

*The Australian Consumer Law:  
don't let your Not for Profit become  
a front page consumer scam!*

**Not for Profit Conference: Empowerment through  
Knowledge**

**Thursday 15 March 2018**

**MCG, Melbourne**

**DF** Mortimer  
& Associates

# Some controversies we would rather forget 1/3

**An audit cleared the Australian Red Cross of fraud or misuse of its Bali Appeal funds, but found some money was not used in strict accordance with the charity's stated aims.**

***“Red Cross cleared on Bali Appeal” The Age 9 August 2003***

# Some controversies we would rather forget 2/3

“That [Melbourne] dinner raised nearly \$200,000, but only \$16,000 ... went to cancer research ... .

The rest went on costs, including nearly \$38,000 that was paid to [speaker] Cherie Blair.”

ABC radio AM - Thursday, 27 October 2005 transcript

# Some controversies we would rather forget 3/3

[233] ...the falsity in the representations is apparent. ... the company received over \$420,000 ... . Of this figure, the evidence shows that about \$10,000 was donated.

[238] I am satisfied that the misleading or deceptive representations made ...about the charitable donations ... constituted unconscionable conduct for the purposes of s 21 of the ACL.

*Director of Consumer Affairs Victoria v Gibson* [2017] FCA 240, Mortimer J

# Focus of this presentation

- *The Australian Consumer Law*
- Case law on “in trade or commerce” and “trading activities”
- *A Guide to the Australian Consumer Law 2017 - for not for profit fundraising and other activities*
- Take home message: “the end does not justify the means”

# *Australian Consumer Law (“ACL”)*

- ACL section 2 defines “trade or commerce” as “any business or professional activity (whether or not carried on for profit)”
- A “business” includes “a business not carried on for profit”.

# *Australian Consumer Law*

- **ACL s18 - a person must not in trade or commerce engage in conduct that is misleading or deceptive or likely to... .**
- **ACL s21 - a person must not in trade or commerce (in relation to supply or acquisition of goods or services) engage in conduct that is ... unconscionable .**

# *Concrete Constructions Pty Ltd v Nelson* (1990) 169 CLR 594

- **Controversy: a wide or narrow definition of “in trade or commerce”?**
- **Decision: “those activities or transactions which, of their nature, bear a trading or commercial character.”**



# *Concrete Constructions Pty Ltd v Nelson* (1990) 169 CLR 594 obiter

McHugh J: suggests context to an activity is important - eg misleading inducements

Brennan J: “there is significant work for the [trade and commerce] qualification to do in the case of non-trading, non-commercial” entities

# *Habashy v Relpar Australia Pty Ltd & Anor* [2006] VCAT 1912

- The activities of the Health Service are not activities which... bear any trading or commercial character
- Constitution authorizes activities which are beneficent ...rather than trading or commercial

# *Hill v Bamawm Extension Pony Club Inc* [2009] VCAT 37

...there is no evidence ...to indicate the Club provided services to children in trade or commerce. ...what evidence there is indicates the Club provided services for altruistic purposes... .

# *AHV Pty Ltd v Blairgowrie Yacht Squadron Inc* [2013] VCAT 1789

- Respondent NFP relies on *Habashy*
- “That was a decision about a community health service, ...which is hardly comparable to a [NFP] that looks after harbour facilities for the benefit of yachting sportspersons.”

# *A Guide to the Australian Consumer Law 2017*

- **Activities are in trade or commerce:**

**...consider the characteristics of the activity; not merely your organisational structure or whether your operation is for profit or not.**

# *A Guide to the Australian Consumer Law 2017*

- Fundraising activities carried out in a business-like way are likely to be in trade or commerce.
- “business-like” = continuous, repetitive & organised

# *Opinion of Senior Counsel*

- Charities and NFPs that raise money in an organised or systematic way are likely to be regulated by the ACL
- Systematic fundraising is a “business or professional activity”
- It is the fundraising activity rather than the entity that is regulated by the ACL

Norman O'Bryan SC, Dawson Chambers Memorandum of Advice 21 September 2016 - publicly accessible (paraphrased)

# *“Trading activity”*

*Kape v The Golden Mile Loophole Railway Society Inc & Ors (No.2)*  
[2017] FCCA 3014

- An activity carried on to earn revenue
- The ends which a corporation seeks to serve by trading are irrelevant
- The making of a profit is not essential
- The fact that trading activities are conducted for a public purpose will not exclude their categorisation as “trade”



# The High Court's views on trading activity

Charitable purpose can be found in “... the natural and probable consequence of [the entity’s]

**immediate activities.”** *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* (2008) 236 CLR 204

**“the end justifies the means”**

# The High Court's views on trading activity

Misleading and deceptive conduct in trade or commerce refers to “those activities or transactions which, of their nature, bear a trading or commercial character.” *Concrete Constructions Pty Ltd v Nelson*

(1990) 169 CLR 594

“the end does not justify the means”

# Thankyou for coming to this presentation

**For further information on this presentation  
please contact**

**Derek Mortimer**

**9370 9333**

**DF** Mortimer  
& Associates