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Fundraising Regulation

Compliance in a changing landscape



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1 INTRODUCTION

For charities and not-for-profit entities ('NFPs') in Australia, fundraising legal compliance is tricky to navigate and almost impossible to fully comply with, particularly in the age of online fundraising. Not only are NFPs often faced with outdated and archaic fundraising laws within their primary State of operation, the same entities are also faced with having to comply with fundraising laws of other states should they wish to fundraise cross-border. The "world wide web" is cross-border.

Current State (and Territory) fund raising regulation appears to be "stuck" in a bygone era of an army of volunteer "door knockers" with identification badges, constrained by the geography of the streets they are assigned, trained in the dos and don'ts of the appropriate 'ask' and planned months in advance.

Today a crowd-funding web page can be set up overnight to help support a person in 'distress', cross promoted across multiple social media platforms (even during live TV), and rapidly ramped up by pay-per-click advertising. The campaign may be 'done and dusted' before donors can cry 'foul' or regulators take a second (or even a first) look at what is going on.

Today paid commercial fundraisers and their army of paid workers (**chuggers**) work the streets of our larger cities and towns, clothed in the colourful t-shirts of well known charities, with very little real transparency into just how much of what you might put into their bucket may actually make its way back to the charity and then into front line charitable services.

Even leaving aside the issue of transparency with 'chuggers', the Deloitte Access Economics: Final Report, *Cutting Red Tape: Options to align state, territory and Commonwealth charity regulation*¹, issued in February 2016, estimates that the annual red tape cost to charities of seeking to comply with the disparate fundraising regulation on a State by State basis is \$15.1M per annum.

The practice of fundraising compliance has been criticised By Justice Connect as inefficient, wasteful and costly.² They, along with others, in their recent *#fixfundraising* campaign have been advocating for the repeal of State (and Territory) based fundraising regulation and the amendment of the Australian Consumer Law (ACL) to ensure the application of the ACL to almost all fundraising activities.

The recent review of the Australian Consumer Law, which also and in addition to the State (and Territory) based regulation, also applies to much fundraising activity, recognised the application of this legislation to much fundraising activity. However the final review report³ by Consumer Affairs Australia and New Zealand (CAANZ) stopped well short of recommending immediate amendments to the ACL. The approach of the report is immediate Regulatory Guidance and a further review of the assessment of the effectiveness of that guidance in 2019-20.

This paper is designed to bring readers up to date with fundraising regulation in Australia. **Part I** of this paper will define the extent of regulated activities in Australia and explore operating State and Territory fundraising laws and regulations. Part I will also consider limits of commercial fundraising commissions in the supply chain and cross border fundraising.

Part II will then move to examine Schedule 2 of the *Competition and Consumer Act 2010* (Cth) ('CCA'), the *Australian Consumer Law* ('ACL'), the relationship between consumer protection and

¹ <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-cutting-red-tape-align-charity-regulation-230216.pdf>

² See Justice Connect, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review – Interim Report*, 9 December 2016.

³ https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf

charitable fundraising and when the ACL currently does and does not apply. This part will also consider the recent Belle Gibson case.

Lastly, **Part III** will consider the recently published Justice Connect *Statement on Fundraising Law Reform* as well as the Australian Government's recent response to the Consumer Affairs Australia and New Zealand ('CAANZ') Interim Report, and make some observations about the suggested reform pathway.

PART I – STATE AND TERRITORY FUNDRAISING REGULATION (INCLUDING LIMITS ON COMMERCIAL FEES FOR THE SUPPLY CHAIN)

2 THE STATES AND TERRITORIES - SUMMARY

With the exception of the Northern Territory, all Australian jurisdictions have their own legislation which regulates charitable fundraising. What I do not deal with in this paper are local authority laws that often place additional requirements on street and door to door collections; and nor do I deal with obligations under lotteries and gaming legislation.

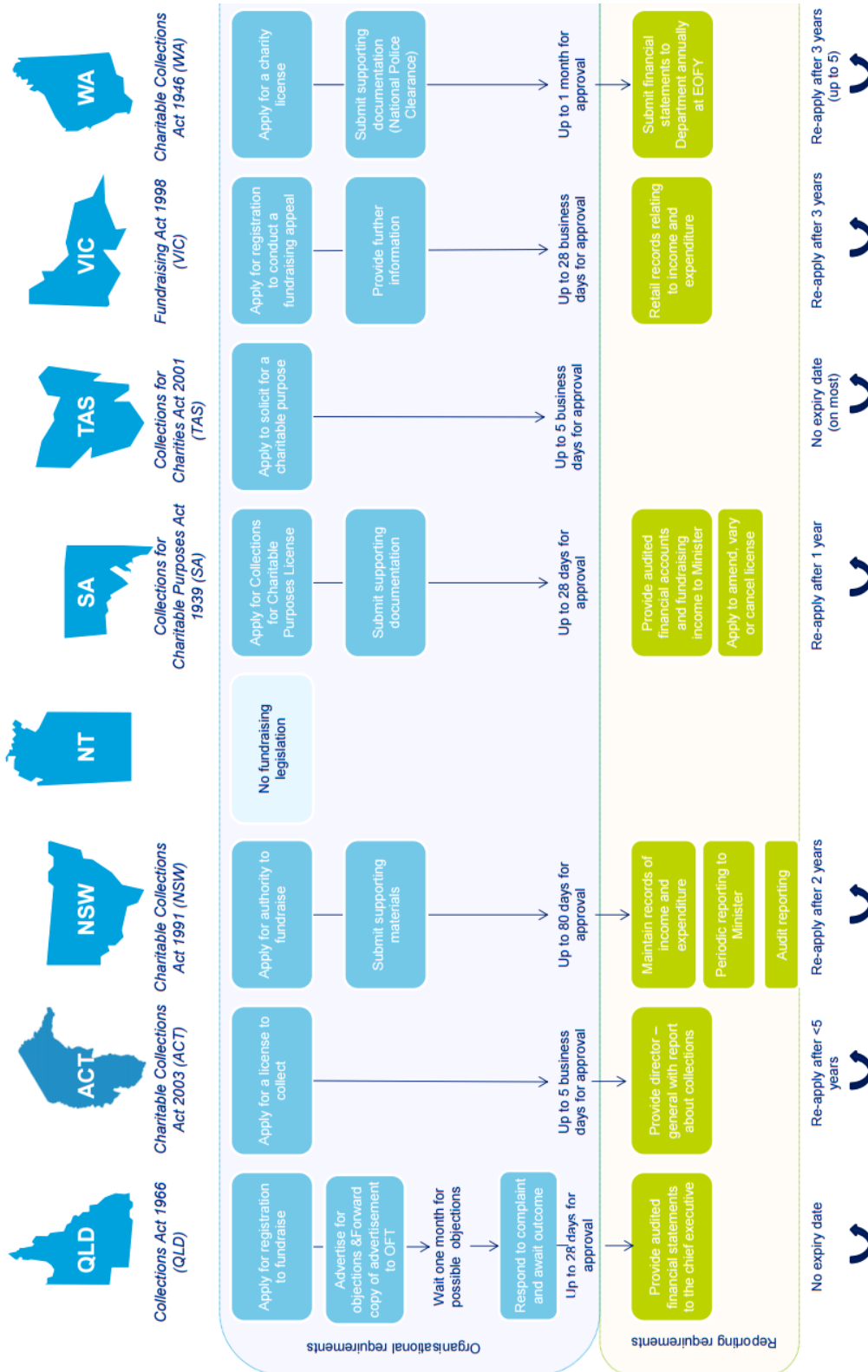
The criticism of State by State regulation is that there is a 'lack of uniformity ... because of the varying antiquity or modernity of the legislation'.⁴

The format of this part of my paper will be unconventional. In order to facilitate comparison between the jurisdictions headings are used with short and to the point comments following.

The questions always arises for a charity based in one State who wants to fundraise though their web site - do they need to obtain a fundraising licence in each State and the Territory (ACT) simply because their web site can be viewed and responded to by donors in those other states? As far as I am aware, no State or Territory regulator has run a prosecution for failure to do so and perhaps for good reason. Read on.

⁴ LexisNexis, *Australian Encyclopaedia of Laws and Precedents*, vol 85 (at June 2014) Charities, 'Regulation of fundraising for charities' [230].

