Not-for-profit Law
Melbourne Office
PO Box 16013
Melbourne VIC 8007
Tel
Fax

Sydney Office
PO Box 436
Darlinghurst NSW 1300
Tel
Fax

The Coordinating Officer
Lotteries and Art Unions Act Review
Liquor & Gaming NSW

Submission to the *Lotteries and Art Unions Act 1901* (NSW) Discussion Paper

About Not-for-profit Law

1.1. The need for a nationally-consistent regulatory regime

ABN: 54 206 789 276 | ACN: 164 567 917

Not-for-profit organisations contribute significantly to our civil society: they build our communities, support our most vulnerable, embody and celebrate our cultural traditions and work to keep us active and healthy. Many not-for-profits fundraise for their activities through community raffles, art unions and other activities regulated by the Act – and the revenue this generates is vital to their ability to pursue their not-for-profit missions and contribute to civic life.

We note the NSW Government acknowledges that community lotteries such as raffles, are a key source of income for many not-for-profit organisations, as stated by Deputy Premier Troy Grant in August 2016:

> Raffles and art unions are a popular way to raise funds for charities, local sports clubs and small businesses, especially in regional NSW where community support keeps many of these organisations going.[1]

The Fundraising Institute of Australia and Third Sector Management Services reiterated the key role of lotteries and art unions for charities' fundraising, in their joint submission to the Productivity Commission Inquiry into Australia's Gambling Industries in 2010:

> In a survey conducted in 1995 of 148 charitable organisations in all states of Australia, 38 or 25.67% stated that they obtained income valued at $14.5 million from lotteries/art unions/calcuttas. The median sum raised (net proceeds) were $64,000 and the average sum raised was $382,000.[2]

Given the importance of community gaming, lotteries and trade promotions to the financial viability and sustainability of many not-for-profits (as well as the need to protect consumers and participants in these activities), their appropriate and efficient regulation is important. Indeed the NSW Government's objectives of the Act include the ongoing viability of organisations that conduct charitable fundraising and lottery systems (along with the objectives of integrity, preventing practices that are unlawful, protecting those who have been misled or deceived about the proceeds of such activities and to penalise those who have acted unfairly).[3]

We note there are multiple and sometimes inconsistent laws governing community fundraising efforts via raffles and other lotteries and gaming activities both in NSW and across Australia. These create unnecessary compliance burdens on non-for-profit organisations, especially those that operate and/or run lottery-related fundraising activities across multiple jurisdictions, including, increasingly, online sales of raffle tickets (see image below for an example of the multiple permits required).

Example:[4]

29 Panama Crescent, Mountain Creek

LOTTERY NO.177

CLOSES: **17/10/16** | DRAWN: **21/10/16**

Lottery 177 closes 12.00 Noon AEST 17/10/16 & drawn 12.00 Noon AEST 21/10/16. Draw conducted at 190 Montpelier Road, Bowen Hills QLD. Members of the public welcome. Winners advised by registered post. Results published 21/10/16 on Surf Life Saving Lottery website www.surflottery.com.au and on 26/10/2016 in "The Australian" newspaper. Tickets from $2 each. The amount of tickets available will range from 2,500,000 (single ticket purchases) to 8,000,000 (if bundle purchases occur). Promoter: S Francia, 190 Montpelier Road, Bowen Hills QLD 4006. GPO Box 9950, Brisbane QLD 4001 QLD Licence No. 30064; VIC Permit No: 10452/16; NSW Permit No. GOCAU/1793; ACT Permit No. ACT R16/00096. Gold valued at purchase price on day. Market variations apply. Surf Life Saving Foundation to pay stamp duty and legal fees for prize home transfer. Prize home complies with council and

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[1] *Media Release: Cutting Red Tape for Community Fundraisers,* Department of Justice, 2 August 2016, http://www.justice.nsw.gov.au/Documents/Media%20Releases/2016/Cutting-Red-Tape-for-Community-Fundraisers.pdf (accessed 24 August 2016).

[2] *Submission to the Productivity Commission Inquiry into Australia's Gambling Industries*, Fundraising Institute Australia Inc and Third Sector Management Services Pty Ltd (joint submission), (undated), http://www.pc.gov.au/inquiries/completed/gambling/submissions/sub148/sub148.pdf (accessed 24 August 2016).

[3] New South Wales, Parliamentary Debates, Legislative Council, 26 June 2003, the Hon Michael Egan, 2260-2261.

[4] Surf Live Saving, Lottery No 177, Terms and Conditions, at: https://www.surflottery.com.au/wp-content/uploads/2016/07/Terms-and-Conditions_Lottery-177.pdf?e1e3f7 (accessed on 1 September 2016).

The failure of regulation to address this complexity causes inefficiencies, costs and concerns for those involved in running not-for-profits, who are often volunteers and rarely have funds to spend on specialist legal advice to clarify the application of laws to their organisation or its activities.

The case study below seeks to illustrate this complexity, and its negative effects on small community organisations that are seeking to do the right thing.

HYPOTHETICAL CASE STUDY:[5] YOUTH ASSOCIATION STRUGGLES TO COMPLY WITH RAFFLE LAWS

On Track is a charitable association that engages with disadvantaged youth. It received a framed and autographed photograph of Usain Bolt, valued at $7,000. It decides to raffle the photograph to raise funds for the organisation.

The association is small, mostly volunteer-run with only two paid staff. On Track is based predominantly in NSW but with some members in Victoria. It decides to promote the raffle through members in both States.

What laws apply: Interplay of community lotteries laws with charitable fundraising laws
Ralph, On Track's administrator, is given the responsibility of organising the raffle. He has never organised a raffle and is unsure what laws apply. As On Track is based in NSW and the competition will be run from NSW, he only looks at NSW laws. After some research, Ralph thinks that either the *Lotteries and Art Unions Act* or the *Charitable Fundraising Act* in NSW applies. Surely it can't be both?

