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Alex Robson
Deputy Chair

Julie Abramson
Commissioner

Krystian Seibert
Associate Commissioner

Productivity Commission

By email: philanthropy@pc.gov.au

Dear Mr Robson, Ms Abramson and Mr Seibert,

Re: Submission to the Productivity Commission's Philanthropy Inquiry

The Australian Competition and Consumer Commission (ACCC) appreciates the opportunity to make a submission to the Productivity Commission's Philanthropy Inquiry.

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (Cth) (CCA), regulate national infrastructure and undertake market studies.

The CCA contains the Australian Consumer Law (ACL), which is a national law that deals with consumer protection and fair trading issues arising across the economy. The states and territories also enforce the ACL under a 'one law, multi regulator' model.

Misconduct in the not-for-profit (NFP) sector and charity scams can greatly affect consumer confidence and trust in the sector. The ACCC considers that regulations specific to charitable donations that address many of these issues are rightly contained in sector specific legislation enforced by sector specific regulators – the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) and related legislation administered nationally by the Australian Charities and Not-for-profits Commission (the ACNC), and the state and territory fundraising specific legislation administered by ACL regulators at the state and territory level.

The ACL generally applies to conduct in the NFP sector where fundraising activities can be characterised as being ‘in trade or commerce’. Determining whether an activity is undertaken in trade or commerce depends upon the facts of each individual case. However in general terms, professional fundraising activities carried out in a business-like manner (i.e. organised, continuous and repetitive fundraising efforts) are likely to be subject to the ACL, whereas collecting a one-off donation for a one-off cause is unlikely to be.¹

The ACL also applies to the activities of any business entities that a NFP may establish. For example, an op shop established by a charity must comply with the ACL when advertising and supplying its products to consumers.

Further, the ACL also applies to the activities of businesses that partner with a NFP, or represent that they are partnered with a NFP. For example, following proceedings commenced by the ACCC, in 2020 the [Federal Court ordered Oscar Wylee to pay \\$3.5 million in penalties](#) for making false or misleading claims. The false or misleading claims made were that for every pair of glasses Oscar Wylee sold, it would donate a pair, when it had not in fact done so, and that it was closely affiliated with Rose Charities from 2014 to 2018, when in fact it had only given a single donation to Rose Charities in 2014.

Additionally, the ACL also applies to the conduct of marketing businesses that NFPs may engage to assist them in acquiring regular donors, or otherwise solicit donations. The ACCC has previously considered this aspect of the NFP sector in some detail through commissioning an [independent research report](#) into commission-based charity fundraising in 2017.

While the ACL may have some role to play in the NFP sector depending on the circumstances involved, the ACCC considers sector specific legislation at the state or national level is much more suitable. This focus of regulating the NFP sector in a holistic way will help promote public trust and confidence.

In particular, the ACNC’s and the state and territory jurisdictions’ ex-ante regulatory roles in the NFP sector provide a sound basis for specific probity and accountability measures designed to ensure good governance in the sector. Their ex-ante regulatory roles also provide these regulators with more powerful and direct enforcement tools to deal with misconduct (for example, the ACNC’s ability to revoke charities’ registration in certain circumstances), than ex-post enforcement through the ACL.

The states and territories are often better placed than the ACCC to address ACL conduct in this sector, particularly where conduct is confined to a single state or territory. These regulators are able to use either the ACL, or fundraising specific regulations they also administer to deal more comprehensively with misconduct. The ACCC will of course continue to consider potential breaches of the ACL where the conduct is widespread and there is a significant public interest in addressing the harm on a national level.

The ACCC has previously expressed our (equivalent) views on appropriate regulatory frameworks in the NFP sector in:

- the submissions we made on [27 February 2018](#) and [16 May 2018](#) to the government initiated [review](#) of the ACNC and its legislation, which was conducted by an independent panel, and

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

- the submission we made on [6 August 2018](#) to the Senate [Select Committee on Charity Fundraising in the 21st Century](#).

The government [response](#) to the ACNC Review Report was released on 6 March 2020 and noted that the ACL is not an appropriate mechanism to harmonise laws in the NFP sector, as it is not designed to impose detailed licensing, reporting and conduct requirements in specified sectors. The government response further noted that repealing state fundraising legislation and relying on the ACL's broad protections could leave regulatory gaps.

The ACCC supports the process currently underway to harmonise state and territory fundraising legislation, in accordance with the [announcement](#) by the Assistant Minister for Competition, Charities and Treasury on 16 February 2023.

Contacts to the ACCC about the NFP sector

Relative to contacts we receive about other sectors, the amount of contacts the ACCC receives about issues in the NFP sector is low.

In the 2022 calendar year, the ACCC received a total of 360,768 contacts including reports of scams, and a total of 121,531 reports excluding scam contacts. Of the non-scam contacts, around only 0.07% related to allegations of issues or conduct in the NFP sector (around 80 reports). Of the 239,237 scam reports over the same period, around 0.33% related to reports of fake charity scams (around 800 reports).

In general, the non-scam reports of issues or conduct in the NFP sector covered the following issues:

- alleged issues with amounts charged or debited, or difficulties in cancelling payments
- allegations of issues with the goods or services provided by a charity or NFP
- potential concerns around the use of funds by a charity, fundraiser or NFP
- queries about whether a particular organisation is a charity, or reports alleging that a particular organisation is claiming to be a charity when it is not registered as such
- alleged irregularities in lotteries/auctions/raffles run by a charity or NFP
- concerns regarding alleged misrepresentations by a charity or NFP around their cause in general, or when soliciting donations
- reports of unwanted contacts from charities or NFPs, or other general concerns regarding marketing contacts from charities or NFPs.

Allegations raised in these contacts have not been confirmed or verified. Contacts to the ACCC do not always mean a business has acted in breach of the ACL, or any other relevant legislation (such as the ACNC Act or state and territory fundraising specific legislation). As noted in our [Compliance and Enforcement Policy](#), given our economy-wide remit, we are unlikely to pursue matters that are more effectively dealt with at the local level by state and territory agencies, or that are better considered by sector specific regulators that have the regulatory focus and expertise specific to an issue.

We also note that consumers and other stakeholders may be more likely to report issues in the NFP sector to the ACNC and/or state and territory regulators, given their specific roles in regulating this sector.

I hope this information is of assistance and thank you again for the opportunity to make this submission.

Yours sincerely

Catriona Lowe
Deputy Chair