The following diagram⁵ provides a snapshot:



⁵ Source: <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-cutting-red-tape-align-charity-regulation-230216.pdf>

3 QUEENSLAND: COLLECTIONS ACT 1966 (QLD) AND COLLECTIONS REGULATIONS 2008 (QLD)

- 3.1 **Regulator** = the Queensland Office of Fair Trading.
- 3.2 **Purpose** = “An Act relating to collections from the public for purposes of charity and otherwise of the community, and for other purposes.”⁶
- 3.3 **Regulated activity** = an ‘appeal for support’⁷ at least in part for a charitable or community purpose.⁸ An ‘appeal for support’ is defined under section 5 of the Act as any expressed or implied **invitation to the public** designed to obtain money or articles for a charitable or community purpose.⁹
- 3.4 **Interstate observation** → “Receiving” is not included as it is in other states. Is an “invitation” made in Queensland if there is no other connection with Queensland other than a web site hosted in another State, able to be viewed and in Queensland and donated to via a resident of Queensland?
- 3.5 **Regulated person** = any person making an appeal for support (charities, not-for-profits, officer holders, agents).
- 3.6 **Key operative provision** =
- 10 Conducting of unlawful appeals for support**
- (1) *No person shall make or cause to be made or assist in making any **appeal for support** for any purpose to which this part applies unless—*
- (a) *where the appeal for support is made for the purpose of a **charity only**—that **charity is then registered** as such **under this Act**;*
- (b) *where the appeal for support is made for the purpose referred to in section 9(b) to (g)—that purpose is then **sanctioned** under this Act.*
- 3.7 **Religious exception** = appeals for support by religious denominations¹⁰ solely for the purpose of advancing that religion.¹¹
- 3.8 **Charity**¹² =
- charitable purpose** means any 1 or more of the following purposes—
- (a) *a purpose which is exclusively charitable according to the law (other than statute law) of Queensland;*
- (b) *the supplying of help, aid, relief, or support to, or the education or instruction (whether spiritual, mental, physical, technical, social, or otherwise) of, or the care, housing, or assistance otherwise of, any persons in distress;*
- (c) *the aiding in any manner howsoever, of any hospital or ambulance or nursing service in the State, whether established or proposed to be established;*
- (d) *any charity;*

⁶ From the preamble to the Act

⁷ s10 of the Act

⁸ s9 of the Act

⁹ Ibid.

¹⁰ This in turn is given a particular meaning under the Marriage Act.

¹¹ Ibid s 6(2).

¹² s5 of the Act. The Act also applies to community purpose fundraising that is not for charity.

(e) any purpose which, pursuant to subsection (2), the Minister determines to be a charitable purpose;

(f) a purpose declared under a regulation to be a charitable purpose for this Act.

charity means any association established for any charitable purpose, and includes any association which, pursuant to subsection (2), the Minister determines to be a charity as well as associations declared to be charities under a regulation, but does not include any association established for any charitable purpose as well as some other purpose, nor any association established for the purpose of making 1 appeal for support only.

3.9 **Local address** ≠ (i.e. no requirement)

3.10 **Separate bank account** = funds from appeals must be banked to a dedicated bank account and all expenses (including commissions) paid out of that same account (with some concession when the running of the campaign is outsourced to paid fundraisers).¹³

3.11 **Limits on commercial fees (example)** = Advertising by paid fundraisers needs to provide particulars of the beneficial arrangements in favour of the paid fundraiser and pre-approved by the OFT.¹⁴

3.12 **Surprising bits** =

3.12.1 The Act contains extensive machinery for the establishment and operation of a State Disaster Relief Fund.

3.12.2 Agreement with paid fundraisers must not just be in writing, but also approved by the Minister.¹⁵

3.13 **Outdated / conflicting bits (some)** =

3.13.1 No mention of fundraising over the internet.

3.13.2 The Act doesn't apply to "appeals for support by religious denominations solely for the purpose of advancing that religion"¹⁶ but then does apply to "door-to-door appeal or street collection for any such purpose made by or on behalf of any religious denomination."¹⁷

3.13.3 The Minister under the Act can grant exclusive IP rights to "distribute or dispose of a device in connection with all or any appeals for support."¹⁸ The OFT confirmed via telephone on 8 May 2017 that no such grants have been made and therefore there is no register of them.

3.13.4 Any member of the public may object to application for registration of a charity under the Act on the basis that the objects of the charity are already covered by another already registered charity.¹⁹

3.13.5 Notice of paid collectors' itineraries (in detail) must be given to the Minister 14 days in advance.²⁰

3.13.6 Envelope collections can only be collected if they are closed.²¹

¹³ Reg 34

¹⁴ Reg 35

¹⁵ Reg 33

¹⁶ s9 of the Act

¹⁷ s14A of the Act

¹⁸ Part 5 of the Act and Part 5 of the Regs

¹⁹ Reg 5

²⁰ Reg 20

²¹ Reg 22

- 3.13.7 Loss of earning allowance for people required for evidence on investigation = \$10.50 / day.²²
- 3.13.8 Expenditure over \$100 must be approved or ratified by the governing body of the fundraiser.²³
- 3.14 **Qld Register** → <https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/check-a-licence-association-charity-or-register/check-a-charity-or-association/>
- 3.15 **Query** → **Constitutional law issue** → just because a non-Queensland based charity, that has no physical presence in Queensland, makes an appeal on its web site hosted on a server not in Queensland that is able to be viewed and responded to by Queensland residents, is that charity making an appeal for support (invitation to the public) in Queensland, to which the Queensland law can respond? There are no people, infrastructure or conduct in Queensland by the fundraiser. There may well be Constitutional issues here for further consideration including:
- 3.15.1 **Ex Territorial affect of laws** (the degree of connection with Queensland required). As a general principle the law making of a State is to be for the peace, welfare (or order) and good government of the State.
- 3.15.2 **Competing State Law / Conflict of law issues** when the laws of more than one State purport to regulate the same activities. Halsbury's Laws of Australia provides this summary – "Although the (CTH) Australia Act 1986 (the 'Act') declares that each State Parliament has power to make laws having an extraterritorial operation, such laws are still required to be 'laws for the peace, order and good government of that State'. Notwithstanding the Act, each of the States may be subject to a territorial limitation implicit in the Commonwealth Constitution, a limitation designed to curtail intrusion by a State into the affairs of the other States. However, a State may legislate in respect of matters and things occurring elsewhere in Australia if there is still a substantial connection with the State in question."²⁴
- 3.16 This same Constitutional law issue could be raised under each State.

²² Reg 28

²³ Schedule 2, item 2 of the Regs

²⁴ Halsbury's Laws of Australia, Legislative Powers of the States, Para 90-1215

4 NEW SOUTH WALES: CHARITABLE FUNDRAISING ACT 1991 (NSW), CHARITABLE FUNDRAISING REGULATION 2015 (NSW)

4.1 **Regulator** = NSW Fair Trading

4.2 **Purpose** = “The objects of this Act are:

(a) to promote proper and efficient management and administration of fundraising appeals for charitable purposes, and

(b) to ensure proper keeping and auditing of accounts in connection with such appeals, and

(c) to prevent deception of members of the public who desire to support worthy causes.”²⁵

4.3 **Regulated activity** = a ‘fundraising appeal’ for a charitable purpose²⁶. “Fundraising appeal” is defined in s5 – “the **soliciting** or **receiving** by any person of any money, property or other benefit” for a purpose that includes a charitable purpose.

4.4 **Interstate observation** → Does a person “solicit” or “receive” in NSW if there is no other connection with NSW other than a web site based in another State able to be viewed in NSW? Arguably not. “Receive” is not defined and so takes its ordinary meaning, defined in the Macquarie Dictionary as, “to take into one’s hand or one’s possession (something offered or delivered)”. The context of its use is consistent with this meaning.

4.5 **Regulated person** = A person who conducts a fundraising appeal²⁷ (including those who participate in it²⁸)

4.6 **Key operative provision** =

9 Conducting unlawful fundraising

(1) A person who conducts a **fundraising appeal** is guilty of an offence unless the person:

(a) is the holder of an authority authorising the person to conduct the appeal, or

(b) is a member of an organisation, or an employee or agent of a person or organisation, that holds such an authority and is authorised, by the person or organisation that holds the authority, to conduct the appeal ...

4.7 **Religious exception** = religious body (or affiliated body)²⁹

4.8 **Charity** = “Charitable purpose” is defined without any great length to include any benevolent, philanthropic or patriotic purpose.³⁰

4.9 **Local NSW address needed** → a local address is needed but the wording of the section leaves open this being the address of an agent.³¹

4.10 **Separate bank account**³² = funds from appeals must be banked to a dedicated bank account operated by **not fewer than 2 persons jointly** (even electronically).

²⁵ s3 of the Act

²⁶ s9 of the Act

²⁷ s9 of the Act

²⁸ s6 of the Act

²⁹ s7 of the Act

³⁰ Ibid s 4.

