 5256.0, 28 August 2015) table 7.1 <http://www.abs.gov.au/AusStats/ABS@.nsf/MF/5256.0>. Gifts comprised donations by individuals (46.4%), business (10.0%), foundations (5.5%), sponsorships (16.0%) and other fundraising (22.1%).

[2] See www.nfplaw.org.au/fundraisingstories

Part A – Interim Report Further Question 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?

We agree with the view expressed in the Interim Report that the ACL applies to many activities undertaken by charities and NFPs and a range of fundraising activities. Given this confirmation, we support the development of regulator guidance on the ACL's application to the activities of NFPs and fundraisers to raise consumer awareness and provide greater clarity to the sector. However, there is currently considerable confusion within the sector and among their professional advisers as to whether the ACL applies to fundraising. We believe providing regulator guidance alone is not sufficient to provide clarity to the NFP sector as to the application of the ACL. We strongly recommend that amendment to the ACL is made in order to provide unequivocal clarification.

We provide two options (pages 5-6) for how the law could be amended, and note our preference is for Option 1:

- **Option 1**: expand the definition of 'trade or commerce' and provide regulator guidance – this would address issues such as crowdfunding and peer-to-peer arrangements, which are evolving rapidly and growing in popularity, or
- **Option 2**: add a Legislative Note to clarify the definition of 'trade or commerce' and make it clearer that the ACL does apply to NFP activities, including fundraising, and provide regulator guidance.

We say the accompanying Explanatory Memoranda should set out examples of fundraising activities that are clearly within the definition of trade or commerce, and those that are not, and where the balance of indicia would be determinative (and why this should not be left to judicial guidance).

We explain (page 7) why the example in the ACL Interim Report relating to whether volunteer fundraising is in trade or commerce is incorrect as it stands.

In response to the question on what regulator guidance should include, we discuss (pages 7-8) an overview of what it should include and provide examples of how guidance can be tailored to the sector. We recommend this be implemented in collaboration with the sector.

Part A – Interim Report Further Question 3

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

We explain (pages 9-10) why clarification and extension of the ACL is essential to support the drive for reform within states and the Australian Capital Territory.

We recommend extension of the ACL by:

- **explicitly applying sections 18, 20 and 50 to fundraising activities by adding a reference to "fundraising activities" to these sections**
- **applying sub-paragraphs 29(1) (e), (f), (g) and (h) to fundraising by creating a new section 29A "False or misleading representations during a fundraising activity", and**

- **supporting the above reforms with a definition of "fundraising activity".**

To further support the drive for reform at the state and territory level, we recommend (page 19) the development of a single, voluntary code applicable to all fundraisers and all fundraising activities.

In our view, implementation of these recommendations (in consultation with the sector) is the best way to support the repeal of existing fragmented, outdated, complex fundraising laws that are not fit for purpose.

Part B – Interim Report Further Question 2

Are there currently any regulatory gaps with regard to the conduct of fundraising?

We say the assumption in the Interim Report that clarification or any extension of the ACL should only occur in response to regulatory gaps is both prejudicial to the interests of reform and does not correctly conceptualise the current problems.

We explain (pages 12-15) the problems which give rise to regulatory gaps:

- inconsistencies across jurisdictions including differing definitions, numerous exemptions, and coverage of different forms of fundraising combined with the constraints of state and territory boundaries
- duplication between fundraising laws in the jurisdictions, between fundraising laws and the ACL and other general laws, between mandatory and voluntary Codes of Conduct
- failure of the laws to deal with current forms of fundraising, including crowdfunding
- lack of compliance (accidental or even deliberate non-compliance) because of the complex, burdensome and inconsistent laws, noting that non-compliance generally relates to procedural matters rather than misconduct)
- lack of enforcement (so that a regulatory system, while in place, is not otherwise monitored), and
- lack of evidence of mischief.

Are generic ACL provisions sufficient to address detriment?

We say (page 15) that reforms making certain generic provisions of the ACL explicitly applicable to all fundraising (as we have recommended) would provide the level of regulatory detail necessary to address the areas of detriment caused by fundraising misconduct. Clarification and broadening of the ACL in line with our recommendations would provide a modern, nationally consistent law for fundraising combined with local government laws and a single, voluntary code of conduct.

We address in more detail some issues raised in consultation on the Interim Report (pages 16-19), including the application of the ACL to serious and minor misconduct, how the process of changing the ACL provides for better ways of responding to new and changing forms of fundraising, how the ACL brings additional remedies for those who may have been subject of unethical or unfair fundraising practices, and the cost neutral position of using the ACL as the mechanism for a national consistent fundraising law. In our view (page 19) using our recommendations would not give rise to any unintended consequences.

We conclude by saying (pages 20-21) that whilst the purpose of state-based fundraising regulatory regimes is to enable and facilitate proper and lawful fundraising activity and to provide reasonable protections to donors, it is also intended to defend against unfair practices. Over time, these regulations have lost their relevance and have been rarely enforced.

Existing fundraising regulation is *hindering* fundraising.

The ACL provides a better regulatory framework for fundraising. An improved regime will deliver benefits for all Australians.

Our Recommendations

Recommendation 1: Make the application of the ACL to NFPs clear by:

a. Amendment to the ACL, preferably to the definition of 'trade or commerce', but if not, through a legislative note, and
b. Accompanying Explanatory Memorandum, and regulator statement and educative material.

Recommendation 2: Regulators should work with the sector to improve understanding of the ACL, fundraiser conduct and donor protection, primarily through education and guidance and in collaboration with peak and sector-based intermediary bodies.

Recommendation 3: Make minor changes to the ACL by:

a. Explicitly applying sections 18, 20, and 50 to fundraising activities by adding a reference to "fundraising activity" to these sections

b. Applying sub-paragraphs 29(1) (e), (f), (g) and (h) to fundraising by creating a new section 29A "False or misleading representations during a fundraising activity"

c. Supporting these changes though a definition of "fundraising activities" such as:

"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 payment or receipt of money only as consideration 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.

