

Australian Consumer Law Review

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Who is the PFRA?

The Public Fundraising Regulatory Association (PFRA) is the self-regulatory body for face to face fundraising in Australia. Face to face fundraising is one of a number of methods used by charities across Australia to generate funding. It provides significant funding that allows charities to provide vital services for local communities and to help solve some of the greatest global issues.

Established in February 2015, the role of the PFRA is to make sure that the right balance is maintained between the duty of charities to ask for donations and the right of the public to experience high standards of behaviour from our members' fundraisers. The PFRA is unique in the fundraising sector in that it is the only organisation that has been established specifically to regulate one type of fundraising and ensure compliance with a Standard (Appendix A).

The PFRA has a role in the self-regulation of face to face fundraising only, and does not have a role in the self-regulation of other forms of fundraising such as cash collections, lotteries, raffles, commercial sales of charitable products or telephone fundraising. In addition to setting standards for face to face fundraisers, the PFRA checks that fundraisers comply with its Standard through a quality assurance program, as well as enforcing the Standard through a penalty, sanctions and remediation regime.

The PFRA is a charity-led, membership-based association. Members include those charities that benefit from face to face fundraising and the professional fundraising suppliers that support charities in this work. A complete list of PFRA charity members is provided at Appendix B. The PFRA is governed by a Board of Directors nominated by PFRA members. The current members of the PFRA Board include individuals from Bush Heritage Australia, Australia for UNHCR, Plan International Australia, The Fred Hollows Foundation, Cancer Council NSW, Taronga Zoo, Public Outreach Fundraising and WAYS Fundraising.

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1. Executive summary

The PFRA welcomes this review of the Australian Consumer Law (ACL) as pertaining to the treatment of donations received by the face to face fundraising sector. In this submission, the PFRA recommends preserving the ACL in its current form subject to minor proposed amendments intended to support the simplification of the consumer law regime.

The PFRA is supportive of the current exemption of charitable donations under the Unsolicited Consumer Agreement (UCA) provisions of the ACL, noting the solicitation of a donation does not constitute an UCA because it is not “for the supply, in trade or commerce, of goods or services to a consumer” (s.69(1)(a)). The PFRA and its members are grateful to the Australian Competition and Consumer Commission (ACCC) for upholding this distinction in its dealings with the sector and education of members of the public. This includes the ACCC’s online publications, which have been updated to reflect that ‘donations to charity where no sales are involved are not unsolicited consumer agreements, even when received by a third party or contractor on the charity’s behalf’¹.

A key requirement in ensuring the ongoing sustainability of the face to face fundraising sector is recognising and preserving the unique role of the donor. A donor is not a ‘consumer’; not of goods, nor services. A donor freely gives of their own volition and their gift involves the transfer of money where they receive no material benefit or advantage in return. The distinction between a consumer and donor is an important one, particularly in the policy context of assessing the appropriateness of protections available to both classes of individual.

The PFRA is keen to emphasise that differential treatment of donors and consumers continues to be appropriate, and that the ACL not be expanded in scope to also

¹ Australian Competition and Consumer Commission, *Unsolicited Consumer Agreements* <https://www.accc.gov.au/consumers/sales-delivery/telemarketing-door-to-door-sales/unsolicited-consumer-agreements#unsolicited-consumer-agreements> (accessed 27 April 2016)

regulate fundraiser engagement with donors. The PFRA would consider an expansion of the ACL to this end to significantly duplicate the work already undertaken by regulators to ensure charitable collections are undertaken lawfully and fairly, including in a manner that is perceived by donors as transparent and appropriate.

The PFRA believes it is essential for charities to be able to approach the public to seek donations, but that this can only be done in a way that is respectful and that ensures that fundraising is a positive and inspiring experience for all involved. To this end, the PFRA submits that donors are appropriately protected under State and Territory legislation and regulations, and that to expand coverage of the ACL to include donations and thereby donors will unnecessarily replicate existing protections, without conferring any additional advantages.

Furthermore, the PFRA supports the existing regulatory environment for face to face fundraising through its self-regulation regime. The aim of the PFRA is to ensure that face to face fundraising is carried out to an agreed standard, with the PFRA setting and enforcing minimum standards for its member organisations. Furthermore, the Fundraising Institute of Australia (FIA) also administers its own Codes, which member organisations voluntarily comply with (typically, organisations engaged in face to face fundraising are members of both the FIA and the PFRA). Both the FIA's Codes and PFRA's Standard serve to provide an additional level of protection to members of the public who are approached in the street or at their place of residence to make a pledge and thereby commence a regular monthly donation.

PFRA members are committed to complying with their regulatory requirements and to increasing public confidence in their fundraising but maintain that there are important distinctions between consumers and donors, and to conflate the two classes under the ACL would invariably increase the workload required for charities and NFP organisations to comply with duplicative requirements across multiple jurisdictions.

2. Background and structure of this submission

Without face to face fundraising many charities would be unable to provide absolutely critical services to communities across Australia and the world. In 2015, more than 320,000 Australians chose to start a regular donation to PFRA members through face to face fundraising. The gifts they make contribute about AUD \$100 million per year in new donations, which members use to deliver vital services.

Most independent academic studies have shown that around 90% of people donate because they are asked by a friend, family member or fundraiser. The ability for charities to ask for donations is vital. Face to face fundraising gives charities one of the most effective means in which to 'make that ask'. The vast majority of these conversations between fundraisers and members of the public are professional, polite and positive and result in people choosing to initiate a long-term giving relationship with the charity.

The people of Australia are incredibly generous supporters of Australian charities, and many thousands of them every year start regular donations to charities after being asked to do so by a face to face fundraiser in a way they would describe as unsolicited. 'Unsolicited' is not synonymous with 'unwanted' in this context (though naturally people can decline to engage with a fundraiser should they choose to). A good example of this is where members of the public who have not actively solicited a face to face fundraiser to make an approach are nevertheless drawn to the work undertaken by a charity and feel compelled to offer a donation. Many donors will acknowledge they would never have learnt about the cause(s) they have chosen to support were it not for their encounter with a fundraiser.

