



Law Council
OF AUSTRALIA

Office of the President

26 April 2018

Mr Patrick McClure AO
Chair
ACNC Review Panel

By email: acncsecretariat@acnclegislationreview.com.au

Dear Mr McClure

ACNC Review Panel and #fixfundraising coalition

I refer to my predecessor's letter to the Minister for Small Business, the Hon Michael McCormack MP, dated 20 June 2017 where the Law Council agreed with certain recommendations arising from the Final Report into the Review of the Australian Consumer Law (**ACL**) (**enclosed**).

The Law Council agreed that regulatory guidance should be developed to clarify the current application of the ACL to not-for-profit fundraising activities and that this be completed in 2017. The Law Council also agreed in principle with the recommendation that a project be commenced to assess the effectiveness of that guidance and any relevant regulatory actions, and whether any future reforms are needed to enable the sector to work more effectively to the benefit of the Australian community.

I note that Justice Connect made a supplementary submission to you on 20 April 2018 in response to your invitation to provide further input to the Panel's deliberations on fundraising, in particular to provide reflections on the Australian Competition & Consumer Commission (**ACCC**) submission (**also enclosed**).

The Law Council endorses Justice Connect's supplementary submission which is consistent with the Law Council's support for reform in this area.

As noted in the Justice Connect supplementary submission, the ACL (and related legislation and multi-regulator framework) provides immediate opportunities to provide a vastly improved regulatory environment for fundraising activities; activities that directly support the sustainability of charities and other not-for-profits (**NFPs**) and can directly impact public trust and confidence in the sector.

The breadth and national consistency are strengths of the ACL over fundraising legislation and there is no properly functioning "specialist" state and territory based regime.

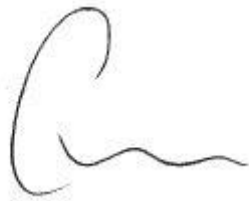
However, a useful compromise position would be a short, minimum mandatory code under the ACL framework with enforcement delegated to the ACCC and the state regulators. Such an approach would be less of an impost on the resources and energies of the ACCC and involve an implementable policy solution to provide significantly better regulatory underpinning of fundraising activity for and on behalf of charities and other NFPs. It would

also provide a modern, predominately principles based and nationally consistent regime that would not compromise donor protections.

The Law Council considers that reform in this area should be a matter of priority to ensure public confidence in the system is maintained.

For further comment or clarification on any of the matters raised in this letter please contact Jennifer Batrouney QC, Chair, Not-for-profit & Charities Committee on (T) 03 9225 8528 or at (E) Jennifer_batrouney@vicbar.com.au

Yours sincerely

A handwritten signature in black ink, appearing to read 'Morry Bailes', with a large initial 'M' and a wavy line extending to the right.

Morry Bailes
President

20 April, 2018

Mr Patrick McClure, AO

Chair

ACNC Review Panel

By email: acncsecretariat@acnclegislationreview.com.au

Dear Patrick

Supplementary submission

We understand that in addition to being raised in written submissions, fundraising surfaced as a key concern during the Review Panel's extensive consultations – concern about ineffective laws and the consequent risk to public trust and confidence, as well as the red tape burden.

This supplemental submission is made in response to your invitation to provide further input to the Panel's deliberations on fundraising, in particular to provide reflections on the Australian Competition & Consumer Commission (ACCC) submission. (For ease of reference we include the recommendations from our initial submission at the end of this submission.)

ACCC submission

We note the written submission made to the Panel by the ACCC. In particular, the following paragraphs:

“We do not support using the ACL as a replacement for state and territory fundraising legislation. The ACL and state and territory fundraising legislation are fundamentally different. The ACL is a law of general application intended to impose minimum standards of conduct across all sectors of the economy. On the other hand, state and territory fundraising legislation focussing on licensing and registration and related ongoing obligations such as financial reporting. Unlike the ACL, state and territory fundraising legislation is designed to promote transparency, accountability and good governance for the sector. The ACL is not designed to address the public's ongoing demand for greater accountability in the charities, not-for-profits and fundraising sector.