The legislation is difficult to understand
Ralph looks up the *Lotteries & Art Unions Act* but finds the language really old-fashioned and confusing. For example, the Act starts off by saying that raffles are prohibited [s 3(4) of the Act] but when he reads further (s 4 of the Act) it seems that some lotteries are permitted. (Are raffles a lottery, Ralph wonders? It's unclear to him, as 'lottery' is defined in the Act by what it's not, rather than by what it is.) Feeling frustrated and very confused, he decides to visit the Liquor & Gaming website to see if he can find out more information about what a raffle is and how to run it.

Compliance burden
When Ralph reads the Liquor & Gaming factsheet on raffles he is relieved to find out that because the prize value will be less than $30,000, On Track does not need a permit. However, while he does not need a permit he still has meet all these other rules in both the Act and Regulations. These include prescriptive rules about what information must be recorded on the tickets, the format of tickets, how the raffle can be promoted, record keeping obligations as well as many other rules. He is overwhelmed.

Ralph then finds out that On Track also has to comply with charitable fundraising laws, which set out a slightly different set of prescriptive rules. He begins to wonder whether it is worth it.

He puts all the information on the tickets that the NSW Acts say he has to and then puts in a sentence about the "The cost of this ticket is tax deductible" because On Track has deductible gift recipient (**DGR**) status. Ralph's manager tells Ralph that she does not think this is correct. He does some research and finds out that whilst the organisation is a DGR, raffle tickets do not meet requirements for tax deductibility. He prints all the tickets again. Poor Ralph.

Cross-jurisdictional complexity
All the tickets sell and Ralph is glad about that (although he is behind in all of his other work). Then he finds out that because some people in Victoria bought some tickets that On Track needed to also comply with the laws there. Ralph is anxious about On Track potentially being prosecuted for failing to abide by the laws in Victoria. He tried to be compliant, wanting to do the right thing and now feels he has let the organisation down.

Too much hassle
Given the time and effort involved in running the raffle On Track is reluctant to engage in any future raffle or other community gaming activity for the organisation. This creates difficulties for the organisation's fundraising.

The laws regulating not-for-profit 'fundraisers' via raffles and other lotteries are part of an overall regulatory landscape for the not-for-profit sector that has been acknowledged as mired in red tape – characterised by the

[5] This case study is not based on a real-life scenario but reflects the type of feedback we hear from NFPs through our work assisting hundreds of organisations per year. The scenario is based on existing laws.

Productivity Commission in 2010 as complex, lacking in coherence and sufficient transparency, and costly to not-for-profit organisations.[6] Despite streamlining in some areas in recent years, there is still great complexity, inconsistency and duplication within the regulatory system. There have been numerous calls for uniform regulation across Australia,[7] and earlier this year it was reported that 'overwhelmingly, fundraising is the source of the greatest amount of regulatory burden for charitable organisations' and that fundraising was the "top priority for reform and an area recognised as making the most difference for regulatory burden reduction".[8]

In this regard, we applaud the NSW Government for its leadership in proposing the abolishment of the *Charitable Fundraising Act 1991* (NSW), as one way of cutting red tape for the sector. We encourage the NSW Government to continue this work by delivering a streamlined, principles-based regulatory approach to community gaming, lotteries and trade promotions which makes it easier for not-for-profit organisations to (compliantly) conduct such activities, wherever they occur in Australia.

In many ways, our recent submissions[9] in relation to charitable fundraising reform are also applicable to this review of the Act. In these submissions, we have argued the existing state-based, permit-driven regulatory approach has produced an overly burdensome and inadequately-enforced system, which requires national reform to achieve a harmonised and principles-based framework. We refer to the following NFP Law submissions on reform of charitable fundraising which are of relevance to issues raised by this Discussion Paper:

- NSW Fair Trading, *Charitable Fundraising Review Discussion Paper 2016* (submitted 15 July 2016), where we broadly supported the repeal of the *Charitable Fundraising Act 1991* (NSW), and

- Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Issues Paper* (submitted 27 May 2016), where we proposed that the Australian Consumer Law (**ACL**) should be clarified to ensure its application to fundraising activities; it is our view that minor amendments to the ACL would enable the repeal of state and territory fundraising regimes, thereby effectively creating a nationally-consistent regulatory regime. **(This submission is included at <u>Annexure A</u>.)**

The reasons for changing to the one national law from a fragmented approach, as stated by the Hon Joe Ludwig, Special Minister for the State and Cabinet Secretary on the Second Reading of the Australian Consumer Law, apply equally to the community lotteries and trade promotion context:

> While these laws may work well for many purposes, each of them differs—to the cost of consumers and business. Australian consumers deserve laws which make their rights clear and consistent, and which protect them equally wherever they are. At the same time, Australian businesses deserve simple, national consumer laws that make compliance easier. A single national consumer law is the best means of achieving these results.[10]

For the not-for-profit sector in NSW, there would be a significant reduction in red-tape if there was one nationally-consistent, principles-based regulatory regime for community gaming, lotteries and trade promotions across Australia. Given the New South Wales Government has acknowledged more broadly the ACL may apply to fundraising activities (pending the facts of each case),[11] further consideration could be given by the NSW Government to its use (through amendment, including through its voluntary codes of conduct) to regulate

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[6] *Productivity Commission Research Report: Contribution of the Not-for-Profit Sector*, Productivity Commission, January 2010, http://www.pc.gov.au/inquiries/completed/not-for-profit/report/not-for-profit-report.pdf (accessed 24 August 2016).
[7] *Measuring and Reducing Red Tape in the NFP Sector*, ACNC Forum, 4 December 2013, page 4 and *Research in to the Commonwealth Regulatory and Reporting Burdens on the Charity Sector*, Ernst and Young prepared for the ACNC, 30 September 2014, page 46.
[8] *Cutting Red Tape: Options to align State, Territory and Commonwealth charity regulation*, Deloitte Access Economics, 23 February 2016, page 2-4).
[9] See http://www.justiceconnect.org.au/fundraisingreform.
[10] Commonwealth, Parliamentary Debates, Senate, 24 June 2010, the Hon Senator Joe Ludwig, p 4283.
[11] Charitable Fundraising Review, Discussion Paper – July 2016, New South Government, Department of Fair Trading, page 9.

gaming, lotteries and trade promotions; see our views on charitable fundraising in the ACL Review Issues Paper submission (**Annexure A**).