³¹ s15(2) of the Act

³² s20(6) of the Act

- 4.11 **Limits on commercial fees** = Commissions paid or payable to any person as part of a fundraising appeal must not exceed one-third of the gross money obtained by that person in the appeal.³³
- 4.12 **Surprising bits** =
- 4.12.1 The charity, not the regulator, must produce financial statements of fundraising appeals during the previous financial year, to any person within 30 days of request.³⁴
 - 4.12.2 Remuneration of board members of fundraising charities (with the exception of ministers of religion) is prohibited unless approved by the Minister.³⁵
 - 4.12.3 Offences (breaches of the Act) by corporations attach to the directors personally if they knowingly authorized or permitted the contravention.³⁶
 - 4.12.4 Changes to charitable objects must be notified to the regulator.³⁷
- 4.13 **Outdated bits** =
- 4.13.1 There is no mention of fundraising over the internet. Where the person is participating in the fundraising appeal by phone, email, mail or any other means which is not face-to-face, and that person is remunerated for the fundraising, he or she must disclose this to the person being solicited whether requested to or not.³⁸
- 4.14 **NSW Register** → <https://www.onegov.nsw.gov.au/PublicRegister/#/publicregister/categories>

³³ s10(6) of the Regs

³⁴ s47(1) of the Act

³⁵ s48 of the Act

³⁶ s51(1) if the Act

³⁷ s16(1) of the Regs

³⁸ Ibid reg 14(a)-(b).

5 VICTORIA: FUNDRAISING ACT 1998 (VIC) FUNDRAISING REGULATIONS 2009 (VIC)

5.1 **Regulator** = Consumer Affairs Victoria.

5.2 **Purpose** = “The purpose of this Act is to regulate the raising and application of money and other benefits for non-commercial purposes from the public.”³⁹

5.3 **Regulated activity** = ‘fundraising appeal’⁴⁰ for the benefit of others in the public interest⁴¹ -

*A fundraising appeal occurs if a person **solicits** or **receives** money or a benefit on the basis of a representation that the soliciting or receiving is not solely for the profit or commercial benefit of the person or any other person, cause or thing on whose behalf the person is soliciting or receiving the money or benefit. [Section 5(1)]*

*Without limiting the generality of the meaning of **public interest**, for the purposes of this Act a fundraising appeal is not conducted in the public interest if, in the opinion of the Court or the Director, as the case may be, the expenses payable in respect of the appeal in a particular period exceed a reasonable proportion of the total amount raised in that period. [Section 6B of the Act]*

5.4 **Interstate observation** → Does a person “solicit” or “receive” in Vic if there is no other connection with NSW other than a web site based in another State able to be viewed in Vic? Arguably not. “Receive” is not defined and so takes its ordinary meaning, defined in the Macquarie Dictionary as, “to take into one’s hand or one’s possession (something offered or delivered)”. The context of its use is consistent with this meaning.

5.5 **Regulated person** = fundraiser (including participants⁴² in a fundraising appeal by the meaning of “conduct”).

5.6 **Key operative provision** =

17A Fundraisers must be registered

*Subject to Division 1, a person must not **conduct a fundraising appeal** unless she or he is registered by the Director as a fundraiser.*

5.7 **Religious exception** = a religious organisation⁴³ unless a commercial fundraiser is involved.⁴⁴

5.8 **Charity** = ‘charity’ and ‘charitable purpose’ are not defined as the Act captures a broader range of fundraising.

5.9 **Local presence (address) in Victoria of the fundraiser** = the language of the Act goes further than other states, requiring more than just presence via an agent – “*if the person is a natural person, her or his residential or principal business address in Victoria; ... if the person is a corporation, the address in Victoria of its registered office or principal place of business.*”⁴⁵ Additionally see the location requirement for accounts and records and place of inspection⁴⁶ of them by any person.

5.10 **Separate bank account** = funds from appeals must be banked to a dedicated bank account (or a general bank account with ‘trust account type’ record keeping, with an account name

³⁹ s1 of the Act

⁴⁰ s5 of the Act

⁴¹ s19A(2)(c) of the Act

⁴² s6 of the Act

⁴³ s16(1) again by reference to the Marriage Act

⁴⁴ s16B of the Act

⁴⁵ s18(2) of the Act

⁴⁶ s33(5) of the Act

that indicates that it contains fundraising appeal monies, only able to be drawn upon by cheque signed by at least 2 people.⁴⁷

- 5.11 **Limits on commercial fees** = the expenses payable in respect of the appeal in a particular period exceed a reasonable proportion of the total amount raised.⁴⁸
- 5.12 **Surprising bits** =
- 5.12.1 Written consent of intended beneficiaries is required. *“An application for registration as a fundraiser must be accompanied by— (a) the written consent to an intended appeal of each intended beneficiary of the appeal.”*⁴⁹
- 5.12.2 *“The registered fundraiser must notify the Director in writing of the retention of the commercial fundraiser within 28 days after entering into the retention agreement with the commercial fundraiser.”*⁵⁰
- 5.12.3 From 4 May 2009, if a business represents that a portion of a “sale” is to be given away, before each sale contract is formed, written disclosure must be made of the percentage or dollar amount to be given away.⁵¹
- 5.13 **Outdated / conflicting bits** =
- 5.13.1 There is no mention of fundraising over the internet, but national appeals are contemplated with records not needing to specifically identify Victoria activities.⁵²
- 5.13.2 A bank account can only be drawn upon by cheque signed by at least 2 people?
- 5.13.3 *“A person conducting a fundraising appeal must ensure that any records or accounts that the person is required to keep under this Part are stored at all times in Victoria at the address or the registered office or principal place of business of the person”*⁵³ Query: Where is the cloud?
- 5.14 **Vic Register** → <https://www.consumer.vic.gov.au/clubs-and-not-for-profits/fundraisers/search-for-a-registered-fundraiser>
- 5.15 **Patriotic funds** → See the Veterans Act 2005 (Vic). I have not dealt with patriotic funds in this paper.

⁴⁷ s27 of the Act

⁴⁸ s6B of the Act and other operative provisions

⁴⁹ s18A(1) of the Act

⁵⁰ s24A(2) of the Act

⁵¹ s12A of the Act

⁵² s29(2) of the Act

⁵³ s31(1) of the Act

6 WESTERN AUSTRALIA: CHARITABLE COLLECTIONS ACT 1946 (WA), CHARITABLE COLLECTIONS REGULATIONS 1947 (WA); AND STREET COLLECTIONS (REGULATION) ACT 1940, STREET COLLECTIONS REGULATIONS 1999 (WA)

- 6.1 **Regulator** = Department of Commerce, Consumer Protection Division. The regulation of fundraising in Western Australia is governed by two pieces of legislation: *Charitable Collections Act 1946* (WA) (CC Act) and *Street Collections (Regulation) Act 1940* (WA). I will focus on the former.
- 6.2 **Purpose** = “An Act to provide for the regulation and control of the collection of money or goods for charitable purposes ...”⁵⁴
- 6.3 **Regulated activity** = ‘collecting’ for charitable purpose.
- 6.4 **Interstate observation** → If the collecting bank for the charity is not in WA and there is no other presence in WA other than a web site hosted in another Australian jurisdiction, only able to be viewed in WA, I suggest that the CC Act is not enlivened.
- 6.5 **Regulated person** = any person making an appeal for support (charities, not-for-profits, officer holders, agents).
- 6.6 **Key operative provision** =
- 6. Restriction on certain collections**
- (1) *No person shall —*
- (a) *collect or attempt to collect any money or goods for any charitable purpose; ... unless he is —*
- (e) *the holder of a licence under this Act ...*
- 6.7 **Religious exception** ≠ (i.e. none)
- 6.8 **Charity**⁵⁵ =
- charitable purpose** means —
- (a) the affording of relief to diseased, sick, infirm, incurable, poor, destitute, helpless or unemployed persons, or to the dependants of any such persons;
- (b) the relief of distress occasioned by war, whether occasioned in Western Australia or elsewhere;
- (c) the supply of equipment to any of His Majesty’s naval, military, or air forces, including the supply of ambulances, hospitals and hospital ships;
- (d) the supply of comforts or conveniences to members of the said forces;
- (e) the affording of relief, assistance or support to persons who are or have been members of the said forces or to the dependants of any such persons;
- (f) the support of hospitals, infant health centres, kindergartens and other activities of a social welfare or public character;
- (g) any other benevolent, philanthropic or patriotic purpose.”
- 6.9 **Local address** ≠ (i.e. no requirement)

⁵⁴ Preamble to CC Act

⁵⁵ s5 of the CC Act

- 6.10 **Separate bank account** = funds from appeals must be banked to a dedicated bank account and operated by authority signed by 2 officers of the organization.⁵⁶
- 6.11 **Limits on commercial fees** =
- 6.11.1 The advisory committee may recommend to the Minister that a licence be revoked if they are of the view that fees of commercial fundraisers are excessive.⁵⁷
- 6.11.2 The Permit for street collecting must authorize payment of collectors.⁵⁸
- 6.12 **Outdated bits (some)** =
- 6.12.1 There is no mention of fundraising over the internet.
- 6.12.2 Consideration in granting a licence is whether there is another charity who could more effectively do the fundraising.⁵⁹
- 6.12.3 “*[P]resent war means the war in which His Majesty was engaged commencing on 3 September 1939.*”
- 6.12.4 The penalty for unlawful fundraising is \$100.⁶⁰ This seems to be so low as to make it effectively meaningless.
- 6.13 **WA Register** → <https://www.commerce.wa.gov.au/consumer-protection/list-licensed-charities>

⁵⁶ Reg 11 CC Regs

⁵⁷ s13(2) of the CC Act

⁵⁸ Reg 11(1) of the Street Collections Regs

⁵⁹ s11(2) of the Act

⁶⁰ s6(2) of the CC Act

7 SOUTH AUSTRALIA: COLLECTIONS FOR CHARITABLE PURPOSES ACT 1939 (SA) AND CODE OF PRACTICE

7.1 **Regulator** = Attorney General's Department (Consumer & Business Services).

