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Committee Secretary
Department of the Senate
PO Box
Parliament House
CANBERRA ACT 2600

By email: charityfundraising.sen@aph.gov.au

Dear Committee Secretary

Submission to the Senate Select Committee on Charity Fundraising in the 21st Century

We welcome the opportunity to make a submission to the Senate Select Committee on Charity Fundraising in the 21st Century (the Committee). We have a limited role in the charities and not-for-profit sector and we have confined our comments to only those areas. We have not sought to respond to all of the issues raised in the terms of reference.

The Australian Competition and Consumer Commission (ACCC) is Australia's national competition and consumer protection enforcement agency. Our role is to enforce compliance with the *Competition and Consumer Act 2010* (CCA), including the *Australian Consumer Law* (ACL), with a view to ensuring that Australia's market economy works for the benefit of all Australians.

The first review of the ACL was completed by Consumer Affairs Australia and New Zealand (CAANZ) in 2017 (the ACL Review). The ACL Review, which involved extensive stakeholder consultation, considered the effectiveness of the provisions of the ACL and the national consumer policy framework. One of the ACL Review's recommendations agreed to by consumer affairs ministers through the Legislative and Governance Forum on Consumer Affairs (CAF) was for CAANZ to issue guidance to clarify the current application of the ACL to the charities, not-for-profits and fundraising sector (Charities Guidance) (NFP sector). The [Charities Guidance](#)¹ was published on 15 December 2017 and is at **Attachment A**.

Throughout the ACL Review and the subsequent review of the Australian Charities and Not-for-Profits Commission (ACNC) legislation (ACNC Review), a number of submissions argued that the ACL should be used to harmonise NFP sector regulation and decrease regulatory

¹ <https://www.accc.gov.au/publications/guide-to-the-acl-for-charities-not-for-profits-fundraisers>

burden on NFP sector participants. We expect that similar arguments will be made to the Committee.

We are supportive of harmonisation and reducing regulatory burden, however, we are strongly of the view that the ACL is not an appropriate vehicle for achieving these objectives for the NFP sector. There are at least two far superior ways to achieve national harmonisation in the NFP sector which are discussed below. Those that argue that the ACL is an appropriate substitute to sector specific legislation fundamentally misunderstand or misconstrue the purpose and legal basis of the ACL and its capacity to deliver the same protections afforded by current sector specific regulation.

The ACL is a national law which has flexibility to deal with issues arising across the economy. Notwithstanding this (and perhaps because of this), sector specific legislation at the state or national level is much more capable at, and suitable for, addressing and mandating standards of conduct, reporting and accountability in the NFP sector. As outlined in more detail below, the ACCC is concerned that substituting sector specific legislation with the ACL would leave large regulatory gaps and lead to less, not more, accountability and poorer, not improved, behaviour. Reduced accountability and a proliferation of poor behaviour will severely undermine the public trust and confidence on which the NFP sector relies.

It is open to state and territory governments to harmonise and modernise their NFP sector legislation and ensure that the regulations correctly balance public protection with regulatory burden. For example, national consistency could be achieved by states and territories adopting a uniform state code that applies to the NFP sector.

Very different protections and regulatory regimes

The ACL and state and territory fundraising legislation cover fundamentally different areas of regulation. Broadly speaking, the ACL prohibits misleading or deceptive conduct and specific forms of unfair practices in dealings between businesses and consumers. It applies consistently to all sectors of the economy.

Unlike state and territory fundraising legislation, the ACL does not mandate that NFP sector participants take specific positive courses of action. It does not require NFP sector participants adopt accountability or transparency measures.

In response to concerns of governments and the public, some state and territory NFP sector legislation contains specific probity and accountability measures designed to promote public trust and confidence in a sector that relies so heavily on voluntary contributions. These provisions include:

- Registration as a fundraiser, including eligibility and disqualification criteria²
- Conditions of registration as a fundraiser³
- Keeping certain records and accounts as fundraisers⁴
- Identification badges for collectors⁵
- Collection receptacles, including how they should be labelled and emptied⁶
- Financial reporting, including how particular portions of funds are to be used and how these reports are to be made⁷

² e.g. *Fundraising Act 1998 (VIC)*, Pt 3.

³ e.g. *Fundraising Act 1998 (VIC)*, s 19C.

⁴ e.g. *Fundraising Act 1998 (VIC)*, ss 29-31.

⁵ e.g. *Fundraising Act 1998 (VIC)*, s 9.

⁶ e.g. *Fundraising Act 1998 (VIC)*, ss 10-11.

- How proceeds of fundraising appeals should be spent⁸
- Certain details that must be disclosed in phone calls and letters⁹ and
- Requirements for direct debt request forms.¹⁰

The ACL is not designed to achieve such specific outcomes. It does not impose the licencing, financial reporting and other accountability requirements to which the NFP sector is currently subject and which seek to ensure good governance and accountability.

Trade or commerce thresholds for the ACL are appropriate

The ACL only captures fundraising activity that is in trade or commerce. Generally, as detailed in the Charities Guidance, if activities meet one or more of the following criteria, then these activities are likely to be within the definition of trade or commerce and therefore covered by the ACL:

- The fundraising activity involves the supply of goods or services, or
- The fundraising activity is engaged in by a for-profit fundraiser, or
- The fundraising activities are engaged in in an organised, continuous and repetitive way.