RECOMMENDATION 1

TThe NSW Government establish a modern, principles-based regulatory approach to community lotteries and trade promotions in partnership with other State and Territory governments to deliver a nationally consistent model of regulation.

1.2. The proposed NSW model

We support the simplification and modernisation of the existing regime in NSW and the adoption of a principles-based approach to regulation of community gaming, lotteries and trade promotions, as the first step towards a uniform Australia-wide regulatory regime (see Recommendation 1 and discussion above). The modernisation of existing NSW law should also adopt a plain-language approach to legislation to make the obligations easier for volunteers and staff within small community organisations to understand and comply with.

We also support a model that imposes most regulatory burden on high risk activities, relieving low-risk activities of a requirement to obtain a permit. However, we query whether a permit-based system is the most effective regulatory approach for activities covered by the Act.

While the Discussion Paper states that between 1 July 2015 and 31 July 2016 Liquor & Gaming received 99 complaints regarding the conduct of certain community lotteries and trade promotions (page 5 of Discussion Paper), no evidence is provided of how many of those complaints were prosecuted. It is therefore difficult to comment on the rate or substance of enforcement action taken under the current Act. As Liquor & Gaming NSW's enforcement and compliance results are not available to the public other than through a freedom of information request, we have not been able to make that request in the short time-frame given for the consultation process. We do note, however, in relation to its *Charitable Fundraising Act 1991* (NSW), the NSW Government stated it does not undertake any specific compliance and enforcement, and of 29 complaints investigated they did not involvement detriment to the public. Further, investigation over a different period found the majority of complaints were found to be minor and unintentional mistakes and the cases of noncompliance had mostly been found to result from complex and statutory requirements.[12]

Drawing on our submission to the ACL, we consider there may be scope to implement a more efficient 'light touch' regulatory approach which would require organisations to comply with a set of overarching principles in the Act (eg, based on fairness, impartiality and transparency of process and outcomes), which are then policed through proportionate enforcement strategies such as education and guidance, 'spot checks' and issuing of compliance substantiation notices, targeted investigations and (where necessary) more serious enforcement action.

[12] Ibid, page 11.

RECOMMENDATION 2

That, in parallel with our Recommendation 1 above, the NSW Government moves towards a principles-based approach to regulation of community gaming, lotteries and trade promotions that is in plain-language and accessible by small volunteer-run not-for-profit organisations.

RECOMMENDATION 3

That the NSW Government considers, as part of its review of the Act:

(a) whether a permit regime is the most effective regulatory approach for activities covered by the Act; and

(b) potential alternatives to a permit regime, including introducing a requirement for not-for-profit organisations to comply with a set of overarching principles (based on fairness, impartiality and transparency of process and outcomes), which are enforced via 'light touch' strategies such as education and guidance, spot checks, issuing of compliance substantiation notices, through to targeted investigations and (where necessary) serious enforcement action.

The following are our brief comments in relation to the proposed model in the Discussion Paper (noting that the proposal is outlined at a relatively 'high level', with the result that we are unable at this stage to comment on the detail or any proposed legislative drafting):

- While the proposed NSW model would create a simplified 'category' system for the classification of gaming activities that do and do not require a permit, all activities conducted would still need to meet the requirements of the Act, Regulations and relevant rules. Unless the requirements under current legislative framework are significantly reduced, simplified and modernised, the proposed model would still create confusion and significant barriers for organisations conducting community gaming, lotteries and trade promotions. (Please see also our comments above regarding a potential alternative to the permit-driven approach.)

- Detailed factsheets have been prepared by the Liquor & Gaming NSW to assist organisations to adhere to the requirements of the Act, Regulations and permits. While the factsheets are helpful in setting out the requirements to be met, they rarely link to the relevant sections of the Act or Regulations and are very complex. If the proposed model is going to move to a less prescriptive approach, the creation of a best practice guide that applies to all community gaming, lotteries and trade promotions (with links to relevant legislation) would help organisations get an overall snapshot of the requirements for those activities.

- We support the introduction of a civil penalty regime for breaches under the Act. While we encourage Liquor & Gaming NSW as a 'light touch' regulator (using methods such as education and guidance as a first intervention to ensuring organisations' and individuals' compliance with the Act, as outlined above) we also encourage it to use other enforcement tools available in appropriate circumstances, including penalty notices.

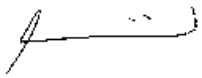
2. Conclusion

In conclusion, the current review of the Act provides both the opportunity to simplify the existing regime in NSW, and then work towards the delivery of a modern, principles-based regulatory approach to community lotteries and trade promotions in partnership with other State and Territory governments to deliver a nationally consistent model of regulation.

We welcome any opportunity to discuss this submission or contribute to further stages of the reform process.

