

30 August 2016

Consumer Law Enforcement and Administration
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

Via online lodgement: www.pc.gov.au/inquiries/current/consumer-law

Productivity Commission Issues Paper: Consumer Law Enforcement and Administration

Thank you for the opportunity to provide comment on the Productivity Commission's inquiry into *Consumer Law Enforcement and Administration* of July 2016 (**the Issues Paper**).

About us

A coalition of sector organisations, including the Australian Institute of Company Directors (AICD), Chartered Accountants Australia and New Zealand, CPA Australia, Governance Institute of Australia (Governance Institute), Justice Connect and other leading sector bodies are calling on Australian governments to work together to provide charities and other not-for-profits (NFPs) with a nationally-consistent and fit-for-purpose regulatory regime for fundraising.

This submission is jointly endorsed by the AICD, Governance Institute and Justice Connect.

We note the Issues Paper is focused on the administration and enforcement of the Australian Consumer Law (ACL) under the multiple regulator model. Our joint submission is addressed to that focus.

However, our earlier submissions to the review of the ACL conducted by Consumer Affairs Australia and New Zealand (CAANZ) (the ACL Review) are relevant to our submission to the Issues Paper. This is because our submissions made the point that the implementation of the ACL has not been sufficiently progressed in terms of its application to the activities of NFPs.

In our submissions, we recommended that amendments be made to the ACL to put its application to NFPs beyond doubt, including in relation to fundraising activities (Attachment A, Justice Connect's *Submission to the Australian Consumer Law Review Issues Paper*, 27 May 2016).

This submission primarily considers the administration and enforcement of the ACL as it is written today.

Our response to the Issues Paper

How is the multiple regulator model for the ACL working and how could it be improved?

Much work has been done to promote broad understanding of rights and responsibilities under the ACL (Issues Paper, page 7). However, this work has largely excluded in what circumstances the ACL applies to the activities of NFPs, including with relation to fundraising.

We are not aware of any government guidance specific to NFPs and how their activities are, or are not, regulated by the ACL.

There is a difference in opinion about the ACL's application to the activities of NFP organisations. Governments have come to different conclusions on its application, as have self-regulatory bodies and the sector (Attachment A, page 9). As a result, there is variation in the way it is administered and enforced across the country.

However, legal advice obtained by Justice Connect's Not-for-profit Law from Norman O'Bryan AM SC states the ACL does apply to many activities of NFPs. He has advised that whether the ACL applies hinges on whether the activities are 'in trade or commerce' and, for some provisions, whether activities also involve supply of goods or services (Attachment B).

The lack of public clarity and lack of regulator guidance about the application of the ACL to the activities of NFPs, mean both NFPs and those they engage with have a pervasive misunderstanding about the rights of consumers and responsibilities of NFPs in many circumstances. For example, many NFPs and consumers do not appreciate the following:

- the ACL clearly applies when a consumer purchases a product from an NFP through a commercial transaction (for example, the sale of sun protection products such as sunscreens, sunglasses and protective clothing)
- only certain provisions of the ACL are like apply to the provision of a free service of an NFP (for example, free medical services provided by an NFP to refugees). The position is less clear when services are provided on a heavily subsidised, but not free, basis, and
- certain provisions of the ACL (those that apply where there is conduct in trade or commerce but no supply of goods or services, for example section 18) will apply to the conduct of most fundraisers (the less formal and more voluntary fundraising is, the less likely the ACL is to apply to the conduct of the fundraiser).

Because of the lack of clarity around the application of the ACL, it is difficult for individuals to understand their rights and obligations when making purchases, receiving services or donating to an NFP. It is complicated and confusing, and there is a lack of information available to both individuals and NFPs on this topic.

This uncertainty also impacts the enforcement approach by regulators. We are not aware of significant enforcement activity taken by regulators for breaches of the ACL by NFPs. This becomes more problematic when activities of NFPs are cross-jurisdictional. It is our view that difference of opinions between regulators as to the ACL's application is preventing appropriate action from being taken under the ACL. This has effectively created a gap in the implementation of the ACL.