Recommendation 4: ACL regulators should, in implementing these recommendations, consult with NFPs, peak and sector-based intermediary bodies, consumers of NFP goods and services, donors and with other relevant regulators and experts across Australia.

Recommendation 5: The sector, in consultation with the regulators, professional fundraisers and others work to develop of a single, voluntary code of conduct to apply under the ACL regime to all types of fundraisers and all type of fundraising activities.

OUR RESPONSE IN DETAIL

Part A – Clarification and extension of the ACL

Interim Report Further Question 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?

Clarification – how?

Without doubt, regulator guidance on the ACL's application to the activities of NFPs and fundraisers would help raise consumer and donor awareness and provide greater clarity to the sector and the public. Therefore, we strongly endorse this recommendation. There is currently considerable confusion within the sector and among their professional advisers as to whether and how the ACL applies to fundraising and other activities of NFPs.[3]

We are pleased to see confirmation in the Interim Report that "the ACL applies to many activities undertaken by charities and not-for-profits", and that the ACL is also likely to cover "a range of fundraising activity". Given this confirmation, we agree the development of further guidance on the operation of the ACL as it applies to not-for-profits would "provide greater certainty".[4]

However, we believe providing regulator guidance alone is not sufficient to give clarity to the NFP sector as to the application of the ACL. Below we describe two options that would provide the requisite clarity – our strong preference is for option 1 *(Recommendation 1).*

Option 1: expand the definition of 'trade or commerce' and provide regulator guidance

We urge Consumer Affairs Australia and New Zealand (CAANZ) to reconsider its positon that the definition of 'trade or commerce' does not need to be reviewed at this time. While CAANZ notes the "… relevance and appropriateness [of the definition] will continue to be monitored in light of market changes, including the 'sharing' economy",[5] we believe it is important for regulation to be ahead of or at least alongside trends, not behind. This current ACL review process provides an opportunity for CAANZ to respond to these growing and rapidly changing markets. In the fundraising arena, crowdfunding and other forms of peer-to-peer arrangements were not in existence when the ACL was first legislated and have exploded in popularity (167% increase in global funds raised by crowdfunding from 2013-2014 with 18%-20% of $16 billion funds for 'social causes')[6]. This is why Recommendation 1 in our initial submission[7] stated:

> "Amend the definition of "trade or 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."

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[3] Justice Connect (Not-for-profit Law) submission to Australian Consumer Law Review, 27 May 2016, pgs. 9-10.
[4] Australian Consumer Law Review, Interim Report, October 2016, pp 15, 20.
[5] Australian Consumer Law Review, Interim Report, October 2016, p 18.
[6] *Crowdfunding Nearly Tripled Last Year, Becoming a $16 Billion Industry* at https://www.entrepreneur.com/article/244503 accessed on 23 November 2016.
[7] Above n3.

We ask that this issue receive further consideration (see also our discussion of peer-to-peer fundraising, page 17).

Option 2: Add a Legislative Note to clarify the definition of 'trade or commerce' and provide regulator guidance

If Option 1 does not proceed, we suggest greater clarity and certainty could be achieved by way of a Legislative Note. This would make it clearer that the ACL does apply to NFP activities, including fundraising. For example, the Legislative Note could appear as follows:

> "trade or commerce " means:
> (a) trade or commerce within Australia; or
> (b) trade or commerce between Australia and places outside Australia;
> and includes any business or professional activity (whether or not carried on for profit).
>
> *Note: Many activities of not-for-profits, including fundraising, conducted by or on behalf of not-for-profit groups or organisations are considered to be a 'business or professional activity (whether or not carried on for profit)'*.

This approach is consistent with the existing style of the ACL which contains other Legislative Notes, for example, after the definition of 'supply' (section 3). The Explanatory Memoranda to the amending Acts would explain the purpose and intended effect of the Note.

In addition, it would be useful for the Explanatory Memoranda to provide an overview of the broad meaning given to 'trade or commerce' as outlined in the Interim Report, including setting out how conduct, with and without the supply of goods or services, is likely to be determined (i.e. relying on the test in *Concrete Constructions Pty Ltd v Nelson (1990)* 169 CLR 594). Similar to the examples set out in the Interim Report, the Explanatory Memorandum should provide examples of fundraising activities that are clearly within the definition of 'trade or commerce', those that are clearly not, and those where the balance of various indicia will be determinative.

There is also a need to provide greater clarity about when services delivered by NFPs on behalf of the government are considered to be in trade or commerce (for example, the services of public hospitals), and where gratuitous supplies are considered to be within trade or commerce.

Aside from greater certainty for the NFP sector, this approach will benefit the Australian community (consumers and donors) as they will more readily be able to understand when the protections of the ACL will apply to them, and what remedies they have available to them should mischief occur.

Role of judicial guidance

We are pleased that the Interim Report acknowledges the need for regulator guidance in this area. To be clear, we think it is critical that clarification of if, how and when the ACL applies to fundraising activities should not be left to 'judicial' (case law) guidance alone.

Judicial guidance is by its nature ad hoc and limited to the particular facts of the case in question. Guidance from case law on 'trade or commerce' has taken decades to develop (even pre-dating the ACL). It would be a particularly unsatisfactory approach in this area (for example, to clarify when fundraising is a professional activity), because NFPs have fewer resources and incentives to litigate (compared with business situations where competitive/lucrative commercial interests are at stake). The mere fact that an NFP's name is associated with any litigation can cause donations to dry up.

By way of example, even with the benefit of a special 'test case' fund to support some (public interest) cases to be taken against the Australian Taxation Office, there have been very few cases brought (for example, on the definition of charity). As no such fund exists in the ACL context, it is reasonable to assume cases would be rare.