Noting the value face to face fundraising contributes to Australian charities, and the process by which this form of fundraising is undertaken, it is important that charities be permitted to continue 'making the ask' of prospective donors. Presently, the ACL permits requests for charitable donations to be made in a manner that is accessible

to the organisations (both charities and third-party commercial fundraisers) making those requests. Together with existing State and Territory charitable fundraising legislation and regulations, and industry self-regulation, the PFRA submits face to face fundraising is undertaken in a manner that meets public expectations about what constitutes fair, transparent and professional engagement. Thereby, mechanisms already exist for the appropriate protection of donors, outside the consumer law regime.

The PFRA is concerned that in the event the Unsolicited Consumer Agreement (UCA) provisions within the ACL apply to either charities or commercial fundraisers collecting donations on behalf of charities, it will firstly inhibit the ability of charities to ‘ask the question’ of prospective donors. This is due to the restrictive requirements under the provisions, many of which are inconsistent with existing charitable fundraising laws. Secondly, this would impose a significant regulatory impost on a sector that is already subject to comprehensive regulation in State and Territory jurisdictions, as well as local government restrictions, with councils often imposing additional requirements on face to face fundraising activity,

It is important here to remember the underlying objective of the ACL, prior to its passing. In his second reading speech, the then-Minister for Competition Policy and Consumer Affairs stated “...Australian businesses deserve simple, national consumer laws that make compliance easier”² and that the “[the Bill] will empower Australian consumers and free Australian businesses to make our markets work better...”³ Notwithstanding the important distinction between businesses and charities, the notion of simple, compliance-conducive law should apply to charities too. The face to face fundraising sector is also a market, albeit not a commercial one, and the PFRA submits that the existing treatment of donations under the UCA provisions of the ACL is appropriate, and meaningfully supports the sector in achieving its charitable objectives.

² House of Representatives Hansard, 17 March 2010, p. 2718.

³ Ibid, p. 2722.

In the event the ACL was amended and the UCA provisions applied to either charities or commercial fundraisers collecting donations on behalf of charities, the PFRA strongly contends the UCA provisions are inconsistent with the objective of a simple law that will make compliance easier. From an overarching policy perspective, this is because the distinction between a donor and consumer would be lost, and the concept of fundraising would thereby be subsumed under a definition of 'in trade or commerce', which is wholly inaccurate. In terms of practical compliance, a change of this nature would represent an additional level of regulation because charities and third-party commercial fundraisers are already regulated within State and Territory jurisdictions, and by local governments, in a manner the UCA provisions would duplicate. This is particularly the case in respect of permitted calling hours (s.73), disclosing purpose and identity (s.74), ceasing to negotiate on request (s.75), and provision of documentation requirements (s.78).

This submission sets out the PFRA's responses to questions in the ACL Review Issues Paper in eight parts, with particular emphasis on the ACL's definitional treatment of consumer and its specific protection provisions relating to consumer transactions including most notably unsolicited consumer agreements. **The PFRA submits that the differential treatment for charities and the third-party commercial fundraisers they engage should be preserved.**

3. Response to ACL Review Issues Paper questions

This section is divided into eight parts, allowing the PFRA to respond to specific questions against the following thematic areas:

- 3.1 National consumer policy framework
- 3.2 The legal framework
- 3.3 General protections of the ACL
- 3.4 Specific protections of the ACL
- 3.5 Product safety
- 3.6 Administering and enforcing the ACL
- 3.7 Emerging consumer policy issues
- 3.8 Other

The PFRA respectfully submits a nil response against questions in the areas of product safety (3.5) and administering and enforcing the ACL (3.6), as these are outside the PFRA's remit and regulatory engagement experience.

3.1 National consumer policy framework

3.1.1 *Do the national consumer policy framework's overarching and operational objectives remain relevant? What changes could be made?*

The PFRA submits that the national consumer policy framework's overarching objectives remain relevant to the extent that it deals with the protection of *consumers* in a trade and commercial context. It would be inappropriate for changes to be made subsuming *donors* in a charitable fundraising context under the ACL, where no clear policy remit exists. To do so would result in the duplicative regulation of fundraising activity (which confers a level of donor protection), as currently administered by State and Territory governments.

The jurisdictions in which charitable fundraising is already regulated include the Australian Capital Territory (*Charitable Collections Act 2003* and the *Charitable*

Collections Regulation 2003); New South Wales (*Charitable Fundraising Act 1991* and the *Charitable Fundraising Regulation 2015*); Queensland (*Collections Act 1966* and *Collections Regulation 2008*); South Australia (*Collections for Charitable Purposes Act 1939*); Tasmania (*Collections for Charities Act 2001*); Victoria (*Fundraising Act 1998* and *Fundraising Regulations 2009*); Western Australia (*Charitable Collections Act 1946* and *Charitable Collections Regulation 1947*); with the Northern Territory not administering any legislation specific to charitable fundraising.

Existing protections exist within State and Territory fundraising laws that would only be duplicated if the ACL's coverage was expanded to include the solicitation of donations under the UCA provisions. This is notable in respect of permitted calling hours (s.73), disclosing purpose and identity (s.74), ceasing to negotiate on request (s.75), and provision of documentation requirements (s.78). Further information about the duplication of existing provisions, including examples, is provided in response to questions raised by the ACL Review Issues Paper under section 3.4 (Specific protections of the ACL) at page 20 below.

3.2 The legal framework

3.2.1 *Is the language of the ACL clear and simple to understand? Are there aspects that could be improved?*

The PFRA submits that the language of the ACL is clear and simple to understand insofar as it deals with the protection of *consumers* in the context of trade and commerce. There is greater uncertainty around the substantive content of some of the provisions of the ACL and the intended practical application (dealt with in response to following questions). In the event changes were made subsuming *donors* in a charitable fundraising context under the ACL, the PFRA is concerned the amended language of the ACL would inappropriately reflect the nature of charitable fundraising activity and the role of a donor who does not receive any material benefit when voluntarily making an ongoing gift to the charity of their choice.

3.2.2 *Is the ACL's treatment of 'consumer' appropriate? Should the ACL apply to charities and not-for-profit organisations?*

The PFRA submits that the ACL's treatment of consumer is appropriate insofar as this includes any individual who acquires goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption. The PFRA has no view on the appropriateness of maintaining the \$40,000 threshold.