The impact of this gap is significant. There are more than 600,000 NFPs in Australia. Of these, 57,000 are economically significant¹, with the charity sector's combined annual revenue in excess of \$1 billion. Donations contribute to 13% of total income for large charities, 23% for medium charities and 32% for small charities.² Fundraising is a core component of income for NFPs and with a growing focus on social enterprise within the sector, the application of the ACL to NFPs is increasingly relevant.

¹ Australian Bureau of Statistics, 'Australian National Accounts: Non-Profit Institutions Satellite Account, 2012-13 (5256.0)', Accessed 22 August 2016, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/5256.0>>

² Australian Charities and Not-for-profits Commission, 'Australian Charities Report – Summary', Accessed 22 August 2016, <<http://australiancharities.acnc.gov.au/download/summary/>>

How could this problem be addressed now?

To address the current uncertainty in the administration and enforcement of the ACL, we recommend that the Australian Competition and Consumer Commission (ACCC), in partnership with other ACL regulators:

- develop and release a statement on the current application of the ACL to the activities undertaken by, or on behalf of, NFPs, and
- produce guidance materials that are clear and in plain language that will support NFPs and the Australian community to understand this statement.

A statement on the application of the ACL should outline:

- an overarching policy goal underpinning the approach to regulation of NFPs (this could be split into different contexts, such as NFPs providing goods and services, and NFPs fundraising)
- the regulatory principles that underpin the approach
- what is in, and what is out of scope of the ACL in relation to NFPs
- the powers that ACL regulators have to regulate these activities and how they will be used in the broader multi-regulatory model, including where activities are cross-jurisdictional, and
- the remedies that can apply when there are breaches of the ACL.

The explanatory and educative materials should:

- help NFPs understand how the ACL applies to their activities generally, and in relation to fundraising specifically
- provide guidance to NFPs on how to comply with the ACL
- outline the roles of the regulator and the approaches they will take, and
- support individuals and NFPs to understand their rights and obligations under the ACL, including with regard to remedies available in the context of misconduct.

The Australian Charities and Not-for-profits Commission (ACNC) 'Commissioner's Interpretation Statements' provide a useful example of how this guidance can be provided to the sector. These statements aim to "guide charities and the public on how we understand the law that applies to charities, including to explain the law made by judges ('common law'), parliament (legislation) and any legal issues that may arise."

We submit that it is appropriate that the ACCC, in partnership with the other ACL regulators, develop this statement and that the associated guidance be developed in consultation with the sector, consumers of NFP goods and services, donors and with other relevant regulators (for example, the ACNC).

How could this problem be address in the longer term?

In the longer term, this issue could be addressed in two ways:

- by continuing to provide up-to-date guidance on the application of the ACL to the wide range of activities of NFPs across Australia, noting the rapid development and change that occurs in the sector's operations, paying particular attention to:
 - service provision by NFPs, including in therapeutic settings, and where services are provided for free or heavily subsidised, or on behalf of government, and
 - the sale of goods and services when associated with a fundraising campaign
- amending the ACL to put beyond doubt its application to fundraising activities, in line with our proposal submitted to CAANZ. We have made recommendations to the ACL Review (refer to Attachment A, page 10) which outline a three step process to achieving regulatory reform, including:
 1. Minor amendments to the ACL to ensure application to fundraising activities is clear and broad
 2. Repeal of state-based fundraising laws, and
 3. Work with other regulators (for example, the ACNC, state-based regulators, self-regulatory bodies) to improve fundraiser conduct (for example, door-knocking, telemarketing, excessive spending of funds on third party services).

The benefits of this approach, including the use of the ACL to achieve nationally consistent fundraising reform is set out in Attachment A (pages 7-8).

We note that our recommendation to address identified issues in the longer term falls, in part, outside of the scope of this review. However, taken together, these recommendations provide a means to achieve reform of the ineffective and inefficient fundraising regulatory regimes that present risks for donors, loss of productivity (estimated at more in revenue losses of more than \$15 million annually for charities alone, with charities being only about 10% of the overall NFP sector) and barriers to innovation; effectively acting as a restraint of trade on this sector's sustainability and growth.

Yours sincerely



John Brogden AM
Managing Director &
Chief Executive Officer

Australian Institute
of Company Directors



Steven Burrell
Chief Executive Officer

Governance Institute
of Australia



Fiona McLeay
Chief Executive Officer

Justice Connect