Exception for fundraising by volunteers?

An important issue is that the application of the ACL is based on the nature of the fundraising activity in question (Example 1, below), rather than the remuneration (or otherwise) of those who carry it out.

In our view, the example in the ACL Interim Report relating to the question of whether volunteer fundraising is in trade or commerce (page, 17 para 5 Interim Report) is not a correct statement of the current application of the ACL to fundraising activities.

There are many, very public examples of volunteers involved in professional fundraising activities – any 'Daffodil day', 'Good Friday Royal Children's Hospital' appeal and so on. Volunteers are commonplace in the NFP sector and, as workers, can be indistinguishable from paid employees. The important question is the nature of the conduct of those fundraising on behalf of a NFP, regardless of whether the individual undertakes the activity as a paid or unpaid worker. Many volunteer fundraisers are provided with training, promotional materials, branded clothing, badges to wear and scripts to assist them in their fundraising activities. Where this level of sophistication exists, the activities are 'professional' in nature, and clearly in 'trade or commerce', regardless of the employment status of the person undertaking fundraising activities. Similarly, if a volunteer is administering a service in a professional setting, that service is subject to the ACL, regardless of the employment status of the person administering the service (e.g. a masseur or hairdresser providing services to disadvantaged people through a charity on a voluntary basis).

In order to ensure equitable protection to all consumers and donors, it is critical that fundraising undertaken by volunteers (in part or wholly) is not excluded from the scope of the ACL, unless that fundraising is so informal that it could not be considered to be 'professional' and in 'trade or commerce' (just as informal trading is also not considered to be in 'trade or commerce').

Further, it should be clear that the ACL applies to fundraising undertaken by third party commercial providers on behalf of a NFP.

What should be included in guidance?

In addition to legislative change or a legislative note in respect of the definition of 'trade or commerce' (options 1 and 2 above), further tailored regulator-produced guidance is needed.

We recommend it include:

- **a statement** by CAANZ on the ACL's current application to the activities undertaken by, or on behalf of, NFPs, and
- **accompanying plain language explanatory and educative materials** to help NFPs and the public understand the statement, and resources to help people exercise relevant rights.

In our view, the statement on the application of the ACL (which could, in part, be drawn from the Explanatory Memoranda) needs to outline:

- the overarching policy goal of regulating activities undertaken by or on behalf of NFPs (this could be split into different contexts, such as NFPs providing goods and services and NFPs seeking donations without providing goods and services)
- the overarching regulatory approach (for example, emphasis on education particularly for minor and unintentional breaches)
- the powers of ACL regulators and how they will be used in the broader multi-regulatory model especially where activities are cross-jurisdictional
- causes of action available to the public where there are breaches of the ACL, and
- the remedies that can apply when there are breaches of the ACL.

The explanatory and educative materials should help NFPs and their advisers understand how the ACL applies to their activities generally, and in relation to fundraising specifically. We recommend that they:

- summarise the relevant provisions of the ACL and signpost the actual provisions, defences and penalties
- give practical examples of NFP activities that are clearly in, and those clearly out of scope
- provide guidance on how to comply with the ACL (in forms accessible by all parts of sector, including in writing (using case studies), visual and other multi-media), and
- outline the roles of the regulators and the approaches they will take.

The ACNC educative materials including 'ACNC Commissioner's Interpretation Statements', guides, checklists supported by webinars and also face-to-face consultations provide a good example of how this guidance can be tailored to the sector. We encourage the Australian Competition and Consumer Commission (ACCC) and other ACL regulators to work closely with the ACNC in developing and distributing materials to the sector. At least initially, there could be opportunities to join the ACNC and Australian Taxation Office in their annual series of face-to-face sessions, utilising each of the state ACL regulators, as a powerful example of 'joined-up' government.

As a general principle, we highlight the importance of collaboration with peak and sector-based intermediary bodies in the development and promotion of these materials *(Recommendation 2).*

This education could be funded, over time, from any pecuniary penalties arising from misconduct that a Court directs to regulators. We consider it appropriate that such funds be directed to education – delivering a benefit to the sector more broadly, consumers and the donating public. To avoid doubt, regulators should not, however, look to penalties as a revenue line nor should education only be undertaken if and when funds are available (from pecuniary penalties).

In our view, funding could also come from a re-allocation of monies otherwise spent by state regulators on administering current fundraising laws.

The following Examples (1 and 2) further explain why (and what) we have recommended guidance be provided about the term 'trade or commerce', and how this term applies to many of the activities of NFPs, including fundraising.

Example 1: Trade and Commerce – which activities of NFPs are "business or professional" activities?

Many activities of NFPs fall within the ACL because the definition of 'trade and commerce' is very broad and includes a 'business or professional activity (whether or not carried on for profit)' where 'business' is defined as including 'a business not carried on for profit'.

It is the *activity* that it is the focus of this definition. It does not matter if:

- the NFP is itself operating as business or professional activity
- an activity is undertaken by the organisation's paid or unpaid workers (volunteers, discussed above).

If the 'activity' is a 'business or professional activity' then it will meet the definition of 'trade or commerce' within the ACL, for example, where a NFP provides a service at commercial rates (gardening) or sells products (gardening books). This compares with, for example, a NFP which provides free services or products (house cleaning services delivered by non-professional volunteers or donated books to the elderly).

However, as previously submitted (Justice Connect, Response to the ACL Review, May 2016) there are some grey areas. We note that CAANZ has formed a view on some of these areas. This suggests that regulators are already able to provide some indication in guidance of when an activity is likely to meet the definition.

Example 2: Trade or Commerce – is a fundraising activity a "business or professional activity"?

Norman O'Bryan AM SC has advised that where a fundraising activity has a level of organisation about it, it is likely to fall within the definition.