Economy wide regulators, such as the ACL regulators, cannot replicate the focus and expertise that specialist regulators deliver. Specific issues related to fundraising should be dealt with in fundraising specific legislation and enforced by relevant specialised state and territory agencies, and, to the extent that they involve charities registered under the ACNC legislation by the ACNC.”

We respectfully disagree with several points made by the ACCC. It is our view that the ACL (and related legislation and multi-regulator framework) provides immediate opportunities to provide a vastly improved regulatory environment for fundraising activities; activities that directly support the sustainability of charities and other NFPs and can directly impact public trust and confidence in the sector.

We make the following comments on the ACCC's submission.

1. The alignment of policy objectives between the ACL and fundraising regulation

In our view the core policy objectives of the ACL and the fundraising legislation are not “fundamentally different.” Rather the policy objectives of the ACL are congruent with the substantive policy objectives of fundraising regulation.

The ACL is founded on policy objectives of preventing practices that: are unfair or contrary to good faith; are unconscionable or deceptive; help people make informed decisions and protect them when have been treated unfairly; penalise those have acted unfairly.¹ Fundraising laws are similarly concerned with fairness and ensuring that people can make informed decisions.

2. The ACL already applies

The ACL is being used to impose minimum standards of good conduct for public-facing NFP fundraising activities. That is, the ACL is already being, and will continue to be used whether or not there is a specialist fundraising regime. There are also local by-laws, criminal laws, ACNC governance standards, and corporate governance requirements (which apply to incorporated associations, companies and co-operatives) and the common law (for unincorporated bodies and trusts) that intersect with fundraising activities.

As the ACL (ACCC) guidance² articulates, there are core standards that must not be breached no matter the delivery mechanism or the type of entity involved; whether the activities are conducted on-line or face-to-face, or whether they are conducted by an individual, an NFP, a charity (registered or not) or by a commercial fundraiser.

3. The ACL has many strengths over the existing “specialist regime”

Breadth and national consistency are strengths of the ACL over fundraising legislation bounded by state and territory borders with inconsistent and more restrictive definitional limits (eg, some of the regimes refer only to charitable purposes and others are far broader covering community purposes).³

There is no single “specialist regime” to replace – the existing state and ACT legislation (there is no fundraising legislation in the NT) does not provide a uniform (or even close to uniform) licensing, registration or financial reporting regime. For example, there are only three jurisdictions (ACT, SA and NSW) where fundraisers are licensed, only four that separately register fundraisers, and the financial reporting requirements vary greatly. Increasingly, states are turning off licensing and reporting requirements for registered charities.

Where serious breaches occur, the ACL offers a bigger tool kit including substantial penalties: for example, the high profile Belle Gibson case was bought by the Victorian regulator under the ACL even though the Victorian Fundraising Act has provisions that mirror those in the ACL regarding false representations and misleading and deceptive conduct.

The activity that most often gains public attention is street collections and for this there are local nuisance laws enforced by local council officers or the police; it would not be the ACCC any more than it is currently state based regulators. Local councils are best placed to use a core code of conduct (see below) and expand on it with any necessary variations for city versus rural conditions (for example).

The following are other reasons why we contend that the ACL is suitable as a platform for reform of fundraising regulation:

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

³ See pages 10-12 Not-for-profit Law's Guide to Fundraising Laws in Australia https://www.nfplaw.org.au/sites/default/files/media/Guide_to_Fundraising_Laws_in_Australia_3.pdf

- a. the ACL represents a modern, principles-based approach to regulation of people and organisations
- b. through jurisdictional cooperation, the ACL can, in its current form, apply to any person (natural or corporate or resident overseas) that operates in Australia – the application of provisions of the ACL to fundraising will encounter no jurisdictional or constitutional barriers
- c. the ACL is a well-understood piece of law (and the recent fundraising guidance assists this) which means it is easier to explain to fundraisers and donors, and is likely to more quickly improve fundraiser behaviour
- d. the minor amendments the #fixfundraising coalition have proposed to the ACL⁴ would be cost effective to implement and serve to further broaden the tool kit available to all ACL regulators
- e. the ACL contemplates the development of voluntary and mandatory industry codes, which would be appropriate and helpful in the fundraising context
- f. 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.”⁵
- g. 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 NFPs can be retained, and
- h. 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.