It is inappropriate for the ACL to apply to charities and not-for-profit organisations as they solicit donations from *donors*, not consumers. Such organisations, many of which are PFRA members, are already required to comply with State and Territory laws governing charitable fundraising. Many regulators have also taken practical steps to ensure donors are sufficiently protected when dealing with charities and third-party fundraisers; in most jurisdictions this includes prescriptive disclosure requirements designed to ensure donors are aware of the nature of their donation and how much of their donation will be retained or received by the beneficiary.

As a *donor* gives without expectation of receiving anything in return, it is nonsensical to conflate this class of individual with that of consumption, particularly where this

pertains to personal, domestic or household use. A person who makes a donation does not 'consume' any goods or services of this nature. Existing protections are in place to ensure that donors are not exploited and that fundraising is undertaken in a manner that is lawful and ethical, by both charities and any third-party fundraising agencies they may engage to provide services.

However, it is essential to note that the fundraising environment is constantly evolving and is historically not limited to the solicitation of *donations*. While the PFRA exclusively represents the interests of members engaged in face to face fundraising where ongoing donations are sought, it is aware that a number of other lawful fundraising practices occur within the sector. For example, charities may be engaged in the sale of lottery tickets or charity-branded products, including vouchers. This could be as simple as the purchase of a ticket to a fundraising dinner, or a drink bottle, first aid kit or pedometer bearing a charity's branding. While such forms of fundraising are outside the PFRA's remit, it is obvious that these transactions are not 'donations', as they confer a material benefit on the consumer purchasing the goods or services. The PFRA wishes to emphasise that engagement with a charity is not an act of consumption unless goods or services are involved.

The understanding of the PFRA and its members has always been that where fundraising involves the sale of goods and services, the ACL will apply to that transaction. Therefore, in many cases, the ACL *already applies* to charities and not-for-profit organisations and any third-party commercial fundraiser engaged in the provision of goods and services to genuine consumers. Such transactions are not 'donations', and are therefore not exempt from the UCA provisions. Therefore, the ACL already serves to protect those consumers who purchase goods and services from charities or third-party commercial fundraisers, where no donation is made.

If the ACL was to apply to donations made to charities and not-for-profit organisations, then the definition of consumer would need to be expanded to include donors. This would make little sense noting (i) a donor is not a consumer;

and (ii) consumers of fundraising-related goods and services already receive the ACL's protection.

Suggesting that a donor is a consumer (of what?) may also have implications for the existing taxation treatment of gifts and donations as administered by the Australian Taxation Office (ATO). Presently, the ATO recognises that claims cannot be made for gifts or donation items that provide an individual with some personal benefit, such as raffle or art union tickets, items such as chocolate and pens or membership fees. This interpretation is consistent with the ACL, but may be compromised if the view is taken that a donor does receive a benefit that would warrant capture and treatment under a consumer law regime.

3.2.3 Should the ACL cover situations where a consumer, including a business, provides their information to a business (such as a comparator website), rather than 'acquires' a good or service, noting that information about consumers has growing commercial value?

The PFRA is aware that charities will sometimes seek to engage with individuals by registering their interest in the charity's work and/or the causes it represents. This may or may not be in connection with the solicitation of a donation. In practice, a charity may subsequently contact an individual who has provided their details (with their consent) with the view to soliciting a donation in the future. This is a form of marketing also referred to as 'lead generation'. While connecting with prospective donors is a great asset to charities and not-for-profit organisation, it is important to remember that this occurs with an individual's consent, and is not transactional (namely, the person registering their interest has not purchased any goods or services, and reasonably does not expect anything by way of material return).

The PFRA submits that including this kind of interaction within the scope of the ACL is inappropriate, as it would conflate activities of an activist nature with that of consumption. For example, if a charity was campaigning to raise awareness for one of its causes and had a petition available for signature (which someone could sign in conjunction with providing their contact details), this would be interpreted as a

consumer transaction under the ACL. This proposition is not a logical one, as an individual is not purchasing the opportunity to sign a petition; they do so of their own volition, without expectation of material return. Activists aren't consumers.

In respect of comparator service providers, the PFRA is unaware of any face to face fundraising activity that occurs on the basis of offering a comparator service that could assist someone in selecting an appropriate charity to receive a donation. The provision of comparator services is more prevalent in the retail space, particularly in the areas of household services (for example, telecommunications, energy and insurance etc.). The PFRA submits that such activity is of a commercial nature, and that the provision of a comparison service should be regulated under the ACL. By contrast, the engagement of members of the public by charities or third-party commercial fundraisers (where no sale of goods or services is involved) is not commercial in nature. Differential treatment of charities and not-for-profit organisations under the ACL in respect of such activities should therefore be preserved.

3.3 General protections of the ACL

3.3.1 *Are the ACL's general protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?*

The PFRA submits that the ACL's general protections are working effectively and address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses. It wishes to emphasise that together with its self-regulation regime and State and Territory charitable fundraising laws, the sector is well aware of, and informed by, the general protections of the ACL, even where they do not specifically apply to donations, which are not made in trade or commerce.

Misleading or deceptive conduct

The ACL provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive (s.18). The PFRA upholds this requirement in a self-regulation capacity through its Standard, which is based upon the following principles:

- (i) **To Serve Beneficiaries:** We fundraise in order to meet the needs of the individuals, communities and causes that our members serve. The money we raise is providing vital support for communities across Australia and the world.
- (ii) **Integrity and Honesty:** Our fundraising will be based on honesty and our actions will be consistent with our stated principles.
- (iii) **Transparency:** We will explain our fundraising clearly and openly to all those who are involved in our work.
- (iv) **Respect:** We will respect our donors, the people we converse with, the public we interact with, the environment we work in, the authorities we work with and the fundraisers who inspire our donors to give.

- (v) Lawfulness: We will act in a lawful manner, ensuring that we are aware of the legal requirements that apply to our work and we will comply with all lawful instructions.