As recommended, guidance should provide clarity, including indicators of when an activity such as a fundraising activity is likely to fall within the definition. Indicators could, for example, include where:

- there is a campaign that has been developed by fundraising professionals (whether on a paid or voluntary basis, discussed above)
- there is an organisational plan or a certain sum of donated funds which the organisation generally raises to carry out its work, and/or identification of specific beneficiaries
- numerous activities are undertaken to implement an organisational plan, like the tasking of existing workers (paid or volunteer) or obtaining permits from local councils
- the fundraising is supported by formal or professional communications or campaign materials
- the fundraising campaign is promoted widely (e.g. on social media, in newsletters (in some cases it may also involve paid advertising) or through existing networks)
- specific services are procured (i.e. engaging workers – paid or volunteer – for the purpose of the fundraising campaign, or the engagement of a third party)
- specific goods are procured (e.g. branded pens) to assist with the raising of funds, and/or
- funds are collected.

The likelihood that a fundraising activity is in trade or commerce increases if more of the indicia above are indicated. **Some of the indicia above alone are sufficient to indicate a fundraising activity falls within trade or commerce, for example, the procurement of specific goods or services**.

As recommended, consultation on this guidance with NFPs, peak and sector-based intermediary bodies, consumers of NFP goods and services, donors and with other relevant regulators needs to occur to refine this list of indicia.

Interim Report Further Question 3

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

In our view, clarification (see above, Q 1) and extension (see below, Q 2) of the ACL is an essential underpinning to support the drive for reform within states and the Australian Capital Territory. (No fundraising regulation exists in the Northern Territory).

The state and territory governments need comfort that if they repeal their fundraising laws, mischief which could harm donors or the public can be addressed via the ACL, and/or through criminal laws, charitable trust powers (under powers vested in state Attorneys-General), and/or conduct rules contained in incorporation regimes (for example, state and territory Incorporated Associations laws, Corporations law and the Co-operatives National Law).

Our position is that the ACL needs both clarification and extension. Therefore, to avoid doubt, our recommendation 1 to *clarify* the current ACL (specifically by amendment, preferably to the definition of 'trade or commerce', or through a legislative note) and recommendation 3 to *extend* the ACL (to make the ACL application explicit to certain provisions and broaden the application of those provisions to all fundraising activities) are to be taken together.

Extension to the ACL – fundraising

***We recommend** (Recommendation 3):*

- ***explicitly applying sections 18, 20 and 50 to fundraising activities by adding a reference to "fundraising activities" to these sections***
- ***applying sub-paragraphs 29(1) (e), (f), (g) and (h) to fundraising by creating a new section 29A "False or misleading representations during a fundraising activity", and***
- ***supporting the above reforms with a definition of "fundraising activity".***

Our suggested definition of fundraising activity is:

> ***"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 payment or receipt of money only as consideration 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**.*

Although sections 18, 20 and 50 may apply to regulate fundraising activities already, our recommendation would make their application explicit and broadened to all fundraising activity (not just that which is in 'trade or commerce'). This can be achieved through defining 'fundraising activities' and adding a specific reference to 'fundraising activities' to sections 18, 20 and 50 (see Justice Connect, Response to the ACL Review, May 2016, p 11).

Currently, section 29 applies to fundraising activities only where there is a supply of goods or services. Most, but not all, sub-sections of section 29 (1) are relevant to and should be applied to all fundraising activities, whether or not there is a supply of goods or services. We recommend creating a mirror provision of section 29 via a section 29A that applies the relevant sub-sections of section 29 (i.e. (1) ((e), (f), (g), and (h)) to fundraising activities specifically. This approach minimises any unintended consequences that could flow from altering or extending the application of the existing

and well-understood section 29, by addressing fundraising activities specifically and separately in section 29A.

We note that our recommended change to section 50 and our recommended addition of section 29A would require corresponding changes to remedies provisions in the Act (in particular, an additional provision section 151A would be needed to mirror the new section 29A and section 168 would need to be updated to mirror an amended section 50). These changes would mean a wider range of remedies under the ACL would be available where breaches occur in relation to fundraising activities (currently, some remedies are restricted in their application to breaches where there is a supply of goods or services alongside fundraising activities).

We note that the purposes of the ACL are closely aligned with the purposes of existing state-based fundraising laws, particularly the prevention of practices that are unfair or contrary to good faith and are unconscionable or deceptive.[8]

ACL regulators should, in implementing these recommendations, consult with NFPs, peak and sector-based intermediary bodies, consumers of NFP goods and services, donors and with other relevant regulators and experts across Australia *(Recommendation 4).*

Role of voluntary code of conduct to support repeal of fundraising Acts and Regulations

We recommend the development of a single, voluntary (that is, self-regulatory) fundraising code of conduct that sits under the ACL framework *(Recommendation 5).*

We believe this will further encourage the drive for reforms at the state and territory level by providing 'belts and braces' support for the repeal of the existing fragmented, outdated and complex state and territory fundraising laws. This single voluntary code would house any (necessary) matters of detail about how fundraising activities should be conducted that currently sit in the state and territory Acts and Regulations. Explicitly, core matters covered in existing state and territory fundraising legislation would be contained in either ACL Acts **or** a self-regulatory code under the ACL.

[8] Australian Consumer Law Review, Interim Report, October 2016, p 5

Part B – Current regulatory problems and role for the ACL

Interim Report Further Question 2

Are there currently any regulatory gaps with regard to the conduct of fundraising?

