



**Submission in relation to:**

# **Australian Consumer Law Review**

**Consumer Affairs Australia and New Zealand**

**The Treasury, Canberra**

**May 2016**

## Introduction

This submission outlines issues relating to the Australian Consumer Law Review and the associated Issues Paper. It has been informed by consultation with CCA members (listed in *Attachment A*) and key organisations in the charities and broader not-for-profit sector (NFP).

It is important to note that this submission does not override the policy positions outlined in any individual submissions from CCA members.

The content of this submission includes: a brief background to CCA; an overview of the current issues for the NFP sector; and a discussion of the issues associated with the potential application of Australian Consumer Law to the work of charities and the broader not-for-profit sector.

In principle, CCA supports the application of Australian Consumer Law to the activities of all NFPs, but not without further consultation and refinement of both the regulations and the enforcement of those regulations.

CCA welcomes this opportunity to provide input into the Australian Consumer Law (ACL) review and to engage in detailed discussion about any issues this submission raises.

## The Community Council for Australia

The Community Council for Australia is an independent non-political member based organisation dedicated to building flourishing communities by enhancing the extraordinary work undertaken by the charities and not-for-profit sector in Australia. CCA seeks to change the way governments, communities and not-for-profits relate to one another. It does so by providing a national voice and facilitation for sector leaders to act on common and shared issues affecting the contribution, performance and viability of NFPs in Australia. This includes:

- promoting the values of the sector and the need for reform
- influencing and shaping relevant policy agendas
- improving the way people invest in the sector
- measuring and reporting success in a way that clearly articulates value
- building collaboration and sector efficiency
- informing, educating, and assisting organisations in the sector to deal with change and build sustainable futures
- providing a catalyst and mechanism for the sector to work in partnership with government, business and the broader Australian community to achieve positive change.

Our success will drive a more sustainable and effective charities and not-for-profit sector in Australia making an increased contribution to the well-being and resilience of all our communities.

## **Context: not-for-profit reform**

The not-for-profit sector contributes over \$55 billion to GDP per annum, encompasses over 600,000 organisations - from large to very small, and is estimated to employ over one million staff (or 8% of all employees in Australia). Each year it turns over more than \$105 billion. It holds over \$175 billion in assets. In the last decade, sector growth has continued at more than 7% a year, greater than any other industry group.

These figures tell only a small part of the story. The real value of the NFP sector is often in the unmeasured contribution to Australian quality of life. NFPs are at the heart of our communities; building connection, nurturing spiritual and cultural expression, and enhancing the productivity of all Australians. Collectively, they make us a more resilient society.

The importance of the NFP sector is now being internationally recognised with many governments putting in place measures to increase NFP investment and productivity. Smaller government and bigger community is a common theme, driven in part by savings, but also by a commitment to greater civic engagement, social entrepreneurship and productivity within the NFP sector.

In Australia there are currently various initiatives seeking to: promote social enterprise; reduce compliance costs for NFPs; encourage a diversification of financing options to build a more sustainable funding base; streamline and refine the regulation of NFPs and charities; establish less bureaucratic reporting requirements while building community transparency; increase philanthropy; improve relationships between government and the NFP sector; promote impact investing; and increase sector performance measurement. CCA supports all these activities.

The establishment of the ACNC is the first time the NFP sector has had an independent regulator dedicated to serving their needs and enhancing their capacity. It has already proved to be a positive step towards red tape reductions, increased transparency, and trust in the community by prospective volunteers and donors. The national charities register has also provided invaluable information.

While the recent history of the NFP sector is framed by growth and reform, new issues are emerging. The level of individual philanthropic giving has still not recovered to the highs of 2009. At the same time, revenue available to governments is effectively falling in real terms against a backdrop of increasing demands and higher community expectations. Competition for fundraising and services has increased. In the context of recent changes, the NFP sector is slowly but surely finding its voice - building its collective power and seeking real reform that will provide substantial savings to government as well as tangible benefits to the community.

Given the size of the sector and its critical role in our community, it is not surprising that it is coming under increased scrutiny, particularly in relation to performance. This is not a new tendency. As pointed out in the 2010 Productivity commission *Report into Productivity in the Not-for-profit Sector*, creeping micro management by funders is undermining the capacity of organisations to respond to the issues of concern for the communities they serve.

Fundraising is one of the main interfaces between the broader not-for-profit sector and the community. There is increased pressure on NFPs to be able to raise money from the community. The issue of misleading and deceptive conduct has been raised in relation to a very small minority of fundraising activities, and it is this issue that this submission largely focuses upon.