While the definition of ‘trade or commerce’ is broad, many activities the NFP sector engages in are unlikely to be in trade or commerce. Some stakeholders in the ACL and ACNC Reviews argued that references to trade or commerce in the ACL could be removed entirely or expanded to include words to the effect of ‘trade or commerce or charitable activity.’

However, the ACL is limited to trade or commerce for both Constitutional and sound policy reasons. It is one of the limited number of heads of power that the Commonwealth has to pass national laws. There is no Commonwealth ‘charities’ head of power that could be used to add to trade or commerce. Moreover, there are sound policy reasons to retain the ACL’s focus to commercial activity. Removal of the trade or commerce filter would undermine the constitutional validity of the ACL and have the effect of extending the application of the ACL to political activity, broader public debate and the activities of individuals not engaging in business. It would have broad regulatory and policy implications across all areas of the economy and significantly dilute the effectiveness of Australia’s consumer law and its enforcement.

An industry code under the Competition and Consumer Act is inappropriate for the NFP sector

A number of stakeholders in the ACL and ACNC Review raised the possibility of introducing a mandatory industry code under Part IVB of the CCA.

As explained above, the policy objectives of state-based NFP sector regulation are fundamentally different to the policy objectives of the CCA and of industry codes specifically. The [Industry Code Framework](#)¹¹ explains the factors that the government considers when deciding whether to introduce an industry code. Relevantly, it explains that the policy objectives of industry codes align with the broader policy objectives of the CCA and ACL to enhance the welfare of Australians through the promotion of competition and fair trading, by ‘recast[ing] fundamental CCA principles into more practical and relevant requirements to

⁷ e.g. *Fundraising Act 1998 (VIC)*, ss 12A and 12B.

⁸ e.g. *Charitable Fundraising Act 1991 (NSW)*, ss 20 - 21.

⁹ e.g. *Fundraising Act 1998 (VIC)*, ss 14 -15.

¹⁰ e.g. *Fundraising Act 1998 (VIC)*, s 15A.

¹¹ <https://treasury.gov.au/publication/p2017-t184652/>

directly address specific problems.¹² Industry codes do this by addressing market failures which need specific regulation; for example, problems arising from bargaining power imbalances, unfair transfer of commercial risk and information asymmetries between businesses. These objectives are fundamentally different to the accountability and probity objectives of state-based NFP sector legislation.

Further, a CCA industry code for the NFP sector would not cover the entire sector. This is because industry codes are subject to the same trade or commerce limitation as the ACL discussed above. This means that any mandatory industry code introduced under Part IVB would only be applicable to that subset of activities of a NFP sector participant that occur in trade or commerce. It would not lead to the industry-wide coverage and harmonisation that the NFP sector desires.

Finally, if the Committee considers it is more appropriate that states and territories remain responsible for the enforcement of NFP sector regulation, there is no mechanism provided for in the CCA or ACL to make states and territories solely responsible for enforcing a mandatory industry code.

Due to these limitations, we consider arguments for a mandatory industry code under the CCA as an appropriate way to deliver regulatory harmonisation are misplaced and would result in ineffective regulation of the NFP sector. There are a number of ways in which state and territory regulations can be harmonised and modernised that are not limited by these challenges.

The NFP sector would have to compete with the ACCC's other compliance and enforcement priorities

The ACCC covers significant ground in identifying and addressing behaviour and harms across all sectors with very limited resources. To illustrate, we receive over 250 000 contacts from the public each year, but we are only resourced to progress around 40 competition and 80 consumer in-depth investigations each year. Therefore, we operate under a strategic compliance and enforcement model, which focuses our attention and resources on those matters that will, or have the potential to, harm the competitive process or result in widespread and systemic consumer detriment.

We cannot develop the same expertise or apply the same focus as sector specific regulators. While state and territory fair trading agencies also have responsibility for ACL compliance, they too prioritise their activities having regard to broader responsibilities. If the ACL were to become the sole regulation in the NFP sector, there would be significantly less oversight and accountability in the sector than there is today. Further, given that we only pursue the matters that have the most impact on the community, many individual or smaller-scale issues would go unaddressed.

Regulating the NFP sector

There are at least two alternative ways to regulate the NFP sector that we consider far superior to amending the ACL or relying solely on the current ACL.

Expanding the role of and empowering the ACNC

The ACNC has an existing role in regulating the NFP sector. The ACNC Act could be amended to expand this role. Expanding the role and functions of the ACNC would allow for a nationally consistent approach to probity, financial reporting and accountability measures.

¹² *ibid*, p 1.

If this approach were adopted, it would be critical to ensure that the ACNC has the appropriate enforcement, compliance and investigative tools and adequate resources to provide meaningful oversight.

Adopting a uniform state code

Alternatively, if the Committee considers that it is more appropriate that states and territories remain responsible for NFP regulation and enforcement, then a uniform state code could be adopted in each jurisdiction. This would also provide a nationally consistent approach. As with expanding the role of the ACNC, it would be critical to ensure that the state and territory entities responsible for administering the code have the appropriate enforcement, compliance and investigative tools and adequate resources to provide meaningful oversight.

Should you wish to discuss this matter further, please contact Parnos Munyard on 02 6243 1339 or parnos.munyard@acc.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rod Sims', with a stylized, cursive script.

Rod Sims
Chair