- *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?*
- *Would generic provisions, such as the ACL provide the level of regulatory detail necessary to address identified areas of detriment? What would the benefits and costs of this approach?*
- *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?*

As a basic principle, it is important to note the use (and extension) of the ACL to regulate fundraising activities should not be based only on any concept of 'regulatory gaps' (or the extent of those gaps). The assumption that clarification or any extension of the ACL should only occur in response to regulatory gaps is prejudicial to the interests of reform and does not correctly conceptualise the current problems: differing definitions, inconsistencies across jurisdictions, rules based on outdated forms of fundraising, and the constraints of state and territory boundaries (discussed further below). These numerous problems involve *both* regulatory gaps and duplicative laws. **Inconsistencies cause regulatory gaps, in that there is confusion as to who the laws apply to and how they are applied.**

Many people are overwhelmed by the inconsistent and fragmented maze of laws across Australia (for a summary see the Not-for-profit Law Guide to Fundraising Laws). As a result, there is also a lack of compliance, and little enforcement of the existing laws.

Regulatory gaps?

The range of problems with the current state and territory-based fundraising law regimes are discussed below.

Inconsistencies

Significant inconsistencies between the application of laws in each state and territory because:

- the application of the laws depends on the particular organisation and the particular activity; there are different definitions of 'fundraising', 'charitable purposes' and 'charity'
- there are numerous and greatly varying exemptions; for example, exemptions apply to any associations incorporated under the incorporations law in Tasmania; trade unions and political parties in Victoria; religious organisations in Western Australia, Tasmania, Queensland and Victoria. Some exemptions are based on the annual amount raised and other factors (less than $15 000 in the Australian Capital Territory, or less than $10 000 in Victoria where only volunteers are used)
- some laws cover different forms of fundraising, while others may not: we note only two jurisdictions have laws that expressly refer to the internet and/or email, and
- the Northern Territory has no specific fundraising law.

Duplication

Duplication exists. This is a waste of regulatory effort. It also creates confusion as to which law might be used should mischief occur and even more confusion where there is overlap, but not complete consistency. For example:

- When fundraising occurs across states or territories, regulation is duplicated in each state or territory (there may need to be multiple licences in place and multiple reporting on the same activity).
- There is duplication of Codes of Conduct amongst states (South Australia has a mandatory code, Western Australia has a voluntary code). There are also self-regulatory bodies each with their own code covering different types of conduct and behaviour (for example, the Australian Council for International Development, the Fundraising Institute of Australia and Public Fundraising Regulation Authority). Some of these self-regulatory codes are enforced.
- There is also duplication between existing fundraising laws and the ACL, for example section 18 of the ACL is very similar to sections 15C and 15D of South Australia's law, section 7 of the Victoria's law, section 12 of Tasmania's law, and section 18 of the Australian Capital Territory's laws.
- There are many general laws that could apply to address the same misconduct (for example, the criminal law). We note the comments from the New South Wales Government in relation to this overlap: "there is no evidence to suggest the Act (*Charitable Fundraising Act 1991 (NSW*) is any more beneficial than general laws appear to be in protecting donors in cases of deception."[9]

Failure to address current forms of fundraising

The existing fundraising laws fail to adequately deal with new forms of fundraising, including fundraising through online platforms. Some existing laws might apply, but others will not. Again this will depend on the definition of 'fundraising' (which is broad in some states like Victoria) and/or the definition of 'charitable purposes' (or similar but different wording!). Significantly, we note that at least one organisation operating an online platform has advised it has had to work with a regulator to develop its own specialised regulatory system.[10] Another organisation contacted us seeking to run an email-based campaign across Australia. They realised that they would need a licence in most jurisdictions. We were contacted by an in-house lawyer for a charity that had spent more than 50 hours attempting to reconcile the laws, and ultimately they constrained their campaign to two states.

Crowdfunding also raises important issues which cannot be accommodated in existing fundraising regimes.

Lack of compliance

Non-compliance is an indicator of ineffective regulation (and effectively creates a regulatory gap). Data suggests there is a considerable number of organisations not complying with the laws (by obtaining the requisite licence, authority, sanction or permit or registration).

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[9] New South Wales Government, *Charitable Fundraising Review, Discussion Paper*, 2016.

[10] Time to #fixfundraising", Tania Burstin, Managing Director of MyCause, https://probonoaustralia.com.au/news/2016/11/time-to-fixfundraising/

We note, for example, in Victoria there are 39,665 incorporated associations, 7,000 deductible gift recipient endorsed entities and funds, and an estimated total of 150,000 NFPs in Victoria, yet only 2,265 fundraisers are licenced under the *Fundraising Act 1988* (Vic) – clearly many fundraisers are not registered. In Western Australia there are more than 18,000 organisations and only 1,484 registered charities with permission to fundraise, and in South Australia there are 20,309 incorporated associations and 761 fundraising licences held. (Note: the actual number of organisations compared to licences is likely to be larger given many NFPs are not incorporated, or are incorporated under a different legal structure, such as the *Corporations Act 2001* (Cth)).

It is understandable why some organisations simply decide not to comply. As the Executive Officer of a small not-for-profit organisation says:

> "... requirements for each state were different, some required police checks for our office bearers (WA), others required that we have a postal address in their state (NSW) - we are based in Victoria. To say that the process was labour intensive is an understatement. We now have different reporting requirements for every state and territory - some annual, some every two or three years. In addition we have to notify these authorities whenever committee members change and also obtain police checks for WA. The other issue is that as an organisation working on a very low budget (approx. $60,000) we now have to have our financial records audited annually and again the reporting requirements differ from state to state and so the auditor has to present more than one report. Previously we were exempt from auditing due to our low budget …it is a great burden for our organisation."[11]

Acknowledged lack of enforcement

Little enforcement of these laws means that a regulatory system, whilst in place, is not well monitored. As recently as July 2016, the New South Wales Government stated it does not undertake "any specific compliance and enforcement under the *Charitable Fundraising Act 1991* (NSW)".[12]

A review of annual reporting in 2014-15 for each of the state and territory regulators does not indicate any compliance activity specifically directed at fundraisers.