Yours faithfully

Juanita Pope, Director
Not-for-profit Law
Justice Connect
[redacted]



Savi Manii, Manager of Advice (NSW)
Not-for-profit Law
Justice Connect
[redacted]

Not-for-profit Law
Melbourne Office
PO Box 16013
Melbourne VIC 8007
Tel
Fax

Sydney Office
PO Box 436
Darlinghurst NSW 1300
Tel
Fax

Submission to the Australian Consumer Law Review Issues Paper

About Not-for-profit Law

About our submission

Part 2:

ABN: 54 206 789 276 | ACN: 164 567 917

The following are the recommendations made in our submission.

Recommendations

Recommendation 1: Amend the definition of "trade and commerce" to clarify whether not-for-profit activities fall within or outside the scope of this definition by including indicia against which activities undertaken by, or on behalf of, a not-for-profit organisation can be assessed.

Recommendation 2: ACL regulators should undertake and support a nationally coordinated and tailored education program focussed on the application of the ACL to the activities undertaken by, or on behalf of, not-for-profit organisations. Funding for the extra resources required for this education program can come, at least in part, from pecuniary penalties issued for any breaches of the ACL in relation to not-for-profit activities.

Recommendation 3: ACL regulators should issue a joint interpretation statement about the application of the ACL to activities undertaken by, or on behalf of, not-for-profit groups. In light of this statement, the ACL regulators should consult with the not-for-profit sector and the public on their proposed regulatory approach to the enforcement of the ACL, and then publish their agreed, nationally consistent approach in a timely manner.

Recommendation 4: Explicitly apply sections 18, 20 and 50 to fundraising activities by adding a reference to "fundraising activities" to these sections.

Recommendation 5: Add a definition of "fundraising activities" to the ACL, for example:

> *"Fundraising activity" includes any activity the purpose or effect of which is the donation of money, goods or services by persons, but does not include the receipt of funds as consideration only for goods and services supplied through a business or professional activity (whether or not carried on for profit). An activity can be a fundraising activity even if nothing is received by the fundraiser.*

Part 1. Unacceptable uncertainty – to what extent does the ACL regulate activities of not-for-profits?

Terminology – not-for-profit, charity

Please note: in this submission we refer to 'not-for-profit organisations' and 'not-for-profits'. The primary distinguishing feature of a not-for-profit organisation (compared with a 'for profit' business) is that any profits made by the organisation must be used for its mission (purposes) and cannot be distributed to its members (known as the non-distribution constraint). Although not well understood by the general public, only about 10% of not-for-profits meet the legal definition of a 'charity'. That is, all charities must be not-for-profits, but not all not-for-profits are charities – this is why we have used the broader term of 'not-for-profit' in this submission

1.1. Context – the not-for-profit sector

For not-for-profits operating in Australia, working out whether or not the ACL applies to regulate their conduct causes unacceptable confusion and concern. We are not aware of any government

guidance tailored to the not-for-profit sector about the types of conduct that are, and are not, regulated by the ACL.

Not-for-profits contribute enormously to Australia from economic and social perspectives, yet many laws are framed without consideration of the not-for-profit context. The Issues Paper itself makes little reference to activities except those undertaken for a profit, and consistently uses the language of "business" to describe entities regulated by the ACL when in fact, the ACL applies far more broadly (albeit to an uncertain extent).

Contribution of the not-for-profit sector in Australia

- There are around 57,000 economically significant NFPs in Australia.
- The direct value that NPIs [non-profit institutions] add to the economy is measured in NPI gross value added (GVA). NPI output that is sold in the market is valued by sales, whilst the non-market output is valued at cost. In 2012-13, NPIs accounted for $54,796m or 3.8% of total GVA. This is an increase on the revised 2006-07 NPI contribution to GVA (3.2%).
- Gross domestic product (**GDP**) measures the value of production inclusive of product taxes. NPI GDP in 2012-13 is $57,710m. The revised NPI GDP for 2006-07 is $34,662m.
- NFPs employ over 1 million Australians.
- 3.9 million NPI volunteers contribute an economic value of $17.3b per annum.

Most recent ABS Satellite Account for the not-for-profit sector (2012-13) available at: http://www.abs.gov.au/ausstats/abs@.nsf/mf/5256.0

Not-for-profits provide a huge number of goods and services in Australia. At times, not-for-profits are operating very much like a business. At other times they offer goods and services for free or at a discount in furtherance of their mission, or are engaged to deliver services as a funded government service provider, virtually as an extension of 'the crown'.

Australian society and the organisations operating within it are increasingly complex, with many organisations straddling 'for-profit' (business), not-for-profit, and government realms; traditional demarcations between sectors are increasingly blurred. The failure of business and consumer regulation to address this complexity causes inefficiencies, costs and concerns for those involved in running not-for-profits, especially when they are often volunteers and rarely have funds to spend on specialist consumer law advice to clarify the application of laws to their organisation or its activities.

1.2 Are the activities of not-for-profits in "trade or commerce"?

The ACL uses the criterion that conduct be "in trade and commerce" as a threshold for determining the application of many of its provisions to conduct, and to draw a line between conduct that falls within and outside of the policy objectives of the ACL. Although section 2 of the ACL (definition of trade and commerce) specifically includes "any business or professional activity (whether or not carried on for profit)", we do not believe this reference alone provides sufficient clarification of the meaning of "trade and commerce" for activities commonly undertaken by, or on behalf of, not-for-profit organisations.

Are activities undertaken by or on behalf of not-for-profit organisations, activities within the ACL definition of "trade and commerce"?