7.2 **Code of Practice**⁶¹ = http://www.cbs.sa.gov.au/assets/files/Charities_CodeofPractice_2017.pdf

7.3 **Purpose** = "An Act to provide for the control of persons soliciting money or property for certain charitable purposes; and for other purposes."⁶²

7.4 **Regulated activity** = 'collectors' for charitable purpose

7.5 **Regulated person** = persons who acts as a 'collector' -

***collector**—a person acts as a collector if the person (either personally or through the agency of another person)—*

*(a) **collects**, or attempts to collect, money or property wholly or partly for a charitable purpose;*

(b) charges, or attempts to charge, for admission to an entertainment in relation to which it is held out that the proceeds are to be devoted wholly or partly to a charitable purpose; or

*(c) **obtains**, or attempts to obtain, money wholly or partly for a charitable purpose by the sale of a disc, badge, token, flower, ribbon or other device; or*

*(d) **obtains**, or attempts to obtain, a bequest, devise or other grant of money or property wholly or partly for a charitable purpose." [Section 4 of the Act]*

7.6 **Interstate observation** → Is "collection" made, or money "obtained" in SA, if a charity's collecting bank is not in SA and there is no other connection with SA other than a web site hosted in another State, able to be viewed in SA? The "obtain" language taken together with the Code of Practice - *If a charity **allows an ongoing collection agreement to be made over the internet** – may seek to extend the regulation beyond the SA borders.*

7.7 **Key operative provision** =

6 Collectors must be authorized by licence

*... [A] person must not act as a **collector** unless the person holds, or is authorised by the holder of, a section 6 licence ..."*

Note: Section 6A – if a paid collector engages others (including volunteers) to help in the collection; the paid collector has to hold an s6A licence.

7.8 **Religious exception** ≠ (i.e. no exemption)

7.9 **Charity**⁶³ =

***charitable purpose** means—*

(aa) the provision of, or assistance or support to the provision of, health services

(within the meaning of the Health Care Act 2008) or research in the field of

⁶¹ Compliance with a condition of licence grant

⁶² Preamble to the Act

⁶³ s4 of the Act

health or such health services;

(a) the affording of relief, assistance or support to diseased, disabled, sick, infirm, incurable, poor, destitute, helpless, or unemployed persons, or to the dependents of any such persons;

(b) the relief of distress occasioned by war, whether occasioned in South Australia or elsewhere;

(e) the affording of relief, assistance, or support to persons who are or have been members of the armed forces of Australia or to the dependents of any such persons;

(f) the provision of welfare services for animals.”

- 7.10 **ACNC charity** = An ACNC registered charity and while so registered is taken to hold an s6 licence.⁶⁴
- 7.11 **Local address** ≠ (i.e. no requirement)
- 7.12 **Separate bank account** ≠ (i.e. no requirement)
- 7.13 **Internet fundraising** = Express treatment of internet fundraising in the Code of Practice.

8 Ongoing collection agreements

In relation to ongoing collection agreements the following requirements apply:

(1) *If a charity contacts a potential donor by **telephone** to negotiate an ongoing collection agreement, the following information must be provided to the potential donor, prior to the agreement being made ...*

(2) *If a charity **allows** an ongoing collection agreement to be made **over the internet**, the following information must be provided to the potential donor on the same page as that on which the donor confirms and accepts the terms of the agreement:*

(a) the amount of the proposed ongoing donation; (b) the annual cost to the donor; (c) the proposed frequency of the ongoing donation; (d) a statement that the donor has a right to terminate an ongoing collection agreement at any time; and (e) details about how the donor can terminate the ongoing collection agreement.

(3) *Within ten business days of the agreement being made, the charity must provide to the donor, written confirmation of the terms of the agreement. If an ongoing collection agreement is entered into by telephone or internet, the charity must provide the donor with written confirmation of the agreement by email or post.*

(4) *Written confirmation must include:*

(a) the amount of the agreed ongoing donation; (b) the annual cost to the donor; (c) the frequency of the agreed ongoing donation; (d) the date of the commencement of the agreement; (e) a statement that the donor has a right to terminate an ongoing collection agreement at any time; and (f) details about how the donor can terminate the ongoing collection agreement.

⁶⁴ s6(3) of the Act

(5) Upon receipt of a termination notification from a donor with an ongoing collection agreement, the charity must immediately terminate that agreement.

(6) Any donation collected after receipt of notification from a donor to terminate an ongoing collection agreement must be refunded within ten business days.

(7) Any termination of an ongoing collection agreement must be confirmed in writing by email or post to the donor within ten business days of the donor's request to terminate the agreement.

9 Promotion of collection activities

A charity must ensure the promotion of collection activities complies with the following requirements:

(1) **charity websites** must include either on the home page, or by way of a link from the home page, the following details:

(a) the charity's name; (b) the purpose for which funds are being collected; and (c) contact details of the charity.

...

(5) **internet advertising** must include the following details:

(a) the charity's name; (b) the purpose for which funds are being collected; and (c) the charity's website (if any).

7.14 Limits on commercial fees =

Licences can be revoked by the Minister for excessive commissions to paid collectors including the ACNC charity deemed licence.⁶⁵

7.15 Surprising bits =

Obtaining bequests is caught by the legislation⁶⁶. This is usually an exemption in the other states.

7.16 Outdated bits =

7.16.1 Tightly prescribed limits apply on what can be paid to a speaker performer at the charity event which must be disclosed at the request of any person if the limit is likely to be exceeded. The prescribed amount includes expenses such as travel and accommodations costs.⁶⁷ The prescribed amount = \$5,000.⁶⁸

7.16.2 Consideration in granting a licence (not a s6A licence) is whether there is another charity who could more effectively do the fundraising.⁶⁹

7.17 SA Register → <http://www.cbs.sa.gov.au/licensing-and-registration/charities/>

⁶⁵ s6(7) of the Act

⁶⁶ See the definition of "collector" in s4 of the Act

⁶⁷ s7(3) & (4) of the Act

⁶⁸ s7(6) of the Act

⁶⁹ s11(2) of the Act

8 TASMANIA: COLLECTIONS FOR CHARITIES ACT 2001 (TAS) AND COLLECTIONS FOR CHARITIES REGULATIONS 2011 (TAS)

8.1 **Regulator** = Consumer Affairs and Fair Trading.

8.2 **Purpose** = “An Act to regulate the collection of donations for charities and for other purposes.”⁷⁰

8.3 **Regulated activity** = any soliciting for charitable purposes.⁷¹

“solicit means to seek a donation by a request communicated in person or –

(a) by mail; or

(b) by facsimile transmission; or

(c) by telephone; or

(d) by e-mail; or

(e) by the internet; or

(f) by a document left on premises; or

(g) by any appeal through the media.”⁷²

8.4 **Regulated person** = any person soliciting for charitable purpose.

8.5 **Key operative provision** =

5. Permissible soliciting

(1) A person must not solicit for a charitable purpose unless –

*(a) that soliciting is **on behalf of an organisation which complies with subsection (2) or holds an authority in writing granted by the Commissioner for a specified period; or***

(b) that soliciting is by a person by virtue of an authority in writing granted by the Commissioner for a specified period.

(2) An organisation must not solicit for a charitable purpose unless it is –

*(a) **an incorporated association or a corporation under an approved statute in the State or Territory in which the principal office of that organisation is located; or***

(b) an organisation that is approved by the Governor by an order-in-Council for the purposes of this Act or a member of a class of organisation that is so approved; or

(c) an organisation that is approved by the Commissioner in writing for a specified period.