We note that in 2011 there were the equivalent of 16.95 full time staff administering about 13,964 licences (authorities, permissions, sanctions etc.), with 204 complaints from which there were only 10 prosecutions across Australia.[13]

Lack of evidence of mischief

The New South Wales Government has stated that it does not undertake enforcement activities because "such an allocation of resources appears unjustified because there is no evidence of a particular problem in the sector. New South Wales has few complaints from persons donating to these appeals". They also state:

> "the majority of breaches are found to be minor and unintentional mistakes and where **non-compliance has occurred it has been the result of complexity and different requirements**

[11] Client provided their story to Not-for-profit Law on 20 September 2016. The client requested their name be withheld but has said they can be contacted for verification purposes. Published at www.justiceconnec.org.au/fundraisingstories

[12] New South Wales Government, *Charitable Fundraising Review, Discussion Paper*, 2016.

[13] Australian Centre for Philanthropy and Nonprofit Studies, *Registered Fundraising Organisations*, University of Queensland, 2012

> **of the Acts**. Furthermore, of complaints made, over a certain period, none were found to have caused public detriment" (emphasis added).[14]

From this New South Wales statement, and our experience in dealing with hundreds of enquiries about fundraising over more than six years (and, over the last six months, we had 7,167 hits on our fundraising pages), we consider it is primarily because of the complex, burdensome and inconsistent laws that there are high levels of accidental or even deliberate non-compliance. It is important to stress that non-compliance with the existing regime is generally for matters such as obtaining the requisite licence, authority, sanction or permit or registration (rather than because of unfair fundraising conduct). As noted by the New South Wales Government, non-compliance is generally not a matter of public harm or serious misconduct.[15]

However, because there is also scant evidence of proactive compliance work by existing fundraising regulators, we do not know (and cannot assume) there are low levels of serious fundraising misbehaviour (such as misleading statements or harassment of donors). In our view, this is all the more reason to clarify and extend the principles-based nationally consistent approach of the ACL.

Please note, we are not recommending a move away from regulation. We are in favour of the regulation of fundraising activities – donors should be able to have trust and confidence in the regulatory system to address misconduct. Rather, it is our view that existing laws are no longer fit-for-purpose or capable of responding to mischief, especially any arising from new ways of fundraising.

As outlined above, where misconduct does occur there are already other laws that can be used. This is demonstrated by current prosecutions in both Victoria (under the ACL) and in Queensland (under the criminal law).[16] Again, this is suggestive of a fundraising law regime that is not working. Where mischief is occurring, other laws are being used to address it.

Reform of fundraising and Australian Consumer Law

Question 2 – are generic ACL provisions sufficient to address detriment?

It is our view that reforms making certain generic provisions of the ACL explicitly applicable to all fundraising (as outlined earlier) would provide the level of regulatory detail necessary to address the areas of detriment caused by fundraising misconduct. Given the estimated red tape cost to charities of $15 million annually,[17] these small reforms to the ACL would be of huge benefit to the sector if they provide sufficient comfort to the state and Australian Capital Territory Governments in order for them to agree to repeal their fundraising laws and regulations.

The purpose of state and territory-based fundraising regulatory regimes is to enable and facilitate proper and lawful fundraising activity and to provide reasonable protections to donors. They are also intended to defend against unfair practices. Over time, these regulations have lost their relevance and have been rarely enforced.

Existing fundraising regulation is *hindering* fundraising and, in our view, could be repealed *immediately* even without any change to the ACL (or a move from existing codes to a single

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[14] Above n10.
[15] Above n 10.
[16] https://www.comcourts.gov.au/file/Federal/P/VID535/2016/actions and https://au.news.yahoo.com/qld/a/33178277/qld-woman-leaves-baby-malnourished/#page5
[17] Australian Charities and Not-for-profits Commission, *Cutting Red Tape: Options to align State, Territory and Commonwealth charity regulation*, Deloitte Access Economics, 23 February 2016 at https://www.acnc.gov.au/ACNC/Publications/Rpt_LP.aspx

voluntary code of conduct under the ACL). As the Interim Report confirms, key provisions of the ACL already apply to many fundraising activities. Our recommendations are to further improve its application, but are not essential preconditions to repeal of existing fundraising laws.

The clarification and broadening of the ACL in line with our recommendations would provide a modern, nationally consistent law for fundraising activities when combined with:

- local government by-laws for face-to-face fundraising activities (for example, to help avoid public nuisance issues), and
- a single, voluntary code of conduct covering all fundraisers and fundraising activities or, until that is achieved, existing self-regulatory codes.

Below we provide greater detail about why we think this approach works and should provide the necessary comfort for state and territories to repeal their laws. We then consider some 'hot issues' – peer-to-peer fundraising and individual enforcement rights as these relate to the consequences, risk and challenges from extending the application of the ACL.

Serious misconduct

Currently, state and territory based regulators have fragmented, and in some case a limited range of remedies under their fundraising laws. They rarely take action under these laws. For example, Consumer Affairs Victoria recently took action in relation to problematic fundraising conduct using the ACL rather than its own fundraising law.[18] In this case, this course of action was available to the regulator as the fundraising involved a sale of goods and services (and therefore section 29 of the ACL applied).

The ACL has a number of remedies capable of addressing serious misconduct in relation to fundraising. Under our recommendations, a wide range of civil and criminal penalties, and other remedies (which can be sought by affected individuals as well as regulators), can apply to fundraising activities that contravene the ACL, serious or otherwise. For example, a regulator could choose between seeking civil and criminal penalty provisions where a person or organisation has contravened the proposed section 29A, and corresponding provisions, through making false representations about fundraising.

By way of further example, if a person or organisation is involved in a breach of section 20, 29, 50, or our proposed section 29A, then a pecuniary penalty of up to $220 000 can be applied by a Court to an individual, or $1.1 million to an organisation, per contravention.