The PFRA Standard also requires that fundraisers must never knowingly mislead a member of the public or use false information in a conversation in an attempt to obtain a donation (2.4.2). Furthermore, State and Territory charitable fundraising laws impose requirements upon fundraisers prohibiting charities and third-party commercial fundraisers from making false and misleading representations in respect of their fundraising activity, so as to protect donors from being deceived. For example, in New South Wales the Authority Conditions prescribed by Fair Trading require communication connected with a fundraising appeal to be based on fact and not be false or misleading (s.14(1)(c)), and that a person conducting or participating in a fundraising appeal must use their best endeavours to answer honestly any question in relation to the purpose of the appeal or the details of the appeal (s.14(3)).

In Queensland, the *Collections Regulation 2008* prohibits false advertising in connection with conducting an appeal for support on behalf of a charity or organisation, which includes a prohibition on false representation about fundraising activity (s.41(1)) and that a person must not make a statement of representation that is false in a material particular when undertaking an appeal for support on behalf of a charity or organisation (s.41(2)). Such prohibitions against false or misleading representations already serve to protect donors in the same way that s.18 of the ACL confers this protection on consumers.

Unconscionable conduct

The ACL provides that a person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time (s.21). As set out above, the principles espoused by the PFRA and upheld by its members include integrity, honesty, transparency and respect. While the solicitation

of donations is not in trade or commerce, the intention of the unconscionable conduct general protection in the ACL is aligned with the expectation and practice of the face to face fundraising sector.

Case studies are available from PFRA charity members which demonstrate the strategies implemented in response to risks identified in this area.

Unfair contract terms

In the course of soliciting donations, a charity or not-for-profit organisation would not enter into what is defined as a 'consumer contract' under the ACL, that is, a contract for the supply of goods or services or a sale or grant of an interest in land (s.23(3)). This is because an ongoing donation made to a charity is not in exchange for the supply of good or services.

Additionally, when a donor makes a 'pledge' in this capacity, the agreement entered into is non-binding insofar as the donor can terminate it at any time without penalty. There is no duty of performance, unlike a standard commercial contract where performance is contingent upon the occurrence of a designated condition or promise. The opportunity for unfair terms to be included is therefore unlikely, as the donor has 'nothing to lose'.

Nevertheless, the PFRA submits that on the basis of the legislative intent of this general protection, the face to face fundraising sector is required to comply with not dissimilar provisions under State and Territory charitable fundraising laws. This is the case in respect of the agreements entered into between a donor and a charity, insofar as certain conditions must be upheld. For example, most jurisdictions require that pledge forms disclose the purpose for which funds are being collected, and include clear reference to the amount an individual has committed to donate.

In South Australia, in order to meet the conditions of the Code of Practice under the *Collections for Charitable Purposes Act 1939*, the pledge form must also disclose the total annual cost to the donor (not just their nominated monthly donation). This requires a face to face fundraiser to perform a calculation based on the prospective donor's nominated donation amount and handwrite it on the pledge form or next to the monthly amount (e.g. monthly pledge amount of \$x = annual cost of \$y). The rationale for this is to make donors aware of the financial commitment they are making over the course of a year, notwithstanding that they may terminate this commitment at any time without penalty.

The PFRA submits that the face to face fundraising sector has implemented best practice recommendations in respect of their information included on their pledge form and disclosures made to donors, in a way that prohibits the inclusion of unfair terms. The nature of an ongoing donation agreement with a charity is also 'low risk' to a donor, as they are able to opt out at the time of their choosing.

3.3.2 Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.2 of the Issues Paper? Are there any gaps that need to be addressed?

The PFRA reiterates that the ACL's general protections are working effectively in the context of transactions in trade or commerce, entered into for the supply of goods or services. While the solicitation of donations is not within scope of these general protections, the face to face fundraising sector nevertheless complies with the spirit of the requirements.

It does so in both a self-regulatory capacity through the PFRA Standard, and also in State and Territory jurisdictions where charitable fundraising regulations prohibit misleading and deceptive conduct, and prescribe the information to be included on donor pledge forms. Therefore, while the solicitation of donations is not in trade or commerce and remains uncaptured by the ACL, other protections exist to deliver consistent outcomes in these areas.

3.4 Specific protections of the ACL

3.4.1 Are the ACL's specific protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?

The PFRA submits that the ACL's specific protections are working effectively and address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses. It wishes to emphasise that together with its self-regulation regime and State and Territory charitable fundraising laws, the sector is well aware of, and informed by, the specific protections of the ACL, even where they do not specifically apply to donations (which are not made in trade or commerce).

3.4.2 Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.3 of the ACL Review Issues Paper? Are there any gaps that need to be addressed, or overseas models that could provide a useful guide?

The PFRA would like to comment specifically in relation to providing consumers with rights when a salesperson approaches uninvited (Part 3-2, Division 2), as raised in section 2.3.5 of the ACL Review Issues Paper.

It is accurate that the ACL provides consumers with specific rights and protections when entering into an agreement to acquire goods or services in situations where the supplier was not invited by the consumer, such as in a door-to-door or telemarketing situation. These rights and protections are not available in other retail contexts and also impose specific obligations on businesses engaged in these sales practices. Therefore, the UCA provisions were introduced as a form of consumer protection in these previously unregulated areas.

The PFRA submits that while donations are exempt from the UCA provisions, a similar level of protection is conferred on prospective donors when they receive an unsolicited approach from a face to face fundraiser. The exemption is definitively appropriate under a consumer law regime noting the distinction between a donor

and consumer, however does not compromise the level of protection afforded to donors or prospective donors, noting the existing ‘checks and balances’ which govern unsolicited fundraising across Australia.

The PFRA maintains that the exemption should continue and that the UCA provisions *should not* apply to charities and not-for-profit organisations or third-party commercial fundraisers soliciting donations, precisely because donors already receive equivalent protections outside the consumer law regime. The PFRA has set out a number of examples against the key requirements under the UCA provisions, below.

Aggressive or high-pressure solicitation techniques

The PFRA understands that the UCA provisions were introduced to protect consumers in circumstances where they may be subject to additional vulnerability or disadvantage due to the nature of the sales process. For example, that the consumer may be subject to aggressive or high-pressure selling techniques, and lack sufficient information to make an informed decision.