Within the extensive case law on the ACL definition of "trade and commerce", there are only a handful of cases that consider whether activities of not-for-profits are in "trade and commerce". These cases highlight the difficulty of making this assessment, for example:

1. *Orion Pet Products Pty Ltd v RSPCA* (Vic) [2002] FCA 860: statements made by an officer of the RSPCA in opposing the sale of electronic dog collars were held not to have been made in trade or commerce.
2. *E v Australian Red Cross Society* [1991] 27 FCA 310: the Australian Red Cross was held not to have engaged in trade or commerce by gratuitously supplying blood to a patient at a hospital.
3. *David & Anor v Roberts, Allen &* Anor [1997] FCA 43: representations made about the possible existence of Noah's Ark at a public lecture promoted through a not-for-profit unincorporated association where a small entry fee was charged were not conduct in trade or commerce:

   > *In my view, the less commercial the character and objectives of an organisation, the greater the degree of system and regularity required for the organisation's activities to be characterised as a "business". This approach, in my view, is consistent with the purposes underlying the Fair Trading Acts, namely to establish standards of conduct applicable to commercial and consumer transactions.... If the net is cast too widely, the legislation will apply to transactions that are not truly commercial in character and confer protection on persons who cannot fairly be described as consumers.* (Sackville J)

There are some activities undertaken by not-for-profit organisations that are clearly within the scope of the ACL, some that are almost certainly outside its scope, but a considerable number that are in a grey area. Where a not-for-profit is engaged in activities such as the sale or exchange of goods and services as part of an enterprise, those activities would fall within the definition of "trade and commerce", unless the price was so subsidised that it negated the commercial nature of the activity. However, activities conducted by not-for-profits that lack a business component or professional nature are unlikely to be within the definition of "trade and commerce". In the following table we have provided examples to illustrate this range.

Are the activities of not-for-profits in "trade or commerce"	
Clearly within the ACL	• a not-for-profit entity engages in the selling of products: e.g. Cancer Councils produce and sell (wholesale and retail) sun protection products such as sunscreens, sunglasses, and protective clothing at commercial rates • a not-for-profit entity delivers services: e.g. Asylum Seeker Resource Centre Cleaning provides commercial and domestic cleaning services at commercial rates in the Melbourne region as a social enterprise • a not-for-profit entity provides childcare services: e.g. a not-for profit childcare centre that operates on a fee-for-service basis
Grey area (note, the issue of whether fundraising is within "trade or commerce" is considered in more	• a not-for-profit entity provides subsidised gardening services to elderly people in a particular region. The not-for-profit is able to subsidise the price of the services as it receives a range of philanthropic and/or government grants. Are the services provided in trade or commerce? • a not-for-profit entity provides free morning meals to people experiencing homelessness in Canberra. Volunteers notice that people who are not

detail at Part 2 of this submission)	experiencing homelessness are increasingly arriving for the free breakfast, so they introduce a gold coin contribution requirement (which they waive when asked). Is the provision of this food in trade or commerce? • a not-for-profit entity charges a very significant yearly membership fee to members. Members get free access to gym facilities, car parks, and a range of discounts at affiliated businesses. Any member of the public can become a member. Is the membership provided in "trade or commerce"? Are the membership benefits provided "goods or services"? • a not-for-profit entity holds a fundraising concert in partnership with a well-known band that is donating its performance to the not-for-profit. The tickets sell out, but there is a storm the day before the concert and the concert cannot be held. Is the supply of the ticket to the concert in trade or commerce? Would consumer guarantees apply so that a refund should be offered? • a not-for-profit entity fundraises through a commercial third party provider. Is the conduct of the third party fundraiser on behalf of the charity in trade or commerce? What if the same fundraising campaign was undertaken by volunteers rather than professionals? If the volunteers engage in misleading and deceptive conduct, is this in contravention of section 18 of the ACL? • a not-for-profit entity manufactures lapel pins in China, and sells these to raise funds for delivering community programs. Many pins are faulty. Are pin purchasers entitled to a refund or replacement of their pin?
Probably outside the ACL	• an unincorporated not-for-profit group with environmental purposes cleans up beaches by picking up rubbish. Local councils have staff to do this work but they are under-resourced. The council knows that the group undertakes these activities, but has no formal arrangement in place. • a not-for-profit entity with purposes focused on providing social interaction for elderly people, offers to provide people over 65 years a companion to visit attractions such as the Botanical Gardens. • a not-for-profit entity uses volunteers to provide free house cleaning for people who are undergoing treatment for cancer.

In our view, many of the activities carried out by the estimated 600,000 not-for-profits in Australia fall into an unacceptable grey area (as illustrated by the examples above), where making an assessment about whether such activities satisfy the definition of being in trade and commerce, and therefore understanding whether or not the ACL applies to regulate that conduct, is extremely difficult for both consumers and not-for-profits.

1.3 'Consumer' in the not-for-profit context

Every Australian interacts regularly with not-for-profits and their activities, whether purchasing their products and services, as beneficiaries of support, by swimming at a patrolled beach or walking through a nature reserve. Millions of Australians are consumers of products and services provided by not-for-profits where that conduct is clearly regulated by the ACL. Virtually every Australian will also experience the conduct of not-for-profits through their fundraising activities – television appeals, social media advertisements, raffles, door knocking, phone appeals or street collections – some of which is covered by the ACL (discussed further at Part 2 of this submission). Many Australians will

also interact with not-for-profits in the grey areas described above, where the application of the ACL to the activities of the not-for-profit or the goods and services being provided is unclear.

This state of uncertainty is detrimental to consumers who are the intended beneficiaries of the ACL. It is unreasonable and totally impractical that, in order to understand whether consumer protections apply to the conduct of a not-for-profit, a consumer must investigate and understand whether the organisation they are interacting with is doing so in a way that attracts the operation of the ACL: surely a consumer cannot be expected to understand whether goods or services are being provided to them at such a discount that the provision could not be said to be in "trade or commerce", or the goods or services are being supplied to them by a volunteer rather than a professional so that they are not being provided in "trade or commerce", or whether the relationship between a member and a not-for-profit could be said to be in "trade or commerce"?

