

Our reference MB/13593  
Phone +61 2 8216 3006  
Email michaelb@marquelawyers.com.au  
Your reference 21RRG0184

11 March 2022

Rebekah Giles  
Company (Giles)

By email:  rebekah@companygiles.com.au

Dear Ms Giles

## OpenAustralia Foundation - Senator Andrew Bragg

We act for OpenAustralia Foundation (**OAF**) and Matthew Landauer. We have your letter of 7 March 2022. It is addressed to Mr Landauer but appears to be threatening litigation against OAF. It would be helpful if you could clarify who exactly it is that your client is threatening to sue.

Your letter is extremely detailed, but not to any useful end. Your client has no cause of action. Without accepting any of the contentions in paragraphs 3 to 37 of your letter, we can dispose of your client's allegations in brief terms.

The sole cause of action identified in your letter is misleading or deceptive conduct, under section 18 of the Australian Consumer Law. As you are aware, conduct can only infringe section 18 if it is "in trade or commerce". None of OAF's conduct about which your client complains is in trade or commerce.

The basis of your argument to the contrary is in paragraph 38. You assert that OAF has "activities in trade or commerce" and appear to assert further that conduct will be in trade or commerce "even if a charity seeks donations or money only (ie without supplying a good or service)".

That is incorrect. The authorities are very clear regarding the scope of conduct which falls within section 18, consistently following the principle laid down by the High Court in *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 (see paragraphs 602-604, 613-614).

Of particular pertinence is this passage in *ALDI Foods Pty Ltd v Transport Workers' Union of Australia* (2020) 282 FCR 174 at [52]:

"A number of cases considered whether representations in the nature of political, social or consumer advocacy are made in trade or commerce. If the advocacy is political or educational in nature and the advocate, or those whose interests the advocate represents, are not themselves involved in trade or commerce, the representations are unlikely to be 'in trade or commerce': see for example *Tobacco Institute of Australia v Woodward* (1993) 32 NSWLR 559; *Orion Pet Products* at [192]-[193] (Weinberg J). Even if a corporation that is engaged in

trade or commerce engages in political and public advocacy relating to regulations that may affect its business, the advocacy may not constitute conduct in trade or commerce: *Village Building Co Ltd v Canberra International Airport Pty Ltd* (2004) 139 FCR 330 at [51]-[59] (French, Sackville and Conti JJ).”

OAF does not engage in trade or commerce. To the extent that it accepts donations, that is not a trading or commercial activity. As the authorities demonstrate, even if it was found to have trading or commercial activities, there is no connection between such activities and the conduct complained of. The conduct does not even reach the level of political advocacy, let alone trade or commerce; it involves the provision of tools and information to the public to support democratic engagement.

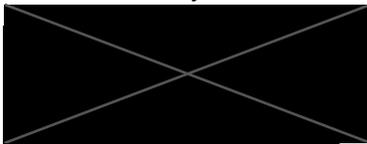
If it was seriously argued that section 18 extends to conduct of this kind, then that provision to that extent would be invalid, as it would infringe the implied constitutional freedom of communication on government and political matters.

We expect that your client knows all of this already. The fact that he has elected to make an empty threat of litigation to our client is interesting, but it has no legal consequence.

OAF is carefully considering the substance of your client’s complaints and will happily make changes to its website if it concludes that any of those complaints have merit. OAF’s sole interest is in participating in our democracy and providing useful tools to Australian citizens as they participate likewise.

Finally, our clients do not accede to your assertion of confidentiality over your letter. You cannot unilaterally impose confidentiality or non-publication obligations on a third party to whom you have sent unsolicited correspondence.

Yours sincerely

A black rectangular box with a white 'X' drawn across it, used to redact a signature.

**Michael Bradley**  
Managing Partner