Non-ACL regulators can also demand documentation, enter and search premises, seize assets or wind up organisations in certain circumstances under the incorporation laws for associations and companies. The Attorneys-General in state and territories, in their capacity as protector of charities, can authorise the bringing of proceedings against charitable trusts. The ACNC can take action against charities registered with it, and has increased powers (enforceable undertakings and removal of responsible persons) where the charity is a 'federally regulated entity'.

In cases of egregious misconduct, criminal laws may also apply, such as laws prohibiting fraud or obtaining financial advantage by deception (either the criminal code in each state and territory or under federal criminal laws). Criminal charges have been laid against a person who had solicited funds on the basis of having a sick child that allegedly she deliberately malnourished.[19]

[18] https://www.comcourts.gov.au/file/Federal/P/VID535/2016/actions
[19] https://au.news.yahoo.com/qld/a/33178277/qld-woman-leaves-baby-malnourished/#page5

As well as regulators and criminal prosecutors having actions available, individuals affected by fundraising conduct can also take action under the ACL – a course of action that is not available under fundraising laws (see further discussion below).

Minor misconduct

With its broad tool kit of remedies and enforcement options available to both people and regulators, the ACL can also deal with minor misconduct. Importantly, the ACL has the regulatory objectives of:

- helping people and organisations understand the overall goal of the regulation and thus minimising non-compliance, and
- promoting an understanding of what the law is trying to achieve (what is appropriate and what is not) and therefore encouraging compliance.

Our proposed self-regulation (ideally a single, voluntary code of conduct that covers all types of fundraising activity) will also aid in building the capacity of fundraisers to operate compliant and ethical fundraising activities. (We note the existing Fundraising Institute of Australia and Public Fundraising Regulatory Authority codes of conduct already require compliance with the ACL).

Importantly local government authorities would continue to regulate where and how some fundraising (mostly face-to-face fundraising) occurs. This is because local governments (or territory governments) manage and regulate the use of public places, and in turn where minor breaches have occurred, it would be these authorities that take action.

Other advantages of the ACL

Mechanism for being kept up-to-date

By its intergovernmental agreement, the ACL has an agreed process for change and review which makes it less likely it will become outdated, providing a better compliance framework for new and changing situations.

Strong public awareness

The Interim Report notes that the 2016 survey showed awareness of the ACL among all Australians at levels of 90% plus [20] – a great base for building more specific public awareness about the role of the ACL in fundraising and other NFP activities.

New forms – peer-to-peer fundraising and the ACL

In some circumstances, current laws may or may not apply to peer-to-peer fundraising. Peer-to-peer fundraising is a method of fundraising that leverages a person's or organisation's supporters to fundraise. It is also known as social fundraising, personal or team fundraising, or p2p fundraising.

Examples and the likely application of the ACL and state fundraising laws are provided below:

- A person sets up a crowdfunding campaign for a friend who is very unwell. The campaign page to help cover medical bills is set up in minutes, shared through social networks, and completed in days. In this case, if there was no other 'activity' it may not be organised to the extent that it would be a "professional or business activity" (and therefore "in trade or commerce") and regulated by the ACL. It *may* be covered by fundraising laws in some jurisdictions such as in Victoria, as it *may* satisfy the definition of fundraising and a licence could be required if the amount raised was likely to be over $10,000 in the year. However, the person may not know this and as such not obtain the licence. Most people donating

[20] Australian Consumer Law Review, Interim Report, October 2016, p 9 – reference is to consumers 90% and business 98%. Donors are also consumers.

would not know whether or not the campaign complied with the fundraising laws, or what action they could take if they were concerned about any mischief.

- A colleague makes biscuits and puts them in the staff room, noting any donation made for the biscuits will go to, say, MS Australia (on account of another colleague who has been unwell with MS). It is unlikely that this activity by itself would meet the ACL definition of trade or commerce. However, if the same person offered tens and tens of home-made packaged biscuits on a weekly basis to their colleagues in exchange for donations and also continued to stock them in local child care centres and several school canteens, then this is likely to meet the broad definition of trade or commerce (and also be a supply of goods) under the ACL. As with the example above, they may or may not be required to comply with a state fundraising law depending on which state, how much he raises and other variables. This is where clarity of the ACL is important and would provide a nationally consistent approach.

If our recommendations for changes to the ACL are implemented, a crowdfunding campaign like the one described above (and most likely the second scenario below involving home-made biscuits) would be subject to sections 18, 20 and 50 of the ACL and a new section 29A. This means the fundraising could not involve misleading or deceptive conduct, could not be unconscionable, must not involve harassment or coercion, or false or misleading representations. This would make it clear to all fundraisers that they cannot engage in such behaviours, thus providing far better protection than the current laws that might or might not apply for those contributing to these campaigns, no matter where they are donating from.

A number of Australian based crowdfunding organisations have joined us in our call for all Australian governments to deal with this matter.[21]

Individual enforcement rights

Aside from enforcement by ACL regulators, the ACL creates private rights that people can enforce through Commonwealth, state and territory legal systems.

Clarifying the application of the ACL, as outlined above, would support individuals and NFPs to understand their rights and obligations including where private rights may be exercised. Given that the Interim Report confirms that certain provisions already apply, these private rights could already be exercised by an aggrieved donor. We acknowledge these rights are not provided under existing state-based fundraising laws.