The face to face fundraising sector has appropriately managed similar risks in the context of soliciting donations. The cornerstone of the sector’s value proposition to donors and prospective donors is that they have a positive and affirming engagement experience, whether on the street or at their place of residence. The PFRA’s Standard sets out a number of relevant behavioural expectations of fundraisers, including that all fundraising should be conducted using positive, respectful and polite verbal and body language (2.4.1).

The Standard furthermore prohibits the use of aggressive, persistent or high-pressure solicitation techniques as fundraisers are expected to immediately end a conversation with a member of the public as soon as they are instructed to do so (2.4.10) and not attempt to follow or comment to a member of the public once a conversation has ended (2.4.11), consistent with s.75 of the ACL (ceasing to

negotiate on request). State and Territory regulations impose similar requirements on fundraisers. For example, the *Queensland Charitable Collections Regulation 2008* provides that a collector must not by words or conduct, unreasonably annoy any person approach during a collection, or stay in, or at the door of, any place of residence or place of employment if asked to leave (Schedule 1, 7(a)-(b)).

In 2015, the PFRA received two complaints from members of the public for the resolution of issues related to real or perceived aggressive or high-pressure solicitation techniques. In the PFRA's experience, the reputational risk to charities fundraising in a less than exemplary manner is a sufficient deterrent against such practice, notwithstanding the unlawfulness of such conduct across State and Territory jurisdictions. The donor experience is for this reason at the centre of face to face fundraising strategy for charities and third-party agencies.

Goods or services that exceed \$100 in total, or where the value is unknown at the time the agreement is made

The UCA provisions of the ACL apply to goods or services that exceed \$100 in total, or where the value is unknown at the time the agreement is made. Furthermore, the UCA provisions are intended to protect consumers by providing a 'cooling-off' or termination period of ten days that allows consumers to change their mind and cancel the contract. It is appropriate that the solicitation of donations is exempt from the UCA provisions, including 'cooling-off', as donors already receive an equivalent level of protection.

For example, donors receive an indefinite termination period when they commit to make an ongoing donation, as they are able to cancel any agreement entered into at any time, and without penalty. This is ordinarily disclosed to a prospective donor verbally during a face to face interaction, but is also written on the pledge form, which is either provided in hardcopy, or emailed to the donor if processed electronically (for example, on an iPad). Therefore, a 'cooling-off' period would not confer any additional protection to donors, as distinct from consumers, which stand to meaningfully gain from this provision.

The ACL requires suppliers to negotiate an agreement within certain calling hours

The ACL specifies permitted hours for negotiating an unsolicited agreement.

Accordingly, a dealer must not call on a person for the purpose of negotiating an unsolicited consumer agreement, or for an incidental or related purpose at the times set out at section 73. The PFRA submits that is wholly appropriate for the solicitation of donations to be exempt from this UCA provision as restrictions are already placed on calling hours under charitable fundraising laws as administered by State and Territory regulators.

In some cases, these restrictions on fundraising hours are more onerous than prescribed by the ACL, as in Queensland where weekday solicitations may only occur until 5.00pm (one hour less than the ACL's prescribed 'no later than 6.00pm' rule).

By contrast, Tasmania permits soliciting between:

- 9am and 8pm between 1 November and 31 January;
- 9am and 7pm between 1 February and 30 April;
- 9am and 5pm between 1 May and 31 August; and
- 9am and 7pm between 1 September and 31 October.

This coincides with different sunset hours throughout the year, presumably with the view to protecting donors who may be solicited in their homes (i.e. a person may have a reasonable expectation to be called upon at 8.00pm in the summer months while it is still light outside, as compared to 8.00pm in the depth of winter when it is dark). The solicitation hours provided in Tasmania are distinct; no other jurisdiction specifies calling hours based on time of year. For example, in Victoria, no hours are prescribed, and Consumer Affairs instructs fundraisers to keep to hours that are "reasonable".

Therefore, the PFRA submits that fundraising calling hours are already sufficiently regulated within State and Territory jurisdictions, and extending coverage of the ACL to the solicitation of donations would only duplicate existing regulations, rather than

confer any meaningful additional benefit. Based on the examples provided, it would also need to be taken into account that the permitted hours for negotiating unsolicited consumer agreements under the ACL would be duplicative or inconsistent with charitable fundraising calling hours in some State and Territory jurisdictions.

The face to face fundraising sector already manages inconsistent regulatory requirements in this capacity, and further regulating fundraising calling hours under the ACL would impose an additional regulatory compliance burden. The PFRA recommends a Regulation Impact Statement be prepared in advance of any regulatory amendments being imposed upon the sector, including in relation to calling hours.

State and Territory fundraising laws also require that prospective donors receive sufficient information about the charitable appeal, in order to make an informed decision about whether they wish to donate. These disclosures must be made prior to any donation agreement being entered into.

3.4.3 Are the UCA provisions flexible enough to deal with emerging business models, including whether it is appropriate to maintain the distinction between 'solicited' and 'unsolicited' sales?

As a donation is not a sale in trade or commerce, the PFRA has no opinion in respect of whether it is appropriate to maintain the distinction between 'solicited' and 'unsolicited' sales. However, it does submit that the distinction is ambiguous in some contexts, for example, at temporary sites like kiosks, which can be found at airports, events and shopping centres. Should the UCA provisions of the ACL be expanded to include the solicitation of donations, then the distinction between 'solicited' and 'unsolicited' donations would become critically important.

3.4.4 Should the UCA provisions apply to commercial companies collecting donations on behalf of charities (currently, donations to charity where no sales are involved are not unsolicited consumer agreements)?

The PFRA submits that where a donation without a sale is involved, it should be immaterial who is making the approach (whether a commercial third party or a charity directly). There is very little distinction, in practice, between a donation made to a charity and one that is prompted by a third party. Furthermore, a wide range of fundraising is actually mediated by third parties, including web, phone, direct mail, major gifts, television, and lotteries. Comparatively few charities run 'in house' fundraising teams, opting instead to engage third party agencies to provide the fundraising services they require.

It is important to understand that the vast majority of third party involvement is on a fee for service basis. What this means is that a charity will engage a third party commercial fundraiser as a service provider, and pay them a fee for this service. Any donations that are collected by the commercial fundraiser are disbursed to the charity in their entirety, i.e. 100% of the funds collected are remitted to the charity.