## **Issues for the not-for-profit sector in the review of the ACL**

### **1. Should Australian Consumer Law be applied to charities and not-for-profit organisations?**

There is already some legal contention about whether the current Australian Consumer Law applies to the activities of NFPs, particularly in relation to fundraising. CCA see this uncertainty as counter-productive.

CCA would argue that the current ACL only partly applies consumer protection issues in relation to fundraising in particular. Where NFPs are providing goods and services there is clearly a consumer and a provider that can be subject to consumer law. Where no exchange of goods takes place, but donations are made, there is less clarity around whether the donor is a consumer, and if so, what goods or services are being provided.

The engagement of community members with a local charity could only rarely be described as a commercial trade, or the provision of services in a competitive marketplace. There are, however, some principles that transcend the exact nature of the interaction and go to the values and principles informing organisational engagement with the community members.

CCA believes that any organisation involved in misleading or deceptive or conduct should be subject to consumer law. This includes all charity and not-for-profit organisations.

The appropriate application of consumer law can only increase public trust and confidence in the NFP sector, and help support the vast majority of organisations that operate ethically and transparently in all their dealings with consumers and the broader community. NFPs deal in trust and are committed to maintaining and building public trust and confidence.

The real benefit of applying the ACL to not-for-profits is that it is relatively modern legislation (as opposed to the absurdly outdated fundraising regulations) and is currently administered by the same authorities that administer fundraising regulations. ACL also at least partially applies to the activities of charities already.

CCA also understands that Fair Trading Ministers around Australia are interested in playing a more significant role in fundraising. The ACL seems to be the appropriate legislative framework.

While supporting the application of ACL to not-for-profits, CCA is very concerned that there may be unintended consequences if all the provisions of consumer law are applied in a catch-all way across the whole NFP sector.

CCA is aware there may also be some technical issues in relation to a range of provisions including how donations and gifts are treated, etc. that may require further amendments to the ACL.

For this reason, CCA would like to see a carefully staged application of ACL to the NFP sector. This must involve active and ongoing consultation with the sector itself, the Australian Charities and Not-for-profit Commission (ACNC), and the various regulatory bodies at all levels of government.

### **2. Will the application of ACL increase the regulatory burden on NFPs?**

No-one in the NFP sector wants to increase red tape, duplication and compliance issues. As a sector it is already subject to over 100 different regulators (Productivity Commission Review 2010). The current fundraising regulatory framework is not only onerous, but also completely counter-productive with eight separate fundraising regulatory requirements.

CCA believes that the application of Australian Consumer Law to the NFP sector has the potential to reduce the regulatory burden imposed on all not-for-profit organisations engaged in fundraising and other community based activities. It is this reduction in regulatory burden that informs the CCA position in support of the application of consumer law to all not-for-profit organisations.

Achieving this reduction will require the various Fair Trading Regulators at a State and Territory level that currently administer fundraising legislation to adopt ACL and dispense with their existing fundraising regulations. It would also require the national adoption of the ACNC charities passport.

### **3. How can ACL provisions such as misleading and deceptive conduct provisions be applied to not-for-profits?**

There is often contention in relation to the application of broader principle based regulations such as the misleading or deceptive conduct provisions, particularly in relation to fundraising. What are the goods or services being provided, what is the trade or commerce, what is a reasonable expectation, what is misleading in relation to marketing and how donations are being used?

CCA would be concerned if predetermined or set metrics around issues such as fundraising returns compared to costs were applied across the not-for-profit sector.

The key to consumer protection is transparency. CCA is happy for appropriate consumer disclosure, but not if such disclosures become onerous or impractical. There is also the principle of proportionality. A very small charity running a local fundraiser should not have the same regulatory burden as a major national charity running a multi-million-dollar event.

Again, it is for this reason that CCA believes there should be a very carefully staged application of consumer law to all NFPs through a process that involves active and ongoing consultation with the sector itself, the ACNC, and the regulatory bodies at a national, State and Territory and local government level.

## **Conclusion**

There is genuine potential for the application of ACL across all not-for-profits to deliver real benefits to the community. Realising this potential will require further regulatory reform and further work and consultation with existing regulatory authorities, the ACNC and the NFP sector.

Continuing with the current dog's breakfast of duplicated and onerous regulations that applies to charitable fundraising is not an option, but the ACL offers a cleaner and more effective regulatory solution to concerns about fundraising and NFPs.