These rights are important: they provide for individuals to hold NFPs accountable for unethical and unfair fundraising practices. Furthermore, private action effectively complements and reinforces the multi-regulatory enforcement model upon which the ACL rests. We note the comments of the Australian Securities and Investments Commissioner: "*if private litigation can achieve an outcome that we might have done previously then we should let the private litigation pursue that outcome, because we can use those resources to devote to another area*."[22]

We note as with any remedy, that there is a risk the provisions could be used primarily for annoyance (in a vexatious manner), but this is not a reason to deny them. There are a number of mechanisms already in place through the court system that mitigate this risk. We also note that

[21] This includes good2give, mycause, everydayhero; sharegift at http://www.justiceconnect.org.au/fundraisingstories
[22] Australian Securities Investment Commission (ASIC) Chairman, Greg Medcraft, cited in "*ASIC backs private litigation*" accessed at http://www.moneymanagement.com.au/news/financial-planning/asic-backs-private-litigation on 23 November 2016

these private rights can be exercised at the current time in relation to the ACL and there is no evidence of them being used for vexatious purposes. Clarification of the application of the ACL to fundraising would also protect fundraisers against vexatious litigation under the ACL, through making their obligations clearer.

The cost of the ACL as the regulatory framework

Question 2 also asks for comments about the benefits and costs of using the ACL for fundraising regulation.

It is our view that using the ACL to regulate fundraising (instead of state and territory-based fundraising laws) would not involve additional costs for regulators and will save the NFPs well in excess of $15 million annually (as this is the estimate for registered charities who are about 10% of the overall NFP sector – which means it is possible this saving could be in excess of $100 million annually). **Existing funding/staff working on the fundraising regimes should be formally redeployed to work using the ACL, ideally on education and proactive compliance work.**

The regulators with oversight of the ACL are the same regulators concerned with fundraising laws (the consumer affairs or fair trading bodies in each state and the Australian Capital Territory), other than the ACCC. This means that for the most part the regulators involved in administration of the fundraising laws would remain unchanged.

The additional advantage of this is that existing experience in regulating the fundraising activity of NFPs can be retained. We note that these regulators are already experienced in the operation of the ACL, for example, in Victoria, of the civil proceedings on hand at 30 June 2015, the majority were under the ACL.[23]

Unintended consequences

As we previously submitted (Justice Connect, Response to the ACL Review, May 2016) our approach avoids issues that could arise if all provisions of the ACL were to apply to fundraising.

We are aware a number of issues that have been raised as potential unintended consequences. We consider these below.

- Provisions drafted in contemplation of a contract between a consumer and a supplier or manufacturer could be applied where the only activity undertaken is to seek a donation. In our view, a donation of its very nature does not involve a contract or bargain, but is rather a gift given voluntarily. **We support the current interpretation by the ACCC that unsolicited consumer agreement provisions do not apply where a donation is sought without any associated provision of goods or services.**
- Concern that some provisions of the ACL (including possible remedies) that deal with a donation (without a supply of goods or service) could change the character of that donation so that it (the donation) no longer meets the *Income Tax Administration Act 1997* requirements of a 'gift'. **We are advised by Norman O'Bryan AM SC that this proposition is not correct. We note that the Fundraising Institute of Australia is awaiting a non-binding ruling from the Australian Taxation Office confirming this position.**

[23] Consumer Affairs Victoria, Report on Operations 2014-15, *Making markets fair*

Self-regulatory code

There is a range of odd requirements concerning fundraising that seem to have developed over time in response to particular incidents or just from not being cleaned out of the regulatory books. For example, you are not allowed to wear a mask or use a toy gun when collecting in Queensland (*Collections Regulations 2008 (QLD*)).

There are some provisions in the state Acts and Regulations that are sensible. For example, if someone knocks on your front door it is appropriate they have clear identification of which organisation they represent – similar to the provisions that apply to telecommunications and other industries. What is needed to protect donors, is to simplify requirements and support improved compliance, is a single, voluntary industry code of conduct applicable to all fundraisers and all types of fundraising activities. We note that the ACL specifically allows for voluntary industry codes of conduct (as well as codes prescribed and enforceable under the ACL).

We recommend that a single, voluntary code be developed by the sector in consultation with the ACL regulators, noting that there are existing codes, both mandatory (Code of Practice*, Collections for Charitable Purposes Act 1939 SA*) and voluntary codes (for example, Fundraising Institute of Australia, Public Fundraising Regulatory Association and the Australian Council for International Development) that could be drawn upon to create a Code of Conduct (Code).

We are not suggesting this Code deal with matters that should be prescribed in law (for example, harassment or coercion of vulnerable donors). We commend the Public Fundraising Regulatory Association's submission to the Interim Review (they kindly shared a draft with us). Their detailed gap analysis shows that much of the behaviours prescribed in existing fundraising laws and regulations are also covered by their code (applicable to face-to-face fundraisers), and that where it is not, their code could be amended. We note they, like the Australian Council for International Development, undertake work to ensure their codes are complied with (for example, the Public Fundraising Regulatory Association's quality assurance program and their penalty, sanctions and remediation regime).

In short, **the Public Fundraising Regulatory Association's detailed work shows that to the extent that the ACL does not already address matters or conduct covered by the existing state fundraising laws, *and* that these provisions are considered by them as worthy of retention, the provisions could be included by modifying their existing code of conduct.**

Conclusion

As is made clear in the Interim Report, the ACL applies to many fundraising activities undertaken by NFPs. However, there is confusion and misconception about how and when it applies. Certainty must be provided to facilitate trust and confidence in the sector.

Clarification of the ACL, as well as extension to make the application of certain provisions explicit to the fundraising activities of NFPs, would provide a modern, nationally-consistent regulatory approach to fundraising that would be supported by criminal laws, local government by-laws and a single self-regulatory code of conduct.

This would provide an increased level of trust and confidence in fundraisers by the Australian community, and importantly by donors. We acknowledge that action must be taken at the state and territory level to achieve one national regulatory framework for fundraising.

However, the ACL is better regulation, not more regulation. It offers a practical solution, balancing risk with the need for a regulatory framework that supports protection of a donor where mischief has occurred, whilst providing the NFP sector a means to efficiently and effectively fundraise in efforts to achieve its mission – for the benefit of all Australians.

We welcome any opportunity to discuss this submission.

Yours sincerely

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