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Mr Murray Crowe
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Send by email: ACNCReview@treasury.gov.au

Dear Mr Crowe

Review of Australian Charities and Not-for-profits Commission (ACNC) legislation

I welcome the opportunity to comment on the review of the Australian Charities and Not-for-profits Commission (ACNC) legislation. We have a limited role in the charities and not-for-profit sector and we have confined our comments to only those areas. We have not sought to respond to all of the issues raised in the terms of reference.

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

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

The ACL should not be used to replace sector-specific laws or regulators

During the ACL review, a number of stakeholders submitted that inconsistencies and duplication between fundraising and other laws that apply to the sector are a significant regulatory burden. Some stakeholders recommended that the ACL be amended to regulate the sector and the various state and territory fundraising laws be repealed. I expect that this suggestion will be made again during the ACNC review.

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

We do not support using the ACL as a replacement for state and territory fundraising legislation. The ACL and state and territory fundraising legislation are fundamentally different. The ACL is a law of general application intended to impose minimum standards of conduct across all sectors of the economy. On the other hand, state and territory fundraising legislation focuses on licensing and registration and related ongoing obligations such as financial reporting. Unlike the ACL, state and territory fundraising legislation is designed to promote transparency, accountability and good governance in the sector. The ACL is not designed to address the public's ongoing demand for greater accountability in the charities, not-for-profits and fundraising sector.

Economy-wide regulators, such as ACL regulators, cannot replicate the focus and expertise that specialist regulators deliver. Specific issues related to fundraising should be dealt with in fundraising-specific legislation, and enforced by relevant specialised state and territory agencies, and, to the extent that they involve charities registered under the ACNC legislation, by the ACNC.

Our current limited role in the sector and recent activities

ACL regulators have a limited role in the charities, not-for-profits and fundraising sector. The sector is subject to the general application of the CCA and the ACL to the extent that the conduct of sector participants is in 'trade or commerce'. There are additional obligations that are likely to apply to sector participants that supply of goods or services. More information about our role can be found in the Charities Guidance.

Research into commission-based fundraising

In its submission to the ACL Review Issues Paper, the ACNC highlighted its research findings that concerns over fundraising methods reduce trust and confidence in the sector and are the main reason for refusing a donation request².

We have also commissioned research into fundraising. In May 2017, we engaged Frost & Sullivan to consider the operation of commercial fundraising agencies within the charity sector, including the size and structure of commissions paid to commercial agencies. Frost & Sullivan interviewed 14 charities, 3 commercial fundraising agencies, one industry association and 13 individuals who have worked in commission-based fundraising. 504 recent donors were also surveyed.

We released the report [Research into the Commission-based Charity Fundraising Industry in Australia](#)³ on 27 November 2017. The key findings of the report are as follows:

- Many charities engage third-party commercial fundraising agencies to solicit ongoing donations.
- Face-to-face fundraising is usually commission-based, calculated by a multiple (typically 8-17 times) of each monthly donation. Fees are usually paid to the fundraising agency shortly after donor sign-up, sometimes before a donor has made any donations.
- Individual collectors, who are usually engaged by fundraising agencies on a casual or independent contractor basis, often receive bonuses for signing up ongoing donors.
- Charities often build in clawback clauses in their contracts with fundraising agencies for cancellation of ongoing donations within a short period of time (usually 3 months).
- Approximately 50% of donors cancel their ongoing donation within the first 12 months.

² https://cdn.tspace.gov.au/uploads/sites/60/2016/07/Australian_Charity_and_Not-for-Profits_Commission.pdf, page 4.

³ <https://www.accc.gov.au/publications/research-into-the-commission-based-charity-fundraising-industry-in-australia>

- The portion of a donation that equates to the fee paid to the fundraising agency depends on the duration of the donation. For example, based on a multiplier of 12, if a donor cancelled in the first 12 months, the entire donation effectively goes to the commercial fundraising agency and not the charity. If donations are made for 5 years then 20% is effectively paid to the fundraising agency.
- The majority of donors surveyed believed that no commission was paid from their donation and that individual collectors did not explain who they worked for or that a commission was to be paid.

This research raises some concerns about the level of transparency of some charitable organisations about their relationships with third-party fundraising agencies and the size and structure of fees paid to these agencies. We are continuing to engage with representatives from the sector and we encourage charities ensure they are clear and transparent with prospective donors when utilising the services of fundraising agencies. Given the prevalence of third-party commercial fundraisers in charity fundraising activities, any poor behaviour third-party fundraisers is likely to erode public trust and confidence in the sector.

CAANZ Charities Guidance

As noted above, on 15 December 2017 CAANZ published [A guide to the Australian Consumer Law for fundraising and other activities of charities, not-for-profits and fundraisers](#) (Charities Guidance). The Charities Guidance clarifies the application of the ACL to the sector. The key points set out in the Charities Guidance are as follows:

- The ACL applies to the fundraising and other activities of charities, not-for-profits and fundraisers that occur in 'trade or commerce'. This includes fundraising in an organised, continuous and repetitive way, fundraising involving the supply of goods or services and fundraising carried out by for-profit professional fundraisers.
- The obligation not to engage in misleading or deceptive or unconscionable conduct apply to conduct in 'trade or commerce' in the collection of donations and where a good or service is supplied.
- Additional obligations apply where a good or service is supplied including an obligation not to make false or misleading representations or harass or coerce donors. The unsolicited consumer agreements and consumer guarantee provisions also apply.
- In addition to the ACL, other State, Territory and Commonwealth laws are likely apply to charities, not-for-profits and fundraisers. If a charity is registered with the ACNC, it must conduct its operations in compliance with the ACNC legislation and governance standards.

I expect that the Charities Guidance will assist the sector to better understand its obligations under the ACL. The Charities Guidance will be reviewed in 2018-19.

The role of the ACNC in the regulation of the charity and not-for-profit sector

The ACNC has a significant role in the regulation of the charity sector and in maintaining and enhancing the public's trust in the not-for-profit sector generally. As discussed above, I expect that a number of submissions to the ACNC review will advocate for greater national consistency in the sector. I agree that the ACNC review may be an opportune time to consider what further work that can be done to harmonise regulatory requirements and reduce regulatory burden on the sector. If the review results in increased roles and responsibilities for the ACNC, it will be critical to ensure that the ACNC has appropriate funding, resourcing and compliance and enforcement powers.

Recent ACNC research⁴ indicates that Australians are interested in how charities use donated funds and consider that charity administration costs are too high. Therefore, I consider that greater financial transparency would benefit both the public and the sector. Although the Annual Information Statement and annual financial reports, which are facilitated by the ACNC, provide some information about expenditure, the information is highly aggregated. I invite the ACNC review to consider how these documents could be replaced or amended to improve financial transparency in the sector.

We look forward to continuing to work with the ACNC. Should you wish to meet or otherwise discuss this matter further, please contact Scott Gregson, Executive General Manager, Consumer Enforcement, 02 6243 1350.

Yours Sincerely

A handwritten signature in blue ink, appearing to read 'Rod Sims', is positioned above the printed name and title.

Rod Sims
Chairman

⁴ Chantlink Market Research (2015), *ACNC 2015 Research: Public trust and confidence in Australian charities*.