It is widely acknowledged (and, as the Review Panel has heard, consistently supported by lived experience) that the existing fundraising laws are not providing an effective or efficient “specialist” regime.

It is no longer a matter of simply updating or even harmonising – the “specialist” regimes are well beyond redemption. Recognition of this is why there is finally much greater buy-in from the states to discuss the ACL regime rather than pursue harmonisation.

In a nutshell, minimum standards of good conduct upon which the ACL is based are exactly what is needed and are vastly superior to inconsistent “specialist” laws which are no longer fit for purpose and, worse still, are operating as a restraint on trade.

4. The ACCC’s existing role

The ACCC describes its role as “limited in the charities, not-for-profits and fundraising sector”. We find this statement quite confusing in light of the recently published guidance which makes it clear that the ACL is not limited to any one ‘sector’ (ie, just to business) – it applies to NFPs. We acknowledge the threshold hurdle of ‘trade or commerce’, but given the broad interpretation of this concept by the courts as well as the results of the ACCC commissioned research about the prevalence of third-party commercial fundraisers, it would seem that there are many instances where the ACL will apply in the fundraising context.

⁴ <https://www.nfplaw.org.au/fundraisingreform>

⁵ Commonwealth, Parliamentary Debates, Senate, 24 June 2010, the Hon Senator Joe Ludwig, p 4283

The greater awareness of the ACL's applicability to fundraising (eg, via the guidance and the Belle Gibson case) means that the ACL and, through it the ACCC, have a growing role to play.

5. Resourcing the ACCC

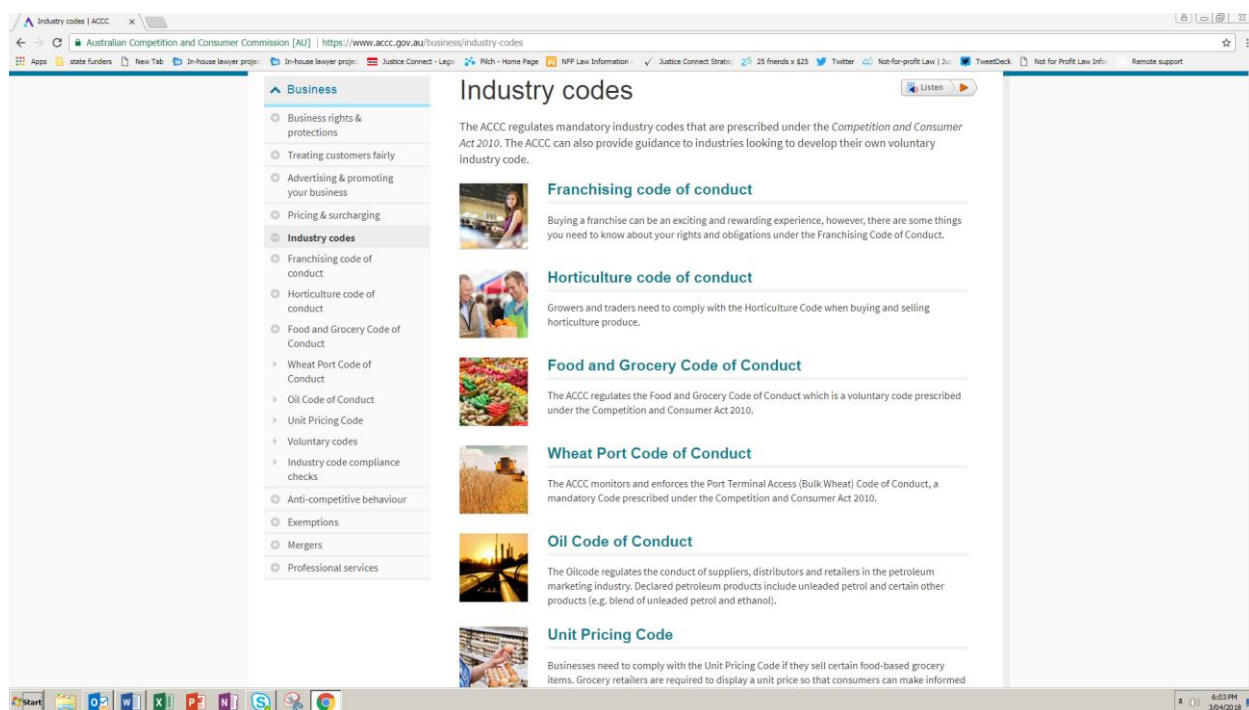
Understandably the ACCC may be concerned they are being given more and more to regulate without additional resources. This is a different question to whether the ACL is the best response in the current environment.