1.4 Recommendations – removing current uncertainty about application of ACL to not-for-profits

Recommendation 1:

Amend the definition of "trade and commerce" to clarify whether not-for-profit activities fall within or outside the scope of this definition by including indicia against which activities undertaken by, or on behalf of, a not-for-profit organisation can be assessed.

The definition of "trade and commerce" must be clarified so that not-for-profit organisations, consumers and regulators can understand when and how the ACL regulates activities of not-for-profits, including activities undertaken to raise funds on their behalf.

To achieve this clarification, we recommend that further indicia be added to the definition of "in trade or commerce". In particular, guidance is required about:

- gratuitous or heavily subsidised supply of goods or services, or inflated priced good as part of fundraising
- activities carried on by not-for-profits that are fully government funded
- services or benefits available to members of not-for-profits
- non-commercial activities carried on by volunteers or semi-professionals at not-for-profits
- advocacy by not-for-profits.

Recommendation 2:

ACL regulators should undertake and support a nationally coordinated and tailored education program focussed on the application of the ACL to the activities undertaken by, or on behalf of, not-for-profit organisations. Funding for the extra resources required for this education program can come, at least in part, from pecuniary penalties issued for any breaches of the ACL in relation to not-for-profit activities.

We urge a coordinated approach from ACL regulators in the conduct of education programs to help both not-for-profits and consumers to understand where the ACL regulates activities of not-for-profits, and where it does not. Support should also be provided to appropriate sector intermediaries

to deliver independent education programs about the application of the ACL to not-for-profits, as they are often better placed to tailor the message and reach particular segments of the not-for-profit sector.

Recommendation 3:

ACL regulators should issue a joint interpretation statement about the application of the ACL to activities undertaken by, or on behalf of, not-for-profit groups. In light of this statement, the ACL regulators should consult with the not-for-profit sector and the public on their proposed regulatory approach to the enforcement of the ACL, and then publish their agreed, nationally consistent approach in a timely manner.

Following clarification of the application of the ACL to not-for-profits, it is our view that there needs to be a transition period for the not-for-profit sector in which the primary focus is education, with enforcement for only the most blatant, deliberate and serious of breaches. In respect of our Recommendation 3, we commend the regulatory approach adopted by the Australian Charities and Not-for-profits Commission as a useful starting for developing a regulatory approach for the not-for-profit sector.

Part 2. Reforms to ensure explicit application of the ACL to fundraising activities

2.1. The critical need for fundraising reform

> *Fundraising legislation differs significantly between jurisdictions, adding to costs incurred by the NFP sector. Harmonisation of fundraising legislation through the adoption of a model act should be an early priority for governments.*
>
> Australian Productivity Commission Contribution of the Not-for-profit Sector 2010 p xxiv

Not-for-profit Law (and many other sector bodies that we work with) considers fundraising regulatory reform should be a critical law reform priority for state, territory and federal governments, and that the ACL is the platform to facilitate that reform.

Appropriate and efficient regulation of fundraising is essential underpinning for the Australian not-for-profit sector. The current, fragmented regulatory landscape is ineffective at regulating fundraising, and compliance with it is burdensome in the extreme. This is a well identified area of red tape that acts as a barrier to not-for-profits getting their important work done (see Appendix 1 for some of the relevant inquiries that have identified this issue and recommended reform). Fundraising regulation is in a very similar state to that of consumer law prior to the reforms that led to the creation of the ACL.

2.2 Why the ACL is suitable as a platform for reform of fundraising regulation

Not-for-profit Law submits that there are many reasons why the ACL is an appropriate vehicle for fundraising regulation:

a. The ACL represents a modern, principles-based approach to regulation of people and organisations.

b. The policy objectives of the ACL are congruent with the policy objectives of fundraising regulation, including the prevention of practices that are unfair or contrary to good faith; that are unconscionable or deceptive; to help people make informed decisions and protect them when have been treated unfairly, and to penalise those have acted unfairly. [1] Fundraising laws are also primarily concerned with fairness. For example, when introducing the then Fundraising Appeals Bill in Victorian Parliament in 1984, the then Premier John Cain said its main purpose was to provide protection to the public and respectable fundraising organisations against fraud and malpractice in fundraising appeals.[2]

c. The ACL works through a cooperative regulatory framework applied uniformly in all jurisdictions of Australia. Through jurisdictional cooperation, the ACL can, in its current form, apply to any person (natural or corporate) in Australia. This means an application of provisions of the ACL to fundraising will encounter no jurisdictional or constitutional barriers.

d. The ACL is a well-understood piece of law, and an extension of the ACL to explicitly cover fundraising would be easy to explain to fundraisers and donors, and likely to impact upon fundraiser behaviour and public trust and confidence in a short time frame.

e. The minor amendments to the ACL proposed in this submission would be cost effective to implement.

f. The ACL contemplates the development of voluntary industry codes, which would be appropriate and helpful in the fundraising context, and could be developed by existing fundraising self-regulatory bodies.[3]

g. The reasons for changing to the one national consumer law from a fragmented approach, as stated by the Hon Joe Ludwig, Special Minister for the State and Cabinet Secretary on the Second Reading Speech on the ACL, apply equally to the fundraising context:

> *"While these laws may work well for many purposes, each of them differs—to the cost of consumers and business. Australian consumers deserve laws which make their rights clear and consistent, and which protect them equally wherever they are. At the same time, Australian businesses deserve simple, national consumer laws that make compliance easier. A single national consumer law is the best means of achieving these results."*[4]

h. The regulators with oversight of consumer law are the same regulators concerned with fundraising laws, and therefore the institutions involved in regulating fundraising activity could largely remain unchanged if regulation of fundraising derived from the ACL alone, ensuring existing experience regulating not-for-profits can be retained.

i. The current regulatory approach of the ACCC and state-based regulators of the ACL is a risk-based, proportionate approach that we consider is appropriate for the regulation of fundraising.