As the majority of charities engage the services of commercial fundraisers, applying the UCA provisions to commercial companies collecting donations on behalf of charities is effectively the same as applying the provisions to all charities. The PFRA submits that the exemption for the solicitation of donations under the UCA provisions of the ACL is appropriate, irrespective of the entity soliciting the donations (whether a charity or a commercial fundraiser). The 'test' should be the activity (solicitation of donations), not the party undertaking the activity (charity vs. commercial fundraiser).

The regulatory complexity that would result for the sector if fundraisers had to comply with different rules under the ACL depending on whether they were 'in house' or third parties would be enormously problematic. A Regulation Impact Statement would need to be undertaken to fully understand the implications of such a change, noting the sector anticipates this would impose unreasonable and unsustainable compliance costs in an already over-regulated environment.

3.5 Product safety

The PFRA has no input in response to the product safety questions posed by the ACL Review Issues Paper, as the solicitation of donations does not involve the sale of products.

3.6 Administering and enforcing the ACL

The PFRA has no input in response to the administration and enforcement questions posed by the ACL Review Issues Paper, as it has no practical experience in these areas.

3.7 Emerging consumer policy issues

3.7.1 *Does the distinction between ‘solicited’ and ‘unsolicited’ sales remain valid? Should protections apply to all sales conducted away from business premises, or all sales involving ‘pressure selling’?*

As referred to at 3.4.3 above, the PFRA has no opinion in respect of whether it is appropriate to maintain the distinction between ‘solicited’ and ‘unsolicited’ sales. However, it is supportive of the distinction as it is important in understanding what the legal and regulatory compliance requirements are under the ACL. The PFRA submits that the distinction could be made clearer, particularly in the context of more ambiguous environments where the primary place of business is ‘mobile’ or ‘changeable’, for example, temporary kiosks.

3.7.2 Do the unsolicited selling provisions require clarification with regard to sales made away from business premises, for example, 'pop-up' stores? How could these issues be addressed?

Yes, as set out at 3.4.3 and 3.7.1, the PFRA submits the UCA provisions require clarification with regard to sales made away from business premises. Consideration should also be given to the measure of 'business premises', particularly for those operating a 'mobile' business, for example, working door to door or at event sites, with no fixed retail premises. In such instances, a person's registered business address may be their place of residence and not their 'business premises' per se. The PFRA recommends due consideration is given to classes of individual without conventional 'bricks and mortar' business premises and submits that an expanded definition of what constitutes business premises for affected sectors be considered and applied.

3.7.3 Are the disclosure requirements effective? Do they need to be refined, or is there evidence to indicate that further disclosure would improve consumer empowerment?

The PFRA has no input on the existing disclosure requirements noting these do not apply to charities and not-for-profit organisations, and donors aren't consumers. However, the PFRA wishes to note that comprehensive disclosure requirements apply to all parties engaged in charitable fundraising across most State and Territory jurisdictions. Therefore, should the UCA provisions of the ACL be expanded to include solicitation of donations, due consideration would need to be given to existing disclosure requirements under charitable fundraising regulations. The PFRA submits in this case, inconsistencies and/or regulatory duplication would most likely arise. The PFRA considers that existing fundraising disclosure requirements are more comprehensive than under the ACL and meaningfully inform donor choice.

3.8 Other

3.8.1 Miscellaneous

The PFRA has emphasised throughout this submission that the differential treatment of donations under the ACL is appropriate, and should be maintained. While the PFRA supports the overarching objectives of the ACL in the areas of consumer protection, it submits there are compliance costs arising from divergent regulatory requirements. Noting the existing regulation of charitable fundraising in State and Territory jurisdictions, any expansion of the ACL to include the solicitation of donations by charities, not-for-profit organisations and/or commercial third party fundraisers, would result in regulatory duplication and thereby impose a substantial and unnecessary compliance cost.

The PFRA maintains that against all of the UCA provisions in the ACL, similar (if not identical) protections exist for donors under charitable fundraising law and through the face to face fundraising sector's self-regulation regime. Therefore, expanding the scope of the ACL would not practically enhance the protection already available to donors through existing regulatory mechanisms. The sector already grapples with inconsistent regulatory requirements between State and Territory jurisdictions, and believes the application of the ACL in a non-commercial context would be unreasonable 'overlay'.

It is the recommendation of the PFRA that should the coverage of the ACL be expanded to include the solicitation of donations within scope of the UCA provisions that a Regulatory Impact Statement is prepared taking into account the compliance cost burdens which this would invariably impose on the face to face fundraising sector. For example, the Australia New Zealand Working Group on Trans-Tasman Competition & Consumer Issues (ANZTTCCI, sub. DR179, p. 2) pointed to compliance costs burdens from divergent regulatory requirements for food, tobacco, lay-by sales, charitable fundraising, lotteries and trade promotions, telephone marketing, door-to door-sales and trade stamps.

Indeed, in some cases, suppliers were identified as having to choose between competing requirements. This in turn gives rise to a form of ‘regulator roulette’ where organisations are forced to choose which regulator to comply with and which to be in breach of. This decision is usually made on a risk minimisation basis by electing to comply with the regulator that can inflict the most ‘harm’ on the organisation in question by way of penalties for the infringement. The PFRA is concerned that if any amendment affecting the face to face fundraising sector was made to the ACL, there would be too many ‘levels’ of regulation to deliver consistency in compliance, to the possible detriment of the applicable regulatory regime(s).

4. Summary of recommendations

4.1 *Differential treatment of entities soliciting donations should be preserved*

The PFRA recommends that the differential treatment of entities soliciting donations should be preserved, namely that the exemption under the ACL's unsolicited consumer agreement provisions be maintained.

The PFRA submits it is not helpful to distinguish between charities and third party commercial fundraisers, as there is no material difference in respect of the collection of donations (100% of funds are remitted to the charity; the majority of charities engage commercial fundraisers; and most commercial fundraisers are engaged on a fee for service basis).