Below we have suggested the development of a mandatory industry code of conduct. If this is introduced by the Parliament (and the ACCC was to become the monitoring and enforcement body), we presume the Government would consider the related regulatory resourcing (see discussion below).

Opportunities

Creation of an industry code

There is a mechanism under the *Competition and Consumer Act 2010* for the prescription of industry codes of conduct. The screen shot below shows just some of the varied industries that already have such codes.



As mentioned in our initial submission, the creation of a short, simple mandatory fundraising code contained within the ACL framework (technically industry codes falls under Part IVB of the *Competition and Consumer Act 2010*) would supplement existing core provisions in the ACL, and facilitate the repeal of state and ACT legislation and regulations on fundraising. The Code would need to address fundraising via face-to-face, on-line and telephone/text, as this appears to be the source of most complaints.

We consider that the current South Australian mandatory Code of Conduct⁶ is a good starting point for what a mandatory code could look like. It would apply to all people and organisations seeking to raise funds for or on behalf of a charity or other NFP (ie, would include third party commercial fundraisers, charities, NFPs, and individuals). It is only 7 pages long, is easy to understand and has common sense provisions about name badges, collection times and the like.

⁶ https://www.cbs.sa.gov.au/assets/files/Charities_CodeofPractice_2017.pdf

Self-regulation (such as the recently tightened and improved codes developed by Fundraising Institute of Australia and the Public Fundraising Regulatory Association) can co-exist well with a mandatory code, providing more detail and a ‘gold’ (or accredited) standard.

Please note, that our suggestion of a mandatory code is a variation on the original #fixfundraising reform plan.⁷ We offer it in the spirit of progressing the debate and recognising that state Ministers are likely to need additional comfort before agreeing to repeal existing laws, especially in the light of the NSW RSL Inquiry.

Creation of an industry code

We note that Industry Codes under the *Competition and Consumer Act* are enforced by the ACCC rather than under the multi-regulator model. This could create a case for additional resources for the ACCC, or a reallocation of resources to the ACCC from the state ACL regulators (where they are currently directed to state-based fundraising compliance).

If the ACCC believes it is not best placed to enforce the new Industry Code, then we believe other options could be explored. For example, there could be a legislative delegation to the state-based ACL regulators and/or to the ACNC in relation to registered charities. There is precedent for this type of delegation: the *Competition and Consumer Act* already delegates certain functions and powers to ASIC⁸ and the *Foreign Acquisitions and Takeover Act 1975 (Cth)* delegates powers to the ATO⁹ (for example).

Process for progressing this issue

In our view this suggestion represents a practical, low cost (or even no cost), implementable policy solution which provides a significantly improved regulatory basis for fundraising activity for and on behalf of charities and other NFPs; a modern, predominately principles based and nationally consistent regime that would not compromise donor protections.

The issue is more about how do we ‘get there’? It needs leadership. It needs the right people at the table to work through the finer details. It needs to be a priority before becomes scandal led reform.

There are many models for making policy break-throughs. The national companies legislation is an example to draw on – the final break through occurred as a result of the pivotal ‘Alice Springs’ meeting as noted in the preamble to the Corporations Agreement 2002.¹⁰

There are other, more recent models such as co-design and policy ‘hackathons’.¹¹ A successful overseas model that Professor Turnour will be aware of is that utilised by the Canadian Muttart Foundation.