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[1] Australian Government, The Treasury, *The Australian Consumer Law: A framework overview* (January 2013); Productivity Commission*, Review of Australia's Consumer Policy Framework*, Report, No. 45, 30 April 2008; Standing Committee of Officials of Consumer Affairs, *An Australian Consumer Law Fair markets — Confident consumers*, 17 February 2009

[2] Victoria, Parliamentary Debates, Legislative Assembly, 3 September 1998, Mr Robert Hulls, p 170

[3] Note ACCC guidance on voluntary industry codes at https://www.accc.gov.au/business/industry-codes/voluntary-codes

[4] Commonwealth, Parliamentary Debates, Senate, 24 June 2010, the Hon Senator Joe Ludwig, p 4283

2.3. The current application of the ACL to fundraising activities is unclear

Fundraising is a specific example of the difficulties described in Part 1 of this submission regarding uncertainty about applying the ACL to activities carried on by not-for-profits. While we submit that the ACL regulates much fundraising, the following table highlights some of the varying opinions, including from within government about the existing application of the ACL to fundraising. This may be why, as far as we are aware, the ACL is rarely enforced against fundraisers even where there is evidence of misconduct.

Does the ACL regulate fundraising? Examples of the differing interpretations.	
Australian Productivity Commission Research Report - Contribution of the Not-for-Profit Sector (2010), p 136	"At the Commonwealth level, fundraising is mainly regulated under three areas of legislation: • the Corporations Act 2001, with regards to companies seeking loans from the public • the Australian Securities and Investments Commission Act 2001, where ASIC may require NFPs subject to its regulatory oversight to provide it with fundraising disclosure documents, such as prospectuses or offer information statements • the Trade Practice Act 1974 [forerunner to the ACL], insofar as it deals with misleading or deceptive information related to fundraising activities."
Department of the Treasury, Australian Government – Discussion Paper (2012)	The discussion paper authored by the Commonwealth Department of Treasury, *Charitable fundraising regulation reform: Discussion paper and draft regulation impact statement*, (February 2012)[5] (the Discussion Paper) contemplated the application of the ACL to charitable fundraising. The discussion paper stated that the application was not automatic as the provisions applied (paragraphs 35-39) only if: • there is a supply or acquisition of goods or services; • the supply or acquisition occurs in the course of trade or commerce; and • the goods or services were supplied to, or acquired by, a consumer.
New South Wales Government submission to the Discussion Paper (2012)	"NSW notes that the outline of the application of the Australian Consumer Law (ACL) to charitable fundraising in paragraphs 35 and 36 [of the Discussion Paper] is inaccurate. The prohibitions on misleading and deceptive conduct, unconscionable conduct, false or misleading representations and harassment or coercion already apply to an organisation, including a charitable fundraiser, if there is a supply of goods and services in the course of trade or commerce. The supply can be to any person, not just a consumer".[6]
Fundraising Institute of Australia submission to the Discussion Paper (2012)	In its response to the question as to whether certain provisions of the ACL apply to fundraising activities, the Institute said "No. Charities, because they are not engaged in commercial activities does not fall within the jurisdiction of the Australian Consumer Law".

[5]Available at: https://sydney.edu.au/documents/about/higher_education/2012/20120405_Charitable_fundraising_discussion_paper.pdf

[6] New South Wales Government comments on the Australian Government's *Charitable fundraising regulation reform discussion paper and draft regulation impact statement*, paragraph 3.1, page 4, available at http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2012/Charitable%20Fundraising%20Regulation%20Reform/Submissions/PDF/NSWGovernment.ashx

Various not-for profit organisations in submissions to the Discussion Paper (2012)	We note of the 92 public submissions to the Discussion Paper, two submissions stated ACL already applied to some activities; two said it clearly did not; another 36 said it should apply; and 17 thought other options were appropriate (largely self-regulation or existing laws), with the remaining not offering specific comment.
Norman O'Bryan AM SC Barrister, Melbourne Chambers. Experienced in ACL Pro bono advice provided to Justice Connect's Not-for-profit Law (May, 2016)	"The ACL applies to most ordinary not-for-profit fundraising activities. Because the definition of "business" in section 2 of the ACL includes "a business not carried on for profit" and the definition of "trade or commerce" includes "any business or professional activity (whether or not carried on for profit)", the ACL will necessarily apply to much (if not all) charitable and NFP fundraising. For example, section 18(1) of the ACL states: "A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". It plainly applies to NFPs when they are raising money. Fundraising is usually a business or professional activity, whether or not the NFP is itself (in an overall sense) operating as a business or professional activity. It is the fundraising, not the NFP that is the focus (in the application of the ACL)."

2.4 A plan for reform

Not-for-profit Law is working with a range of peak bodies including the Governance Institute of Australia, Australian Institute of Company Directors, Chartered Accountants of Australia & New Zealand and CPA Australia on the need for fundraising reform. We all share the view that small changes to the ACL accompanied by repeal of state-based fundraising laws can achieve substantive fundraising law reform for the benefit of Australians and the not-for-profit sector.

Not-for-profit Law obtained pro bono advice from Norman O'Bryan AM SC to the effect that the application of ACL provisions to fundraising activities hinges on whether the fundraising activities can be considered to be "in trade or commerce" and, for some provisions, whether the fundraising activities also involve a supply of goods or services. Based on this expert legal advice, Not-for-profit Law submits that the ACL applies to many fundraising activities as currently drafted. However, in line with our submissions in Part 1, the application of the ACL to fundraising activities, as with many other activities of not-for-profits, is misunderstood – people often do not understand the extent of its application, or how it can be used to achieve redress for fundraising misbehaviour.

