

# **Fair Trading (Soliciting on Behalf of Charities) Amendment Bill**

Member's Bill

As reported from the Commerce Committee

## **Commentary**

### **Recommendation**

The Commerce Committee has examined the Fair Trading (Soliciting on Behalf of Charities) Amendment Bill, and recommends that it be passed with the amendments shown.

### **Introduction**

The purpose of the bill is to increase the transparency and public accountability of third-party businesses that collect funds on behalf of registered charities. There is concern that a disproportionate percentage of donated money may be retained by the third-party collectors to cover “costs”, and that the members of the public making the donations are not aware of this.

To address this concern, the bill as introduced proposes amendments to the unfair practices part of the Fair Trading Act 1986 (section 26)<sup>1</sup> that would require disclosure by collectors, in particular by providing

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<sup>1</sup> This part of the Fair Trading Act specifies certain conduct that is prohibited under the Act such as bait advertising, pyramid selling, and demanding and accepting payment without intending to supply as ordered.

that when a third-party collector retains more than 20 percent of the funds raised, this fact must be disclosed to the public. The bill also provides that where the retained portion is greater than 50 percent, the percentage portion must be disclosed proactively.

We recognise that the issue the bill seeks to address has caused some public concern. However, the current Fair Trading Act's provisions regarding unfair practices provide for prohibitions on conduct, but they do not include positive provisions, such as the disclosure requirement that the bill proposes. While excessive retention of monies could be made a prohibited conduct, quite specific requirements would be needed regarding the conveying of the necessary information to consumers.

We also considered amendments to the bill to provide for disclosure in a consumer information standard regulation, under section 27(1) of the Fair Trading Act, rather than requiring disclosure under section 26 (unfair practices) of the Act.

Section 27(1) of the Fair Trading Act provides for the making of regulations to prescribe the content of information about particular goods or services, or the form or manner in which it is required to be disclosed, in a consumer information standard. We understand that under this provision, information could be required about third parties retaining a percentage of funds donated to charities. However, section 27(1) would not allow disclosure about third party collectors as the definition of "services" excludes contracts for the performance of work such as those between charities and third party collectors.

We received submissions from some large and reputable charities who submitted against the bill. Others agreed that some regulation was appropriate, but thought that the provisions in the bill were not workable. For example some charitable organisations spend up front to attract long-term regular donors, with the up-front cost being a smaller proportion of the donations over time.

We concluded that the complexities involved could not be dealt with in primary legislation and there is no simple universal solution. We have therefore recommended instead a regulation-making power enabling the Governor-General to make regulations, by Order in Council, on the recommendation of the Minister of Consumer Affairs to address concerns in this area.

In the light of this, we recommend amending clause 4 to delete proposed new sections 26A, 26B, and 26C, and to insert new section 28(A) to provide for regulations to be made relating to fund-raisers making requests for charitable purposes. The member in charge of the bill supports these amendments.

### **Regulations covering fund-raisers making requests for charitable purposes**

New subsection 28A(1) would enable the Governor-General, by Order in Council and on ministerial recommendation, to make regulations relating to fund-raisers making requests for charitable purposes. Regulations could be made prescribing requirements for disclosure of information about the fund-raiser, the charitable organisation, and the relationship between the parties; the financial benefits the fund-raiser or any person other than the charity will or may receive (directly or indirectly) as a result of making requests; and the amount of any donation included in the price of goods or services.

Regulations could also be made under this subsection prescribing the manner of disclosure, and how the financial benefit must be calculated and expressed; and specifying any financial benefit that the fund-raiser would not be required to disclose.

New subsection 28A(2) would require the Minister, before making a recommendation under this section, to consult those who might be affected, to give them the opportunity to comment, and to consider any comments.

New subsection 28A(3) provides that a failure to comply with subsection (2) does not affect the validity of any Order in Council made under new section 28A.

New subsection 28A(4) provides that a person to whom the regulations apply cannot accept funds for a charitable organisation unless they comply with regulations made under new section 28A.

New subsection 28A(5) defines the terms used in new section 28A. We are conscious that the aim of this bill is to control professional third-party businesses that collect on behalf of charities, not the charities themselves or those who volunteer to collect for them. Accordingly, the definition of “fund-raiser” would include a person who, in business, makes requests for charitable purposes and that person’s

employer or principal; it would not include the charitable organisation concerned, or an employee of that organisation, or a volunteer (a person who does not expect or receive any financial benefit for his or her fund-raising activities).

The definitions in new subsection 28A(5) also make it clear that the charitable organisations covered by this bill would include not only charitable entities or any other person whose purpose or predominant purpose is charitable, but also a person or organisation that represents itself as a charitable organisation.

### **Consumer law review**

We are advised that there is likely to be significant amendment of the Fair Trading Act resulting from the review of consumer law that the Government is undertaking. Consideration of whether to require disclosure by collectors would fit within the wider context of the part of the review looking at possible additional best practice enforcement tools for consumer protection and promoting business competition.

## **Appendix**

### **Committee process**

The Fair Trading (Soliciting on Behalf of Charities) Amendment Bill was referred to the committee on 9 December 2009. The closing date for submissions was 19 March 2010. We received and considered 25 submissions from interested groups and individuals, and we heard seven submissions. We received advice from the Ministry of Consumer Affairs.