8.6 **Internet** → in addition to being in the definition of “solicit”, the internet is also, in my view, included within the ordinary meaning of ‘electronic media’. See below.

S10(4) of the Act provides as follows:

⁷⁰ Preamble to the Act

⁷¹ s4 of the Act

⁷² s3 of the Act

An organisation must not, by request in writing (whether or not that request is to a particular person) or through any **electronic media** or in an advertisement, solicit for a charitable purpose unless he or she discloses in that writing, electronic media or advertisement –

- (a) a statement of the purpose for which the donation is sought; and
- (b) the name of the organisation; and
- (c) the address of the principal office of the organisation; and
- (d) a contact telephone number for the organisation; and
- (e) any other information required by the regulations.

8.7 **Interstate observations** → “Soliciting” by the internet is expressly contemplated. The application of the Act to fundraisers who have principal offices outside Tasmania is expressly contemplated in section 6. The need for charities to register in more than one State or Territory is expressly contemplated in section 7. However, is a web site, able to be viewed in another State, an “activity” in that State? See the following provisions:

6. Approval of organisations for soliciting

(1) Where an organisation is *an incorporated association in a State or Territory other than Tasmania* or is a corporation whose principal office is located in a State or Territory other than Tasmania, that organisation must not solicit for any charitable purpose unless the organisation is first approved by the Commissioner.

7. Requirement for licence or authority in another jurisdiction

An organisation must not solicit for a charitable purpose if, arising from any activity in any other State or a Territory, including soliciting for charitable purposes, that organisation is required to hold a licence or other authority under **one or more relevant Acts** and that licence or authority is not in force.

Then in s3(1) of the Act:

(3) A **relevant Act** is taken to be any Act specified in the regulations as a relevant Act for the purposes of this Act and includes the following:

Charitable Collections Act 1946 of Western Australia;

Charitable Fundraising Act 1991 of New South Wales;

Collections Act 1966 of Queensland;

Collections Act 1959 of the Australian Capital Territory;

Collections for Charitable Purposes Act 1939 of South Australia;

8.8 **Religious exception** = “For the purposes of section 4(j) of the Act, soliciting by a religious organisation, by way of an appeal to its adherents or any other person who has attended a religious service by that organization, is authorized.”⁷³ Fundraising appeals within venues used by a religious organisation are also exempt.⁷⁴

8.9 **Charity**⁷⁵ =

⁷³ Reg 4

⁷⁴ Reg 4

⁷⁵ s3(1) of the Act

charitable purpose includes a benevolent, philanthropic or patriotic purpose and any purpose for the protection of the environment or the welfare of animals.

8.10 **Local address** ≠ (i.e. no requirement)

8.11 **Separate bank account** = ≠ (i.e. no requirement)

8.12 **Limits on commercial fees** =

8.12.1 “An organisation must not permit an agent, contractor, officer or employee of that organisation to receive any benefit which is manifestly excessive if that benefit in whole or in part is derived from funds obtained by donation.”⁷⁶

8.12.2 “An organisation must not permit any donation given for any charitable purpose to be used for any purpose other than the purpose for which it was obtained except for –

(a) reasonable expenses incurred in the administration of the organisation; or

(b) reasonable payments to agents, contractors, officers or employees of that organisation for expenses incurred in its administration.”⁷⁷

8.12.3 *Manifestly excessive* seems different to a *more than reasonable*. It is therefore difficult to correlate the last 2 items.

8.13 **Outdated** ≠ (i.e. very little)

8.14 **Tas Register** →

http://www.consumer.tas.gov.au/publications/search_topics?queries_topic_query=charities&topic_query_logic=AND&search_page_111936_submit_button=Submit¤t_result_page=1&results_per_page=15&submitted_search_category=&mode=

⁷⁶ s13(1) of the Act

⁷⁷ s14 of the Act

9 AUSTRALIAN CAPITAL TERRITORY: CHARITABLE COLLECTIONS ACT 2003 (ACT)

- 9.1 **Regulator** = Justice & Community Safety.
- 9.2 **Purpose** = “An Act to regulate collections for charities, and for other purposes.”⁷⁸
- 9.3 **Regulated activity** = ‘collection’ for charitable purpose, with ‘collection’ for the purposes of the Act defined in s4(1) of the Act as follows:

*a **collection** is the soliciting or receiving by a person of money or a benefit if, before or during the soliciting or receiving, the person represents that the purpose of the soliciting or receiving, or that the **purpose** of an activity or enterprise of which the soliciting or receiving is part, is or **includes a charitable purpose**.*

Sub-section (2) of section 4 then goes on as follows:

(2) For subsection (1), it is immaterial whether the money or benefit is solicited or received—

(a) in person; or

(b) by post, telephone, email, fax or other means; or

(c) as a donation or otherwise.

- 9.4 **Interstate observation** → See earlier comments on soliciting and receiving. Section 4(2) may take the meaning further than in other states. Record keeping relating to all activities including beyond ACT need to be kept but don’t have to separately show ACT activities.⁷⁹
- 9.5 **Regulated person** = any person who conducts a collection including a person who organises, manages, or assists in organising or managing the collection.⁸⁰
- 9.6 **Key operative provision** =

14 Unlawfully conducting collections

(1) A person commits an offence if—

*(a) the person **conducts a collection**; and*

(b) the person is not authorised by a licence to conduct the collection.

- 9.7 **Religious exception** ≠ (i.e. no exemption)
- 9.8 **Charity**⁸¹ =
***charitable purpose** includes any benevolent, philanthropic or patriotic purpose.*
- 9.9 **Local address** ≠ (i.e. no requirement)
- 9.10 **Separate bank account** = funds from appeals must be banked to a dedicated bank account and only operated on not less than 2 signatures.⁸²
- 9.11 **Limits on commercial fees** =

⁷⁸ From the preamble to the Act

⁷⁹ s50(3) of the Act

⁸⁰ s8 of the Act

⁸¹ S3 Dictionary

⁸² s45 of the Act

9.11.1 The Act contains a very specific example of a condition that may attach to a licence grant if the licensee engages a commercial fundraiser as follows:

A charity holds a licence authorising it to conduct a particular collection. The charity engages a commercial fundraiser to conduct the collection for it. The licence conditions provide that if the licensee engages a commercial fundraiser, each advertisement for the collection must state the following information (the required information):

- *the licensee has engaged a named commercial fundraiser for the collection*
- *the amount of remuneration payable to the commercial fundraiser or how the remuneration is to be calculated.*⁸³

9.11.2 “If a licence is issued to an unincorporated body, **the nominated person** for the body in relation to the licence is taken to be the licensee.”⁸⁴ Then in Example 2 in that section the following appears - “If, under this Act, something must be done by the licensee of a licence issued to an unincorporated body, the nominated person for the body in relation to the licence to which the thing relates is required to do the thing. If failure to do the thing is an offence, the nominated person commits the offence.” Best practice would see the whole management committee nominated and updated as they change.

9.12 **Outdated bits =**

9.12.1 No mention of fundraising over the internet.

9.13 **ACT Register** → <http://actoft.sbcit.com.au/>

⁸³ Example 2 in s17 of the Act

⁸⁴ s31(1) of the Act

10 CROSS BORDER FUNDRAISING – SUMMARY OF A PRACTICAL APPROACH

- 10.1 **If a charity has “people on the ground” in a State or Territory** (participating in a fundraising appeal), a license should be sought in that State or Territory.
- 10.2 **If a charity has a “back office” or its “collecting bank” branch in a State or Territory**, a license should be sought in that State or Territory.
- 10.3 The State or Territory **in which the website of a charity is hosted** may be important.
- 10.4 **If a charity has no connection with a State or Territory**, consider the individual laws of a State or Territory that the charity may not intend to apply in. If a charity decides that it doesn't intend to apply, call the regulators office that State or Territory and run the thinking past them. Then have the governing body of the charity consider next steps.
- 10.5 **If in doubt about a jurisdiction** after following step 4, consider taking advice on saying in the appeal, that donations are not being sought from that jurisdiction (and then ensure that this is followed in practice). This may not be enough in all jurisdictions.
- 10.6 Any decision not to apply in a particular jurisdiction should be made by the governing body.
- 10.7 If still in doubt, apply for a licence in the in doubt jurisdiction.