4.2 *Any proposed amendments to the ACL in respect of the solicitation of donations should be comprehensively considered in a Regulation Impact Statement (or equivalent regulatory impact analysis)*

The PFRA submits that the existing consumer law regime is not intended to regulate charitable fundraising. Therefore, any proposed amendments to the ACL to this end would have far-reaching regulatory compliance implications across all jurisdictions.

The PFRA recommends that consideration be given to:

- the potential to reduce, rather than increase, the compliance costs for the face to face fundraising sector;
- the administrative cost, complexity and potential for distorted commercial behaviours as a result of altering the application and scope of the existing consumer law regime to include fundraising activity not involving the sale of goods and services to consumers; and
- the likely change in compliance outcomes and any risk to regulatory objectives under existing charitable fundraising regulatory regimes across Australian States and Territories.

5. Conclusion

The PFRA is appreciative of the opportunity to provide input to the ACL Review. The Review represents an important milestone in revisiting the spirit of the consumer law regime five years post-implementation, and to consider opportunities to further enhance the meaningful and practical application of the ACL.

The PFRA and its members strongly believe that there is a clear and important distinction between donors and consumers, and furthermore, between charitable fundraising involving the solicitation of donations, and commercial transactions involving the sale of goods and services. The ACL in its current form supports this distinction.

Charitable fundraising is an activity already regulated by Australian States and Territories. These fundraising laws are comprehensive, even if not entirely consistent across jurisdictions. Importantly, the PFRA believes they provide meaningful protection to donors, in the same way the ACL seeks to protect consumers. There is nothing to be gained by expanding the scope of the ACL to include the solicitation of donations as this is not the purpose nor designation of a consumer law regime.

It is important for the sustainability of the face to face fundraising sector that charities and the third party commercial fundraisers they work with are able to accessibly engage prospective donors. As set out in this submission, existing regulatory protections are in place to ensure members of the public have a positive experience when they consider making a donation. Thereby, the PFRA respectfully submits mechanisms already exist for the appropriate protection of donors outside the consumer law regime, and that differential treatment of entities soliciting donations be preserved under the ACL.

Appendices

Appendix A: PFRA Standard

Appendix B: List of PFRA charity members

Appendix A: PFRA Standard

Introduction

This Standard has been implemented to ensure that all people involved in face to face fundraising are respected and enjoy an inspiring and rewarding experience. This includes: members of the public who donate, fundraisers, regulators and local authorities, business owners, and charities.

The Standard is in two main sections: *Governance* which describes the underlying principles of the Standard and *Compliance* which describes what is acceptable and what is not acceptable for PFRA members in carrying out face to face fundraising.

Purpose

The purpose of this Standard is to ensure that all face to face fundraising conducted by member organisations of the Public Fundraising Regulatory Association complies with a standard set of rules and meets a uniform standard of behaviour.

Section One - Governance

1.1 Principles

This Standard is based upon these principles:

i) *To Serve Beneficiaries:*

We fundraise in order to meet the needs of the individuals, communities and causes that our members serve. The money we raise is providing vital support for communities across Australia and the world.

ii) *Integrity and Honesty:*

Our fundraising will be based on honesty and our actions will be consistent with our stated principles.

iii) *Transparency:*

We will explain our fundraising clearly and openly to all those who are involved in our work.

iv) *Respect:*

We will respect our donors, the people we converse with, the public we interact with, the environment we work in, the authorities we work with and the fundraisers who inspire our donors to give.

v) *Lawfulness:*

We will act in a lawful manner, ensuring that we are aware of the legal requirements that apply to our work and we will comply with all lawful instructions.

1.2 Definitions

“Face to face fundraising” means the practice of approaching a member of the public either in the street, at their residence, or at commercial premises with the primary purpose of seeking an ongoing donation through a bank or credit card direct debit.

“Fundraiser” means someone representing a PFRA member who undertakes face to face fundraising

“Fundraising” means face to face fundraising

“Member” means member organisation of the PFRA

“Must” means that a PFRA member is required to comply with a clause of the Standard.

“Should” means that a PFRA member ought to take all reasonable steps to comply with a clause of the Standard.

“Vulnerable Person” means someone for any of these reasons would seem to a reasonable person to be incapable of making financial decisions:

- i) intoxication through drugs or alcohol
- ii) incapacity due to illness or disability
- iii) age-related confusion
- iv) learning difficulties
- v) language competence
- vi) any other circumstance where capacity is in doubt
- vii) under the age of 18

1.3 Scope

- 1.3.1 This Standard describes the basic standards of behaviour required of all face to face fundraisers representing members of the PFRA.
- 1.3.2 The Standard covers requirements for ensuring public and fundraiser safety.
- 1.3.3 This Standard applies to PFRA members. PFRA can only monitor this Standard and enforce it if necessary against a PFRA member.
- 1.3.4 This Standard does not replace nor override any law. PFRA members should note that legislation applying to face to face fundraising differs in each State and Territory. For this reason, the Standard’s provisions must be read in conjunction with the relevant State or Territory legislation. If there is any conflict between the provisions of this Standard and legislation, the legislation prevails.

1.4 Understanding

- 1.4.1 Members must ensure that all fundraisers fully understand this Standard before they commence fundraising for the first time and retain an understanding of the Standard while they continue to fundraise.
- 1.4.2 Members must keep a record including the signature of each fundraiser confirming that the fundraiser understands the requirements of the Standard and has received a copy of the Standard.
- 1.4.3 Members must ensure that charity fundraising staff involved in the management of face to face fundraising fully understand this Standard.

Section Two – Compliance

2.1 Legislation, Regulation and Other Standards

- 2.1.1 When conducting fundraising activities, member organisations and their fundraisers must comply with:
- i) All current fundraising legislation and regulations;
 - ii) The permit requirements included in any location specific permit to conduct fundraising; and
 - iii) Any rules that the PFRA may issue.
- 2.1.2 Members are also advised to comply with the Fundraising Institute Australia Standard of Face to Face Fundraising Practice.

