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Mr Murray Crowe
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The Treasury
Langton Crescent
PARKES ACT 2600

Send by email: ACNCRewiew@treasury.gov.au

Dear Mr Crowe

Supplementary submission to the Review of Australian Charities and Not-for-profits Commission (ACNC) legislation

I write further to the submission of the Australian Competition and Consumer Commission (ACCC) dated 27 February 2018.

I note that a number of submissions received by the review panel argue that the Australian Consumer Law (ACL) should be used to harmonise charities and not-for-profit regulation and decrease regulatory burden on charities, not-for-profits and fundraising sector (NFP sector) participants.

While the ACCC is supportive of both harmonisation and reducing regulatory burden, the ACL is not an appropriate way to attempt to deregulate or harmonise laws in the NFP sector. 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 legislation and regulation.

If sector specific legislation is repealed and the ACL adopted as a purported substitute, this will leave large regulatory gaps and lead to less accountability and poorer, not improved, behaviour. This will severely undermine the public trust and confidence on which the NFP sector relies.

The issue of whether the NFP sector requires greater regulatory oversight than other sectors of the economy is a matter for Government. Deregulation should be done on its merits and following a cost-benefit assessment, and this assessment should not include the false premise that the ACL or an Industry Code can provide the same level or even similar levels of protection and oversight as the current sector specific regulation.

It is, and has always been, open to state and territory governments to harmonise and modernise their NFP sector legislation and ensure that the regulations correctly balance public protection and regulatory burden. These factors were weighed when the states and territories harmonised consumer protection laws in the ACL and there are other notable

examples of harmonisation in the areas of work health and safety, evidence law and the regulation of the legal profession.

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.

The ACL does not mandate that market participants take specific positive courses of action. It is not designed to provide for additional accountability and transparency measures for specific sectors.

In response to concerns of governments and the wider public, State and Territory based fundraising 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 criteria¹
- Conditions of registration as a fundraiser²
- Keeping of certain records and accounts by fundraisers³
- Identification badges for collectors⁴
- Collection receptacles, including how they should be labelled and emptied⁵
- Financial reporting, including how particular portions of funds are used and how these reports are to be made⁶
- How proceeds of fundraising appeals should be spent⁷
- Certain details that must be disclosed in phone calls and letters,⁸ and
- Requirements for direct debt request forms.⁹

The ACL was not designed with such micro-regulation in mind and it cannot replace the licensing, financial reporting and other accountability requirements to which the NFP sector is currently subject and which ensure good governance and accountability.

These significant regulatory gaps, which the ACL cannot fill, may ultimately allow for undesirable and harmful behaviour to occur in the NFP sector and so erode public trust.

Trade or commerce thresholds for the ACL are appropriate

The ACL already captures NFP sector activity that is in trade or commerce. As detailed in the Charities Guidance¹⁰ published by Consumer Affairs Australia and New Zealand (CAANZ) on 15 December 2017 which is attached at the end of this letter, generally if

¹ Eg, Fundraising Act 1998 (VIC), Pt 3.

² Eg, Fundraising Act 1998 (VIC), s 19C.

³ Eg, Fundraising Act 1998 (VIC), ss 29-31.

⁴ Eg, Fundraising Act 1998 (VIC), s 9.

⁵ Eg, Fundraising Act 1998 (VIC), ss 10-11.

⁶ Eg, Fundraising Act 1998 (VIC), ss 12A and 12B.

⁷ Eg, Charitable Fundraising Act 1991 (NSW) ss 20-21.

⁸ Eg, Fundraising Act 1998 (VIC), ss 14 and 15.

⁹ Eg, Fundraising Act 1998 (VIC), 15A.

¹⁰ https://www.accc.gov.au/system/files/guide_acl_fundraising-1.pdf

activities meet one or more of the following criteria, then those activities are likely to be within the definition of trade or commerce and therefore covered by the ACL:

- engage in a fundraising activity involving a supply of goods or services, or
- are a for-profit professional fundraiser, or
- are fundraising in an organised continuous and repetitive way.

While the definition of trade or commerce is broad, many of the activities the NFP sector engages in are unlikely to be in trade or commerce. Some submissions have 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 relies on to pass national laws. Moreover, there are sound policy reasons to maintain the ACL focus on commercial activity. Extension of the law to political activity or broader public debate or the activities of individuals not engaging in business would have broad regulatory and policy implications and significantly dilute the effectiveness of the consumer law and its enforcement.

An Industry Code is inappropriate for the NFP sector

A number of submissions have raised the possibility of introducing a mandatory Industry Code under Part IVB of the *Competition and Consumer Act 2010* (CCA).

As explained above, the policy objectives of the NFP sector regulation are fundamentally different from the policy objectives of the CCA and of Industry Codes specifically. The Industry Codes framework¹¹ explains the factors the government will take into account when considering 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. Industry Codes are designed to 'complement the objectives of the CCA 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 directly address specific problems.'¹² Industry Codes do this by addressing market failures which are in need of specific regulation; for example, problems arising from bargaining power imbalances, unfair transfer of commercial risk and information asymmetries between parties. These objectives are fundamentally different to accountability and probity objectives of State and Territory fundraising legislation.

Further, an industry code for the NFP sector is unlikely to cover the entire sector. This is because industry codes are equally subject to the same trade or commerce limitation as the ACL, which has been discussed above. This means that a mandatory Industry Code introduced under Part IVB would only be applicable when an NFP sector participant's conduct is in trade or commerce. This would not lead to the desired industry-wide coverage and harmonisation the sector desires.

Due to these two significant limitations, the ACCC considers arguments for a mandatory industry code under the CCA to deliver regulatory harmonisation are misplaced and would leave regulatory gaps undermining public trust in the sector. As above, there are a number of ways in which state and territory regulations can be harmonised and modernised which are not subject to the same challenges.

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

¹² *Ibid.*, 1.

The NFP sector will 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, the ACCC receives over 250 000 contacts from the public each year, but is only resourced to progress around 40 competition and 80 consumer in-depth investigations each year. We therefore 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 consumer detriment.

We cannot develop the same expertise or apply the same focus as industry 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 becomes the primary regulation in the NFP sector, we consider there will be significantly less oversight and accountability than there is today. Further, given the ACCC only pursues the matters that have the most impact on the community, many individual or smaller-scale NFP sector issues will not be addressed through ACCC intervention.

I understand you have had some contact with the ACCC in relation to these matters. Should you wish to meet or discuss this matter further, please contact Scott Gregson, Executive General Manager, Enforcement Division on 02 6243 1350 or scott.gregson@acc.gov.au.

Yours sincerely



Rod Sims
Chairman