PART II – ACL & CHARITABLE FUNDRAISING

11 INTRODUCTION

- 11.1 In its 2016 submission as a response to the *Australian Consumer Law Review – Interim Report*, Justice Connect called for the urgent reform of fundraising laws. This, it argued, could be achieved via the ACL with some minor changes. Their argument is that if NFP and charitable fundraising could be governed by the national ACL, and outdated State and Territory laws could be repealed, this would simplify the system, create efficiency and remove red tape.
- 11.2 This Part II contemplates the already established relationship between fundraising laws and the ACL. Part IV will address Justice Connect’s recommendations as to suggested further changes to the ACL.
- 11.3 In October 2016 the Australian Government through Consumer Affairs Australia and New Zealand (‘CAANZ’) released the *Australian Consumer Law Review – Interim Report* (‘**Interim Report**’) to seek the views of the ‘Australian community on options to improve the Australian Consumer Law’.⁸⁵ In relation to not-for-profit fundraising, the Interim Report noted that stakeholders have expressed a range of interpretations of the ACL’s scope and coverage, particularly in relation to ‘consumer protection with regard to fundraising activities’.⁸⁶
- 11.4 Justice Connect argues that ultimately there is no definitive answer as to what extent consumer laws apply to fundraising.⁸⁷
- 11.5 The main confusion stems from whether or not the threshold of engaging in ‘trade or commerce’ is being sufficiently met by entities which are fundraising.
- 11.6 Despite some clarification by CAANZ in the Interim Report, subsequent submissions made in response to the Interim Report argue that alterations to the ACL are still required to provide guidance to the extent that consumer laws apply to charity and NFP fundraising.

12 TO WHAT EXTENT DO CONSUMER LAWS ALREADY APPLY TO CHARITABLE FUNDRAISING?

- 12.1 The open Legal Advice by Mr Norman O’Byrne AM SC in a recent Statement on Fundraising Reform gets right to the heart of the matters:

The ACL operates federally under the Competition and Consumer Act (Cth). The ACL is applied in all jurisdictions through the Australian Consumer Law Application Acts that exist in all States and Territories. ... [T]he ACL has the potential to regulate every commercial and non-commercial activity in every Australian State and Territory, whether that activity is undertaken by person or a corporate entity

*... [A] key provision of the ACL is section 18(1) which simply says: “A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”. Section 2 defines “**trade or commerce**” very broadly, so as to include “**any business or professional activity (whether or not carried on for profit)**” and “**business**” includes “**a business not carried on for profit**”. Not-for-profits raising money are covered by section 18(1) because, in my view, fundraising is usually a “business or professional activity”, whether or not the not-for-profit is itself (in an overall sense) operating as a business or professional activity. It*

⁸⁵ Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review* (2016) 1.

⁸⁶ *Ibid* 12.

⁸⁷ Justice Connect, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review – Interim Report*, 9 December 2016.

is the fundraising (the activity), rather than the not-for-profit (the organisation, whatever its legal structure may be) that is the focus.

Because of these broad definitions, the misleading and deceptive conduct provision of the ACL applies to many (if not all) not-for-profit fundraising activities.”⁸⁸

12.2 ‘In trade or commerce’

Central to the issue of ACL reform discussed in the Interim Report is whether the phrase ‘in trade or commerce’ is clear enough for charities. For example, whether the ‘in trade or commerce’ threshold is met by entities:

- engaging in conduct such as selling cupcakes are acting in ‘trade or commerce’ if the activity is not-for-profit;
- receiving unsolicited donations;
- subsidising activities (such as gardening for the elderly) and still receiving some profit; or
- raising funds through a commercial third party provider.⁸⁹

Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd (1978) 36 FLR 134 held that the terms ‘trade’ and ‘commerce’ are ordinary terms and as such describe ‘the negotiations verbal and by correspondence, the bargain, the transport and the delivery which comprise *commercial arrangements*’ (emphasis added).⁹⁰ Therefore, to determine whether the conduct has occurred in trade or commerce, the court essentially looks for a commercial arrangement.

The High Court case of *Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594* placed caveats on this, noting that ‘in trade or commerce’ does not extend to the internal communications of a corporation. (The High Court did, however, note in its judgement that pursuant to *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd (1978) 140 CLR 216* a company can sue another company over the first’s misleading or deceptive conduct towards customers).⁹¹ In *Concrete Constructions* a worker suffered significant injuries as the result of falling down an air-conditioning shaft. The worker accused the appellant corporation of engaging in misleading or deceptive conduct within the section 52 definition of the then *Trade Practices Act 1974* (Cth). The worker claimed that the misleading and deceptive conduct was constituted by the foreman’s misinformation about safe removal of grates on the shaft. In rejecting this claim and providing guidance to entities on what trade or commerce constitutes, the High Court accepted that ‘in trade or commerce’ should be read narrowly. The High Court emphasised that

[I]t is plain that s.52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purposes of, its overall trading or commercial business. Put differently, the section was not intended to impose, by a side-wind, an overlay of Commonwealth law upon every field of legislative control into which a corporation might stray for the purposes of, or in connection with, carrying on its trading or commercial activities. What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character. Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods

⁸⁸ Mr Norman O’Byrne AM SC, in Statement of Fundraising Reform, 10 August 2016 as part of the #fixfundraising campaign. https://www.justiceconnect.org.au/sites/default/files/Joint%20statement%20on%20fundraising%20reform_1.pdf

⁸⁹ Ibid 16 - 17

⁹⁰ *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd (1978) 36 FLR 134, 139.*

⁹¹ *Concrete Constructions (NSW) Pty Ltd v Nelson [1990] HCA 17, [4].*

*or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public.*⁹²

- 12.3 The Interim Report noted that this case had the effect that, when interpreting the ‘in trade or commerce’ threshold in relation to fundraising activities, focus has to be on the ‘*particular* activities or transaction in question, rather than whether the entity is generally engaged in trading or commercial activities’.⁹³ Thus, it is irrelevant whether profit is obtained from engaging in conduct.
- 12.4 What is relevant, however, is the nature of the relationship between the entity engaging in the conduct and the consumer or person to whom this is directed. Also important is the frequency of such conduct.
- 12.5 In considering this, the Interim Report stated that:
- A not-for-profit selling cupcakes would be likely to be engaging in trade or commerce if the selling of the cupcakes was in exchange for payment as part of its fundraising activities;
 - A not-for-profit subsidising gardening services is likely to be engaging in trade or commerce as it is supplying a service to consumers in exchange for profit, even if this service is subsidised;
 - Where the not-for-profit has engaged a third party contractor then the third party fulfilling its contractual obligations would constitute the ‘in trade or commerce’ element. The Interim Report also suggested that where fundraising is being conducted by employees as opposed to volunteers, this would also meet the ‘in trade or commerce’ threshold; however
 - A not-for-profit receiving unsolicited donations would not likely be engaging in trade or commerce.

The Interim Report did however note that more case law is required in this area.

- 12.6 The Interim Report noted that the proposed changes submitted to CAANZ sought to remove ‘in trade or commerce’ or alter it as a threshold requirement to provide clarity to the not-for-profit sector.⁹⁴ The thrust of this argument was that without the ‘in trade or commerce’ requirement, not-for-profits would meet all of the threshold requirements for the ACL to apply to their activities. In turn, not-for-profits would have clarification that the ACL applies to fundraising in any capacity.
- 12.7 CAANZ rejected this suggestion. CAANZ argued that altering the ‘in trade or commerce’ threshold would have an overarching effect on not only not-for-profits, but also for-profit organisations as well.⁹⁵ Consequently, despite feedback that stakeholders support the operational scope and objectives of the ACL, these objectives would be altered should the legislature alter the ‘in trade or commerce’ threshold.⁹⁶ Instead, in order to provide certainty over which charitable or not-for-profit activities are covered by the ACL, CAANZ suggested that guidance by regulatory bodies was more appropriate.⁹⁷

Misleading or Deceptive Conduct: Section 18

- 12.8 Under section 18 of the ACL a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. As mentioned above, with the exception of unsolicited donations, most conduct engaged in for the purpose of fundraising

⁹² Ibid [8].

⁹³ Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review* (2016) 17.

⁹⁴ Ibid 15.

⁹⁵ Ibid 17.

⁹⁶ Ibid 12.

⁹⁷ Ibid 13.

appears to be 'in trade or commerce' in CAANZ's view.⁹⁸ It is therefore essential that charities and NFPs understand how relevant provisions under the ACL operate, and also how they might apply to fundraising activities, so as to avoid penalty under the ACL.