2.2 Public and Fundraiser Safety

- 2.2.1 Fundraisers must not operate in a way that creates any risks to public safety or their own safety.
- 2.2.2 Members must take all reasonable steps to ensure the safety of fundraisers and the public.
- 2.2.3 Fundraisers must not cause members of the public to enter the road to avoid them.
- 2.2.4 Fundraising locations must be selected to ensure that there is maximum space between the fundraisers and the edge of the kerb.
- 2.2.5 Fundraisers should always work in teams of at least two people, except for door to door fundraisers who must always work in teams of at least two people.
- 2.2.6 Door to door fundraisers must not enter a private dwelling.
- 2.2.7 Members must comply with the relevant Workplace Health and Safety Laws in the applicable jurisdiction(s).

2.3 Regulations

- 2.3.1 Where not otherwise prescribed by law, fundraisers must provide donors with a written disclosure that fees are paid to a named commercial fundraising organisation.
- 2.3.2 Fundraisers must always wear the prescribed identification badge and have this clearly visible to the public on their torso while working. Unless otherwise specified by legislation or permit conditions, this badge must contain at least:
- i) A recent photo of the fundraiser
 - ii) Fundraiser name
 - iii) Charity name and logo
 - iv) The words “Paid Collector”
 - v) Charity contact information
 - vi) For agency fundraisers: agency name

- 2.3.3 All fundraisers must dress smartly and tidily and street fundraisers must be clearly identifiable as charity representatives through use of branded clothing.
- 2.3.4 Fundraisers must immediately follow any direction given to them by officers of the relevant local or state authority, police officers or any other authority holder.
- 2.3.5 Fundraisers must immediately follow any reasonable direction given to them by authorised representatives of the PFRA, such directions being consistent with the principles of this Standard and the purpose of the PFRA.
- 2.3.6 Fundraisers must comply with any direction given to them by an access authority holder (i.e. state or local government officer or shopping centre management) to comply with the requirements of their permit.
- 2.3.7 All fundraisers working in a location that requires a specific permit must have a copy of that permit with them in some form, at all times while working.

2.4 Behaviour

- 2.4.1 All fundraising should be conducted using positive, respectful and polite verbal and body language.
- 2.4.2 Fundraisers must never knowingly mislead a member of the public or use false information in a conversation in an attempt to obtain a donation.
- 2.4.3 Fundraisers must not bring fundraising into disrepute while working or while identifiable as charity representatives by:
 - i) Smoking and/or drinking alcohol
 - ii) Being inappropriately dressed
 - iii) Taking or being under the influence of illegal drugs
 - iv) Lewd or aggressive behaviour
 - v) Exploiting their position for personal gain (for instance soliciting a job offer, making sexual advances or seeking a discount on a good or service)
- 2.4.4 Fundraisers should not approach members of the public in groups of more than one fundraiser. Where necessary however, a trainer, coach or team leader can assist in conversation with a member of the public.
- 2.4.5 Members must not permit people other than fundraisers or other staff who have the required understanding of the PFRA Standard to approach members of the public.
- 2.4.6 Members must take reasonable steps to ensure that the number of fundraisers at a location is consistent with the available space at the location.
- 2.4.7 Fundraisers must not behave in a way that might be reasonably interpreted as forcing a member of the public to enter a conversation against their will.
- 2.4.8 Fundraisers must not initiate physical contact with a member of the public but may reciprocate appropriately.

- 2.4.9 Fundraisers must not block the public right of way or move to obstruct a member of the public.
- 2.4.10 Fundraisers must immediately end a conversation with a member of the public as soon as they are requested to do so.
- 2.4.11 Fundraisers must not attempt to follow or comment to a member of the public once a conversation has ended.
- 2.4.12 Fundraisers must not intentionally approach a member of the public who appears to be vulnerable.
- 2.4.13 If a fundraiser becomes aware that the person they are talking to is vulnerable, they should politely terminate the conversation at the earliest possible opportunity.
- 2.4.14 Fundraisers must not approach a member of the public who has, to the fundraiser's knowledge, recently been approached by another face to face fundraiser from their own or another organisation.
- 2.4.15 Where there is a disagreement between fundraisers relating to a fundraising location or any other matter this must be resolved politely and professionally between the fundraisers. If agreement cannot be reached the disagreement must immediately be referred to the PFRA for resolution.
- 2.4.16 In the event of a disagreement between fundraisers that is referred to the PFRA for resolution, fundraisers must immediately comply with the directions of the PFRA.
- 2.4.17 Fundraisers must not approach other fundraisers during the course of their fundraising with the intention of disrupting their work in any way; this includes seeking to recruit them to work for another fundraising organisation.
- 2.4.18 Fundraisers must notify their Team Leader or Manager of any complaint or incident alleging a breach of this Standard or otherwise likely to bring face to face fundraising in disrepute.
- 2.4.19 Members must notify the PFRA of any complaint or incident alleging a breach of this Standard or otherwise likely to bring face to face fundraising in disrepute which has been raised by a local authority, state government, business association or other body which the PFRA has responsibility for engaging with.
- 2.4.20 Unless it is elsewhere specified by legislation, regulations, permits or licences, fundraisers should not work outside of the following hours:

Street Fundraising:

- Monday to Sunday 8 am to 8 pm
- Christmas Day and Good Friday – no fundraising

Door to Door Fundraising

- Monday to Friday 10 am to 8 pm unless by appointment
- Weekends and public holidays 10 am to 6 pm unless by appointment
- Christmas Day and Good Friday – no fundraising

Appendix B: List of PFRA charity members

ActionAid Australia
Amnesty International
Australian Conservation Foundation
Australia for UNHCR
Australian Red Cross
Barnardos Australia
Bush Heritage Australia
Cancer Council NSW
Cancer Council Queensland
Cancer Council South Australia
Cancer Council Victoria
CARE Australia
Careflight
CBM Australia
Cerebral Palsy Alliance
ChildFund Australia
Children's Cancer Institute Australia
Greenpeace Australia Pacific
House With No Steps
Mater Foundation
McGrath Foundation
Médecins Sans Frontières Australia
Mind Australia
Mission Australia
National Breast Cancer Foundation
Oxfam Australia
Peter MacCallum Cancer Foundation
Plan International Australia
Save the Children Australia
Starlight Children's Foundation
Taronga Conservation Society Australia
The Fred Hollows Foundation
The Heart Research Institute
The Nature Conservancy
The Wilderness Society
UNICEF Australia
Vision Australia / Seeing Eye Dogs Australia
WWF Australia