Applying the current Australian Consumer Law without appropriate consultation and engagement is not without challenges as it has the potential to create more issues than it addresses. A staged approach drawing heavily on key players including the NFP sector itself, has the potential to deliver real improvements in regulatory controls and consumer confidence.

Protecting the community and building trust and confidence is not just about ensuring fair competition in the provision of goods and services, it is also about providing a meaningful level of information and transparency. This can be achieved more readily within the framework of the ACL rather than creating separate regulations for the different levels of charitable activities (fundraising, donations, provision of goods or services, in kind donations, etc.).

CCA would welcome further discussion about the potential application of ACL across the NFP sector.

## **Current Membership – Community Council for Australia Attachment A**

### **Organisation**

2Realise

Access Australia's National Infertility Network

Alcohol Tobacco and Other Drugs

Arab Council Australia

Australian Charities Fund

### **Australian Council for International Development**

Australian Healthcare and Hospitals Association

Australian Indigenous Leadership Centre

Australian Institute of Superannuation Trustees

Australian Major Performing Arts Group

Australian Women Donors Network

Beyond Blue

Business Council of Co-operatives and Mutuals

Carers Australia

Centre for Social Impact

Church Communities Australia

Churches of Christ Community Care Vic/Tas

Community Based Support

Community Broadcasting Association of Australia

Community Colleges Australia

Compass Housing Co Ltd

Connecting Up Australia

### **Drug Arm**

e.motion21

Ethical Jobs

EveryMan

Foresters Community Finance

Foundation for Alcohol Research and Education

Foundation for Young Australians

Fundraising Institute of Australia

Good Samaritan Foundation

### **Director / CEO**

Rowena Stulajter

Sandra Dill

Carrie Fowlie

Randa Kattan

Jenny Geddes

### **Marc Purcell (Director)**

Alison Verhoeven

Rachelle Towart

Tom Garcia

Bethwyn Serow

Julie Reilly

Georgie Harman

Melina Morrison

Ara Cresswell

Andrew Young

Chris Voll

Gabriel Hingley

Murray Coates

Jon Bissett

Don Perlgut

Greg Budworth

Anne Gawen

### **Dr Dennis Young (Director)**

Claire Vissenga

Michael Cebon

Greg Aldridge

Rhyll Gardner

Michael Thorn

Jan Owen

Rob Edwards

Catherine Cresswell

Good2Give	Lisa Grinham
HammondCare	Stephen Judd
<b>Hillsong Church</b>	<b>George Aghajanian (Director)</b>
Justice Connect	Fiona McLeay
<b>Life Without Barriers</b>	<b>Claire Robbs (Director)</b>
Lifeline Australia	Pete Shmigel
Maroba Caring Communities	Viv Allanson
Mater Foundation	Nigel Harris
<b>Mission Australia</b>	<b>Catherine Yeomans (Director)</b>
Missions Interlink	Pam Thyer
<b>Musica Viva</b>	<b>Mary Jo Capps (Director)</b>
Opportunity International Australia	Robert Dunn
Our Community	Denis Moriarty
Palliative Care Australia	Liz Callaghan
Philanthropy Australia	Sarah Davies
Port Phillip Housing Association	Karen Barnett
Power Housing Australia	Julie Quass
Pro Bono Australia	Karen Mahlab
Reach Foundation	Trisha Squires
<b>RSPCA Australia</b>	<b>Heather Neil (Director)</b>
SANE	Jack Heath
SARRAH	Rod Wellington
<b>Save the Children Australia</b>	<b>Paul Ronalds (Director)</b>
Scope (Vic)	Jennifer Fitzgerald
Settlement Services International	Violet Roumeliotis
SHOUT	Darryl Smeaton
Social Ventures Australia	Rob Koczkar
St John Ambulance Australia	Robert Hunt
The Benevolent Society	Joanne Toohey
The Big Issue	Steven Persson
The Fragile X Association of Australia	Wendy Bruce
The Non Profit Alliance	Kelly Beaumont

**The Smith Family**

The Ted Noffs Foundation

Variety Australia

**Volunteering Australia**

**Wesley Mission**

White Ribbon Australia

**World Vision Australia**

YMCA Australia

Youth Off The Streets

**Lisa O'Brien (Director)**

Matthew Noffs

Neil Wykes

**Brett Williamson (Director)**

**Keith V Garner AM Mth (Oxon)  
(Director)**

Libby Davies

**Tim Costello (Chair)**

Ron Mell

Fr Chris Riley