12.9 In order for section 18 to apply, the first three elements – person, in trade or commerce and engaging in conduct – must be fulfilled before considering whether an entity's behaviour has been misleading or deceptive. Once these three thresholds have been met, the approach to determining misleading or deceptive conduct becomes an objective one. It involves asking whether the impugned conduct viewed as a whole has a tendency to lead a person into error.⁹⁹ The initial question which must be asked is 'whether the misconceptions, or deceptions, alleged to arise or to be likely to arise are properly attributed to the ordinary or reasonable members of the classes of prospective purchasers'.¹⁰⁰

12.10 A leading Australian case on misleading or deceptive conduct is *Taco Company of Australia Inc & Anor v Taco Bell Pty Ltd* (1982) 42 ALR 177. This case provides a four step test to determining whether particular conduct is misleading or deceptive. This involves:

1. Identifying the relevant section (or sections) of the public whom the question of whether conduct is, or is likely to be, misleading or deceptive;
2. Considering the matter by reference to all who come within it, including the astute and gullible, the intelligent and the not so intelligent, the well-educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations;
3. Adducing evidence that some person has in fact formed an erroneous conclusion. This however is not essential;
4. Establishing a causal connection between the conduct of the offending party and the misconception by consumers.¹⁰¹

12.11 Essentially, there has to be conduct which causes misconception or deception. This misconception or confusion does not have to be deliberate, however. In *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* [1984] FCA 167, 88 the majority noted that:

*Whether or not s. 52(1) is contravened does not depend upon the corporations intention or its belief concerning the accuracy of such statement, but upon whether the statement in fact contains or conveys a meaning which is false; that is to say whether the statement contains or conveys a misrepresentation.*¹⁰²

12.12 An example of misleading or deceptive conduct within the charity and NFP sector is discussed below in *Director of Consumer Affairs Victoria v Gibson* [2017] FCA 240 [127] ('Belle Gibson Case'). Here his Honour Mortimer J held that statements to the effect that *everything* raised by book sales would go to charities was misleading as only a fraction of roughly \$250 000 profit was directed to charities. The implications of this are also discussed below.

Unconscionable Conduct: Section 21

12.11 Under section 21 of the ACL, a person must not, in trade or commerce, in connection with:

- 12.11.1 the supply or possible supply of goods or services to a person (other than a listed public company); or

⁹⁸ Ibid 17.

⁹⁹ *Director of Consumer Affairs Victoria v Gibson* [2017] FCA 240, [121].

¹⁰⁰ *Campbell v Backoffice Investments Pty Ltd* [2009] 238 CLR 304 [26].

¹⁰¹ *Taco Company of Australia Inc & Anor v Taco Bell Pty Ltd* (1982) 42 ALR 177.

¹⁰² See also *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 [9].

12.11.2 the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

12.12 Section 22 provides that considerations the court must take into account when assessing an alleged contravention of section 21. It states that, 'In determining whether unconscionability whether a person (the **supplier**) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the **customer**), the court may have regard to:

- a) the relative strengths of the bargaining positions of the supplier and the customer; and
- b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
- c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and
- d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
- e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and
- f) the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers; and
- g) the requirements of any applicable industry code; and
- h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and
- i) the extent to which the supplier unreasonably failed to disclose to the customer:
 - (i) any intended conduct of the supplier that might affect the interests of the customer; and
 - (ii) any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and
- j) if there is a contract between the supplier and the customer for the supply of the goods or services:
 - (i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and
 - (ii) the terms and conditions of the contract; and
 - (iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and
 - (iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and
- k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for

the supply of the goods or services; and

l) the extent to which the supplier and the customer acted in good faith'.¹⁰³

12.13 In the *Belle Gibson case* Mortimer J cited *ASIC v National Exchange Pty Ltd* [2005] 148 FCE 132 at [33] in noting that prohibitions of section 21 involve questions of conscience. Here, "unconscionability" means something not done in good conscience'.¹⁰⁴

13 ACL PENALTIES

A breach of the ACL for Misleading or Deceptive Conduct may result in the following enforcement provisions:

- Undertakings;¹⁰⁵
- Substantiation Notices, which generally involve having statement makers substantiating their claims;¹⁰⁶
- Public Warning Notices;¹⁰⁷
- Injunctions;¹⁰⁸
- Damages, when any person has knowingly participated in particular conduct;¹⁰⁹
- Compensation and other orders;¹¹⁰
- Orders to redress loss or damage suffered by non-party consumers;¹¹¹
- Other orders (such as voiding any contract);¹¹²
- Non-punitive orders such as corrective advertising.¹¹³

The section, however, is not a pecuniary penalty provision.

In addition to the above enforcements, a breach of the ACL for Unconscionable Conduct may result in the following enforcement provisions:

- Pecuniary penalties;¹¹⁴
- Adverse publicity orders;¹¹⁵
- Disqualification orders;¹¹⁶
- Infringement notices.¹¹⁷

14 BELLE GIBSON CASE STUDY

In March 2017 the Director of Consumer Affairs Victoria brought an action against Annabelle (Belle) Gibson for breaching sections 18, 21 and 29 of the *Australian Consumer Law*, Schedule 2 of the *Competition and Consumer Act 2010* (Cth) adopted by the ACL (Vic) - misleading or deceptive conduct, unconscionable conduct, and false and misleading representations.

14.1 Facts of the Case

¹⁰³ *Competition and Consumer Act 2010* (Cth) sch 2 ('Australian Consumer Law') s 22.

¹⁰⁴ *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 [41].

¹⁰⁵ *Competition and Consumer Act 2010* (Cth) sch 2 ('Australian Consumer Law') s 218.

¹⁰⁶ *Ibid* s 219.

¹⁰⁷ *Ibid* s 223.

¹⁰⁸ *Ibid* s 232.

¹⁰⁹ *Ibid* s 236; s 2(3).

¹¹⁰ *Ibid* s 237.

¹¹¹ *Ibid* s 239.

¹¹² *Ibid* s 243.

¹¹³ *Ibid* s 246.

¹¹⁴ *Ibid* s 224.

¹¹⁵ *Ibid* s 247.

¹¹⁶ *Ibid* s 248.

¹¹⁷ *Competition and Consumer Act 2010* (Cth) s 134A.

On 17 July 2013 Ms Gibson incorporated a company called 'Belle Gibson Pty Ltd'. Ms Gibson was also the registered holder of the business named 'the Whole Pantry'. It was under this title that Ms Gibson sold iOS Apps, Android Apps and a book known as The Whole Pantry. The concept of The Whole Pantry was based on Ms Gibson's alleged 'experience' of being diagnosed with terminal brain cancer in 2009, which she claimed to have cured through pursuing natural remedies.

All of these representations were made across Gibson's Facebook and Instagram accounts, during media interviews and in her apps and book. For context, the excerpt from Ms Gibson's book provided:

Belle Gibson is an inspirational young mother... Diagnosed with terminal brain cancer at the age of twenty, she found herself without support and out of sync with conventional medicine. So began a journey of self-education that resulted in her getting back to basics, as she set out to heal herself through nutrition and lifestyle changes.

Ms Gibson also made representations on a number of occasions that portions of revenue derived from her book and app sales would be given to charity. The Director of Consumer Affairs noted, however, that of all the representations made, only three donations were made to charities. These were:

- A \$5,000 donation made to the Bumi Sehat Foundation;
- A \$4,823.53 donation made to the Vestal Water on behalf of Kinfolk Café; and
- A \$1,000.00 donation made to One Girl.

It was later discovered that Ms Gibson did not, nor did she ever, have cancer. The Director of Consumer Affairs Victoria brought an action against Gibson for contraventions of the ACL not only in relation to the representations made about Belle Gibson having cancer, but representations made about her company's charitable giving.

14.2 Issues

The issues before the court were whether Ms Gibson had contravened sections 18 of the ACL for misleading or deceptive conduct, 21 for unconscionable conduct and 29 for false or misleading representations.

14.3 Findings by the Court

Ms Gibson's Company met the Thresholds for the ACL to apply

Her honour Mortimer J held that all of the conduct that occurred did so in trade or commerce. At 117 she noted that:

The promotion, marketing and sales of The Whole Pantry book and apps were commercial activities. The conduct of the launches of the apps was part of the promotion of the commercial activity.

Section 18 Misleading or Deceptive Conduct

After laying out the relevant principles, Mortimer J found Ms Gibson had contravened section 18 of the ACL and ACL (Vic) on numerous counts.

In relation to the *Cancer Representation*, Mortimer J held that Ms Gibson had made representations and statements that she had brain cancer. Along with other confirmations that Ms Gibson was not suffering from cancer, her Honour also noted that Ms Gibson had undergone a brain scan performed at the Alfred Hospital in Melbourne in 2011 which confirmed she did not have a brain tumour. As such her Honour held that

I am satisfied that, in the context the statement were made, members of the community reading those statements would be erroneously led to believe that Ms Gibson was suffering from terminal brain cancer and this was never the case.