In short, there are willing experts from the legal profession and the sector ready to assist. We hope that the Review Panel will consider this recommendation for a process for fundraising reform. At the very least, an additional ACNC Advisory Committee comprised of state and territory representatives would be a constructive beginning.

ACNC objects – are they are barrier to the ACNC having a role in fundraising reform?

We understand that some people question if the reforms and opportunities discussed above fall within the ambit of this Review, or the purview of the ACNC.

⁷ <http://www.nfplaw.org.au/fundraisingreform>

⁸ See s. 26 Competition and Consumer Act 2010

⁹ See s. 137 *Foreign Acquisitions and Takeover Act 1975 (Cth)*: <https://www.ato.gov.au/General/New-legislation/In-detail/Other-topics/International/Foreign-Investment-Register/?page=1%20-%20When%20did%20the%20changes%20become%20law>

¹⁰ <https://www.coag.gov.au/sites/default/files/agreements/Revised-Corporations-Agreement-2002.pdf>

¹¹ <https://canadiangovernmentexecutive.ca/the-hackathon-as-an-instrument-in-policy-design/>

In our view, this suggestion is misconceived and would rely on an overly restrictive interpretation of section 15-5(2).

Section 15-15(1)

All three of the existing objects in section 15-5(1) are highly relevant.

The first object of the ACNC of maintaining, protecting and enhancing public trust and confidence in the sector directly interfaces with the regulatory environment underpinning donations made by the public. Research, including that commissioned by the ACNC, consistently highlights the link between the public's need for confidence that their donated dollar gets to the beneficiary and ensures services are delivered against a decline in trust in the sector if they do not believe this to be the case. Put another way, if the public are misled, deceived or rely on false representations when they are contemplating a donation, this will undoubtedly erode public trust and confidence (the NSW RSL being a current illustration). Laws and regulation that support truth in fundraising (such as the ACL) are directly relevant to this object.

The second object of the ACNC references the sustainability of the sector. Public fundraising – especially fundraising conducted with the hallmarks of 'trade and commerce' (ie, some sophistication and professionalism) – is directly linked to the sector's sustainability.

The third object of the ACNC Act is the reduction of red-tape. We find it hard to conceive of a better example to fit within the third object of promoting the reduction of unnecessary red tape than the current mess that is the state and territory based fundraising laws. Surely laws about how collection tins on a long poles can be used, inconsistent but highly specific rules about font size on name badges, and the need (and expense) of advertising in print newspapers put the ridiculousness of any assertion to the contrary beyond doubt.

Section 15-15(2)

This sub-section sets out how the Act seeks to achieve the objects stated in section 15-15(1). It is a short summary provision and cannot, by its very nature, be a fully comprehensive list. That said, we note that para (2)(a) refers to a national regulatory framework that reflects "... funding arrangements" which would sensibly include donations and fundraising activities.

Conclusion

Thank you for the opportunity to make some further points on the issue of fundraising reform – its regulation and administration. We firmly believe that not to proceed with the existing vehicle of the ACL is a mistake – allowing the quest for the perfect to be the enemy of the good.

We have been able to discuss the ideas outlined above with some of the organisations in our *#fixfundraising* coalition. We plan to have more detailed discussions shortly, **and we already have formal endorsement of this submission from the Governance Institute of Australia, Philanthropy Australia, Community Council of Australia and the Public Fundraising Regulatory Association.**

Kind regards



Sue Woodward
Director – National Projects
Not-for-profit Law
sue.woodward@justiceconnect.org.au



Nadine Clode
Manager Education and Advocacy
Not-for-profit Law
nadine.clode@justiceconnet.org.au

Recommendations from our initial submission

We recommend the formation of a specialist Advisory Committee, with a secretariat and terms of reference about reporting back to CAANZ before the end of 2018. This Committee should include CAANZ representatives, sector representatives and the ACNC. The Committee could consider, and where agreed upon, progress the implementation of the following:

- Referral of any necessary or desirable legislative powers to the Commonwealth to ensure there is a robust national regime for regulating fundraising.
- The creation of a short, simple mandatory fundraising code to be contained within the ACL, which would supplement existing core provisions in the ACL, in exchange for States and Territories repealing their existing legislation and regulations on fundraising. It would need to address fundraising via face-to-face and telephone/text means, as this appears to be where most complaints derive from.
- Repeal of all licensing requirements. Reporting can be achieved through information in the AIS, and the questions in the AIS could be tailored to cover a broader range of issues, such as third-party fundraising, face-to-face fundraising and telephone fundraising.