### **Committee membership**

Hon Lianne Dalziel (Chairperson)

David Clendon

Clare Curran

Te Ururoa Flavell

Melissa Lee

Peseta Sam Lotu-Iiga

Hon Nanaia Mahuta (until 9 February 2011)

Hon David Parker (from 9 February 2011)

Katrina Shanks

Jonathan Young

Amy Adams, the member in charge in the bill, participated in the consideration of this item of business.

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**Key to symbols used in reprinted bill**

**As reported from a select committee**

text inserted unanimously

~~text deleted unanimously~~

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*Amy Adams*

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Member's Bill

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**The Parliament of New Zealand enacts as follows:**

- 1 Title**  
This Act is the Fair Trading (Soliciting on Behalf of Charities) Amendment Act **2009**.
- 2 Commencement**  
This Act comes into force on the day after the date on which it receives the Royal assent. 5
- 3 Principal Act amended**  
This Act amends the Fair Trading Act 1986.

*Disclosure of collector's interest***4 New sections 26A, 26B, and 26C inserted**

The following sections are inserted after section 26:

**“26A Interpretation**

For the purposes of ~~sections 26A, 26B, and 26C~~ 5

“**charitable entity** has the meaning given to it in section 4(1) of the Charities Act 2005

“**collector** means a person who is not an employee of a charitable entity, who in the course of trade acts on a professional basis on behalf of any charitable entity 10

“**requesting funds** means canvassing for subscriptions; or appealing for donations; by means of the telephone, the Internet, or in any public place.

**“26B Requiring disclosure by collectors**

“(1) Subject to ~~section 26C~~, if a collector acting on behalf of a charitable entity is requesting funds, the collector must disclose if a portion of the fund is retained by any third party, including the collector, as set out in ~~subsection (2)~~: 15

“(2) Where a disclosure is required under ~~subsection (1)~~,—

“(a) if the proportion retained is less than 50 percent of the donation amount, then the collector must disclose that a portion of the donation will be retained by the collector but is not required to disclose what that portion is: 20

“(b) if the proportion taken is more than 50 percent, then the collector must disclose the portion of the donation that will be paid to the collector to the nearest percent. 25

“(3) Disclosure must be made before the donation is accepted by the collector on behalf of the charitable entity.

“(4) For the avoidance of doubt, this section does not apply to any employee of the charitable entity. 30

**“26C Exclusions**

~~Section 26B~~ does not apply in respect of an individual donation if—

“(a) the portion to be retained by the collector or the third party is not more than 20 percent of the total donation made; or 35

~~“(b) the donation is not more than \$20 and is made by way of cash only.”~~

**4 New section 28A inserted**

The following section is inserted after section 28:

**“28A Regulations relating to disclosure by fund-raisers making requests for charitable purposes** 5

“(1) The Governor-General may, by Order in Council made on the recommendation of the Minister in accordance with **subsection (2)**, make regulations, in relation to fund-raisers making requests for charitable purposes, for all or any of the following purposes: 10

“(a) prescribing requirements for the disclosure of information about—

“(i) the fund-raiser, the charitable organisation, and the relationship between those parties: 15

“(ii) the financial benefits that the fund-raiser or any person other than the charitable organisation has received, or will or may receive, (whether directly or indirectly) as a result of making requests: 20

“(iii) the amount of any donation included in the price of goods or services:

“(b) prescribing the manner of disclosure, including—

“(i) by whom, and to whom, disclosure must be made: 25

“(ii) when and how disclosure must be made, including any particular words required:

“(c) prescribing how the financial benefit must be calculated and expressed:

“(d) specifying any financial benefit that the fund-raiser is not required to disclose. 30

“(2) The Minister must not make a recommendation under this section unless—

“(a) the Minister has consulted with such persons or representatives of such persons as the Minister considers will be substantially affected by any Order in Council made in accordance with the recommendation and those per- 35

- sons have had the opportunity to comment to the Minister; and
- “(b) the Minister has considered any such comments.
- “(3) A failure to comply with **subsection (2)** does not affect the validity of any Order in Council made under this section. 5
- “(4) If regulations made under this section require a fund-raiser to disclose information, that fund-raiser must comply with the regulations.
- “(5) In this section—
- “charitable entity has the meaning given to it in section 4(1) of the Charities Act 2005 10
- “charitable organisation—
- “(a) means—
- “(i) a charitable entity; or
- “(ii) any other person or organisation whose purpose, or predominant purpose, is a charitable purpose; and 15
- “(b) includes a person or organisation that holds itself out as being a charitable organisation, whether or not that person or organisation would otherwise be a charitable organisation within the meaning given in **paragraph (a)** 20
- “charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community 25
- “fund-raiser—
- “(a) means a person who, in business, makes requests for donations for charitable purposes; and
- “(b) includes that person’s employer or principal; but 30
- “(c) does not include—
- “(i) the charitable organisation concerned or an employee of that organisation; or
- “(ii) a volunteer (being a person who does not expect to, and does not, receive any financial benefit for his or her fund-raising activities) 35
- “requests includes—
- “(a) soliciting for donations for a charitable purpose; and

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- “(b) canvassing for subscriptions for a charitable purpose;  
and  
(c) requests, by suppliers of goods or services, for dona-  
tions that are included as part of the price of goods or  
services.”

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**Legislative history**

19 November 2009  
9 December 2009

Introduction (Bill 102–1)  
First reading and referral to Commerce Committee

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