Mortimer J also held that Ms Gibson had contravened section 18 with the *Treatment Representation*. Ms Gibson had claimed that she had tried chemotherapy and radiotherapy but removed herself from these cancer treatments in favour of natural therapies. In her *60 Minutes* interview, Ms Gibson had claimed that Dr Johns had treated her with this in Perth. Like the Cancer Representation, Mortimer J held that the false statements made in Ms Gibson's *The Whole Pantry* cookbook and app would lead reasonable members of the community to believe that she had undergone conventional cancer treatment.

Based on all of these findings, Mortimer J held that Ms Gibson had contravened s 18 of the ACL and the ACL (Vic) based on these Health Representations.

Misleading and Deceptive Conduct in Relation to Charitable giving

Perhaps most pertinent to charities and NFPs, Mortimer J held that Ms Gibson had misled and deceived consumers by making representations about the company's charitable giving.

On numerous occasions Ms Gibson had promoted that a 'large part of everything' the company earned was 'donated to charities and organisations which support global health and wellbeing, protect the environment and provide education to those who otherwise wouldn't have the opportunity.'¹¹⁸ Moreover, Ms Gibson had also stated that the profits from her app sales would be directed to four charities or charitable causes.¹¹⁹ In all instances, Ms Gibson's representations fell far short of reality. Out of \$420,000.00 made and received through book and app sales, Ms Gibson donated roughly \$10,000.00.¹²⁰

As such Mortimer J held that reasonable consumers would have been misled into purchasing Ms Gibson's products for the purpose of raising funds for particular charities and made a finding of breach of s18 of the ACL (Vic).

Section 29 Misleading Representations

Mortimer J rejected the Director's allegation of misleading representations made in Ms Gibson's book and app. Here, Mortimer J considered that not enough evidence had been adduced by the Director to disprove 'whether the representations ... made that activities of that kind promoted – diet, health, exercise and "wellness" ... could cure, or stabilise, cancer – were false or misleading claims'.¹²¹

Section 21 Unconscionable Conduct

Mortimer J held that there was simply not enough evidence adduced by the Director to establish that Ms Gibson had acted against her conscience in promoting her wellness cookbook after discovering she did not have cancer.¹²²

In relation to the misrepresentations and deception over charitable giving, however, her Honour held that Ms Gibson had engaged in unconscionable conduct within the meaning of section 21. Mortimer J particularly focussed on Ms Gibson's false representations being used as a way to bolster the image of the company and therefore reap the benefit of extra sales.¹²³

¹¹⁸ *Director of Consumer Affairs Victoria v Gibson* [2017] FCA 240, [213]

¹¹⁹ *Ibid* [206] – [212].

¹²⁰ *Ibid* [233].

¹²¹ *Ibid* [182].

¹²² *Ibid* [184] – [196].

¹²³ *Ibid* [238] – [242].

PART III – WHERE TO NEXT IN REFORM?

15 JUSTICE CONNECT STATEMENT ON FUNDRAISING REFORM

Despite some clarification by CAANZ, Justice Connect argues that the ACL still needs to be altered to clarify the application of the ACL to fundraising. Currently, \$15 million is spent in charity compliance each year.¹²⁴ For larger charities this is troublesome; donations are being directed towards compliance (usually in administration costs) rather than service delivery.¹²⁵ For smaller charities and NFPs, there is a high risk of inadvertent non-compliance. Justice Connect notes that:

The current regime creates risks for donors, losses to productivity, barriers to innovation, and negatively impacts the sector's sustainability and growth.¹²⁶

The case study included in Justice Connect's Statement on Fundraising Reform demonstrated that in order to run a national fundraising campaign, or a campaign over the internet, an organisation would have to:

- 60 days out from the campaign apply to the NSW regulator to be able to fundraise;
- At least two months before fundraising apply to register as a charity in Queensland and advertise the application within seven days of submitting it for at least a month;
- Apply to register in Victoria at least 28 days before fundraising as well as to South Australia for a fundraising licence;
- Apply for fundraising authority for the person or organisation in NSW;
- Apply for a licence and obtain authority in the ACT;
- Apply to register and obtain a sanction or authority from a person or organisation in Queensland;
- Apply for fundraising authority in WA;
- Seek fundraising approval in TAS.¹²⁷

In addition an organisation would need to submit numerous financial statements at various times to each State and Territory body at various times.

In its Statement on Fundraising Reform, Justice Connect sought three main changes to the ACL in order to overcome these issues with compliance. These were:

- **“Clarification and minor amendments to the Australian Consumer Law (ACL) to ensure application to fundraising activities is clear and broad;**
- **Repeal of fragmented State and Territory fundraising laws; and**
- **Work[ing] with regulators and self-regulatory bodies to provide guidance to fundraisers to continue to improve fundraiser conduct”.**¹²⁸

In its submission in response to the Interim Report Justice Connect provided more detail as to how this could be implemented. Two options were proposed.¹²⁹

Option 1

¹²⁴ Justice Connect, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review – Interim Report*, 9 December 2016, 3.

¹²⁵ Justice Connect, 'Statement on Fundraising Reform' (Law Reform Statement), 3.

¹²⁶ Justice Connect, 'Statement on Fundraising Reform' (Law Reform Statement), 3

¹²⁷ Ibid 8-9.

¹²⁸ Ibid 7.

¹²⁹ Justice Connect, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review – Interim Report*, 9 December 2016, 2.

Option 1 proposes to alter the ACL to expand the meaning of 'in trade or commerce' and also provide regulator guidance. Justice Connect believes that this would 'address issues such as crowd funding and peer-to-peer arrangements, which are evolving rapidly and growing in popularity'. Under Option 1, Justice Connect suggests that sections 18, 20 and 50 should make express reference to 'fundraising activities' to provide greater clarity. Justice Connect also recommends that a new section, section 29A, be inserted headed 'False or misleading representations during a fundraising activity'. In line with this, Justice Connect also proposes that 'fundraising activity' be defined in the ACL as well.

¹³⁰

In addition to legislative changes, Justice Connect supports the introduction of a single voluntary code which will be applicable to all fundraising activities.

Option 2

Option 2 proposes that if the above changes cannot be made to the legislation, then the Australian Government should add a Legislative Note to 'clarify the definition of 'trade or commerce' and make it clearer that the ACL does apply to many NFP activities, including fundraising, and provide regulator guidance.'

Justice Connect suggests that a legislative note could appear as:

"trade or commerce" means:

- (a) Trade or commerce within Australia; or
- (b) Trade or commerce between Australia and places outside of Australia;

And includes any business or professional activity (whether or not carried on for a 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 a profit)'.

Peak Body Guidance: Fundraising Institute of Australia

The Fundraising Institute of Australia ('FIA') is the largest representative body for the charitable fundraising sector in Australia. In 2017, the FIA published a Draft Exposure Code ('the Code') to help regulate the sector, but does not purport to be subordinate legislation. Under the Code each Member must comply with particular ethical conduct. This could be a proactive step towards achieving the voluntary code suggested by Justice Connect. The Code requires adherence to behaviour also required under the ACL.

For example, under section 3, each Member has an obligation not to bring Fundraising into disrepute; to act honestly, openly, and with responsibility for public trust; to act with respect for professional Fundraising, the Charitable Cause that they represent, Donors and Beneficiaries; to not exploit relationships with Donors; and to be open and honest about the work that they do, how funds are raised and disbursed.

Each member also has an obligation under section 4.10 to refrain from conduct including harassment, undue influence, intimidation or coercion, which appears to overlap with the ACL's section 50 (which prohibits harassment and coercion) and section 168.

Under the Code 4.11(a)-(b) prohibits promotional material which is not factually accurate, truthful or likely to mislead or that fundraising activities are carried out at no cost. This also has an overlap with the ACL's sections 18 (Misleading or Deceptive Conduct) as well as section 21 (Unconscionable Conduct).

¹³⁰ Ibid 2 – 3.

Regulator Guidance

CAANZ has also proposed to issue regulator guidance as soon as possible to the charity and NFP sector.

16 THE AUSTRALIAN CONSUMER LAW REVIEW – FINAL REPORT

In April 2017 the Australian Government released the 'Australian Consumer Law Review – Final Report'. In it the Government suggested that the ACL applies to a wide range of fundraising activities already. It acknowledges, however, that there is still widespread uncertainty within the industry even amongst industry professionals as to what fundraising activities are regulated by the ACL.

As a solution, the Government supports CAANZ's proposal to issue regulator guidance as soon as possible instead of legislative reform. Between 2019 – 2020, after a significant amount of time has elapsed, CAANZ will assess whether this guidance has been successful. After this, CAANZ will assess whether the ACL requires amendment.¹³¹ Alterations to the ACL could therefore be three or more years away.

¹³¹ Commonwealth of Australia, 'Australian Consumer Law Review – Final report' 97.