The LCA [Law Council of Australia] submission makes the points we have made above. It also suggests other ways in which the ACNC could progress fundraising reform which we endorse.

We also consider that the Committee, once formed, and having addressed fundraising as a priority could then actively progress other opportunities to harmonise ACNC regulatory requirements with the numerous other State and Territory laws which cover charities and NFPs (refer above also, 2.2.5 ACNC extension to NFPs).

Recommendation

- 6. The ACNC progress its removal of red tape agenda, by promoting the resolution of the most significant regulatory burden, the fundraising regime, by forming an Advisory Committee of all States and Territories to give urgent consideration to *#fixfundraising***

20 June 2017

The Hon. Michael McCormack MP
Minister for Small Business
PO Box 622
House of Representatives
Parliament House
CANBERRA ACT 2600

By email: michael.mccormack@aph.gov.au

Dear Minister

Final Report of the Australian Consumer Law Review

Thank you for your letter of 31 March 2017 (Ref: MC17-001602) in response to our letter about reform of the not-for-profit fundraising regulatory framework.

Your letter refers to the suite of reforms arising from the Final Report into the Review of the Australian Consumer Law (**the Report**). Now the recommendations of the Report are public, we write to highlight two recommendations in Chapter 2.7 for your attention.

In order to significantly improve the regulation of fundraising for charities and other not-for-profits, we urge you to consider:

1. **Agreeing** with the recommendation that regulator guidance be developed to clarify the current application of the Australian Consumer Law (**ACL**) to not-for-profit fundraising activities and that this be completed in 2017.

The Report affirms that the lack of regulator guidance makes it difficult for fundraisers and charities to determine if and how the ACL applies.

2. **Agreeing in principle** with the recommendation that a project be commenced to assess the effectiveness of that guidance and any relevant regulatory actions, and whether any future reforms are needed to enable the sector to work more effectively to the benefit of the Australian community, **but reject the timeframe of 2019-20 and propose it be commenced concurrently with the development of regulator guidance in 2017.**

A 2-3 year delay in taking action on this important issue would be unfortunate. The changes required to the ACL to provide better donor protection are minor and can be implemented as part of the current review. It is better that effort taken to develop guidance be spent on the clarified and expanded ACL provisions.

It is the Law Council's view that a small, specialist working group should be established before the end of 2017 to finalise minor changes to the ACL that clarify

and broaden its coverage of fundraising activities. The Not-for-profit & Charities Committee of the Law Council's Legal Practice Section has members with high levels of expertise who would be willing to participate in such a group.

As previously mentioned, the Law Council of Australia is a proud supporter of the campaign to '#fixfundraising', led by a coalition of sector and peak professional bodies (including the Australian Institute of Company Directors, Justice Connect, Philanthropy Australia and the Australian Council of Social Service). The recommendations outlined above are consistent with those put forward by this coalition. We note that the coalition have also written to you outlining examples of the current issues and how reforms to the ACL would help overcome them, including examples where there are gaps in the protection of donors. The Members of the Not-for-profit & Charities Committee agree with these examples and commend them to you for serious consideration.

We would be grateful for your advice about how you propose to deal with the recommendations relating to fundraising (discussed above) at the meeting of Legislative & Governance Forum on Consumer Affairs in August.

For further comment or clarification on any of the matters raised in this letter please contact Jennifer Batrouney QC, Chair, Not-for-profit & Charities Committee on (T) 03 9225 8528 or at (E) Jennifer.Batrouney@vicbar.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Fiona McLeod', written in a cursive style.

Fiona McLeod SC
President