If the application of the ACL to the particular type of fundraising activity depends on various technicalities (for example, the degree to which the fundraising is carried out professionally), there will be continued confusion and slow uptake of its protections and remedies.

Not-for-profit Law and the organisations listed above submit that fundraising reform could be achieved through three simple steps:

1. **minor amendments to the ACL to ensure application of certain provisions to a broad conception of fundraising activities is clear**
2. **repeal of state and territory-based fundraising laws, and**
3. **work with other regulators (for example, the Australian Charities and Not-for-profits Commission, state and territory-based regulators and self-regulatory bodies such as the Fundraising Institute of Australia and the Australian Council for International Development) to improve fundraiser conduct (for example, door-knocking, telemarketing,**

excessive spending of funds on third party services).

We stress that undertaking step 1 without also undertaking step 2 contemporaneously would amount to a failure of reform, and would mean that fundraisers need to continue complying with existing fragmented and duplicative regulation along with the amended ACL.

2.5. Recommendations – explicit application of the ACL to fundraising activities

Recommendation 4: Explicitly apply sections 18, 20 and 50 to fundraising activities by adding a reference to "fundraising activities" to these sections.

By way of example, section 18 could be amended as follows:

"18 Misleading or deceptive conduct

1. A person must not, in trade or commerce or **in relation to fundraising activities**, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
2. Nothing in Part 3-1 [unfair practices] limits by implication subsection (1)."

And section 50 could be amended as follows:

"50 Harassment and coercion

1. A person must not use physical force, or undue harassment or coercion, in connection with:

   (a) the supply or possible supply of goods or services; or …[paragraphs b,c,d]

   (e) fundraising activities."

An application of sections 18, 20 and 50 to fundraising activities would make available a broad range of remedies and enforcement actions where fundraisers contravene the requirements of these sections. Although these sections likely apply to regulate many fundraising activities already, our recommendation would make that application explicit, and broaden the application to *all* fundraising, compared to its current application to fundraising that is in trade or commerce. Importantly, by focussing on explicitly extending a small selection of principles-based provisions to fundraising activities, our recommended approach avoids issues that could arise through extending all provisions of the ACL to fundraising, or extending provisions drafted in contemplation of a contract between a consumer and a supplier or manufacturer (fundraising of its very nature does not involve a contract or bargain).

Example of conduct not currently covered by the ACL that would be covered if our recommendations are adopted

Crowdfunding is increasingly used to fundraise for people and causes, often with an element of spontaneity. For example, if a particular need arises, such as a person needing expensive medical treatment or a community hoping to raise funds urgently for equipment, a crowd funding campaign may be set up in a few minutes, shared through social networks, and completed in days. Often such campaigns raise funds from around Australia. In some jurisdictions, for example Victoria, this crowdfunding would satisfy the definition of fundraising and a licence could be required. It is unlikely

that this type of community-based crowdfunding would be considered to be in "trade or commerce" and therefore would not be regulated by the ACL currently.

Under our proposal, a crowdfunding campaign of this nature would no longer need to be concerned with applying for licenses in multiple jurisdictions of Australia and instead would simply need to meet the principles set out in sections 18, 20 and 50 (that is, the fundraising cannot involve misleading or deceptive conduct, cannot be unconscionable, and must not involve harassment or coercion).

Recommendation 5: Add a definition of "fundraising activities" to the ACL, for example:

> *"Fundraising activity" includes any activity the purpose or effect of which is to solicit a donation of money, goods or services by persons, but does not include the receipt of funds as consideration only for goods and services supplied through a business or professional activity (whether or not carried on for profit). An activity can be a fundraising activity even if nothing is received by the fundraiser*.

There are benefits and downsides to defining "fundraising activity" in the ACL. As experience shows, attempts to define fundraising over the years have been fraught; fundraising practices evolve quickly, adapting to changing environments, practices and social needs. Although Not-for-profit Law accepts there is merit in leaving the concept of "fundraising law" undefined, on balance we believe that it should be defined to provide greater certainty to fundraisers. Therefore, we recommend that a broad definition of fundraising activity be added to the ACL, and we note that there is an inbuilt process for ongoing updates to the definition via the ACL review process.

We support further consultation and engagement of technical experts to refine the best approach for achieving the clear application of the ACL to fundraising activities.

In conclusion

The current review of the ACL is an opportunity to both improve the ACL for the not-for-profit sector, and to use its unique cross-jurisdictional framework to break through decades of failed attempts to harmonise and reform the regulation of fundraising in Australia.

We welcome any opportunity to discuss this submission.

Yours sincerely

Sue Woodward, Director,
Not-for-profit Law, Justice Connect
[redacted]

Kate Fazio, Manager of Education,
Not-for-profit Law, Justice Connect
[redacted]

APPENDIX 1: – Regulatory reform inquiries relevant to fundraising

For submissions made by Justice Connect (formerly PILCH) to these inquiries, please go to our Fundraising Policy Page www.justiceconnect.org.au/fundraisingreform

Australian Government, *Rethink, better tax, better Australia, white paper* (2015)

Australian Government, *Charitable fundraising regulation reform Discussion paper and draft regulation impact statement* (February 2012)

Australian Government's report *Strength, Innovation and Growth: The Future of Australia's Not-for-Profit Sector* (July 2012)

Productivity Commission, *Contribution of the Not-for-Profit Sector* (2010)

Australian Government, *Australia's Future Tax System* (2010)

Senate Economics Legislation Committee, *Inquiry into Tax Laws Amendment (Public Benefit Test) Bill* (2010)

Senate Standing Committee on Economics, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001)

Senate Standing Committee on Economics, *Inquiry into the Disclosure Regime for Charities and Not for-Profit Organisations* (2008)

Senate Standing Committee on Economics, *Investing for good: the development of the capital market for the not-for-profit sector in Australia* (2012)