

26 May 2016

Consumer Affairs Australia and New Zealand
c/- The Australian Competition and Consumer Commission
23 Marcus Clark Street
CANBERRA ACT 2601

via online submission

Dear Sir/Madam

Australian Consumer Law Review

The Australian Institute of Company Directors (AICD) is pleased to provide a submission to Consumer Affairs Australia and New Zealand's review into the Australian Consumer Law (ACL). This submission is limited to addressing the issue of the applicability of the ACL to charities and to not-for-profits.

The review of the ACL provides the ideal opportunity to lay a foundation for a broader reform of fundraising regulation across Australia. Small changes to the ACL, accompanied by repeal of state-based fundraising laws, could achieve substantive law reform for the benefit of Australians and the NFP sector.

The AICD is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director education, director development and advocacy. Our membership of more than 38 000 includes directors and senior leaders from business, government and the not-for-profit (NFP) sectors.

The AICD is working with leading sector bodies, including Justice Connect's Not-for-profit Law and the Governance Institute of Australia, on the urgent need for fundraising reform.

The critical need for fundraising reform

Over the last decade, there has been much discussion of the need to abolish or harmonise fundraising laws. The current state and territory-based regulatory framework is fragmented, burdensome, rarely enforced; it is fundamentally failing in its objective to protect donors and provide for transparency, and public trust and confidence in fundraisers. Fundraising regulation is in a similar position to the fragmentation of consumer protection law prior to the creation of the ACL.

The AICD considers fundraising regulatory reform should be a critical priority for state, territory and federal governments – it is essential in underpinning the Australian not-for-profit sector and currently operates as a barrier to 'business'.

The current application of the ACL to fundraising activities is unclear

There is significant disparity in opinion about if and how the ACL currently applies to fundraisers and, as far as we are aware, the ACL is rarely enforced against fundraisers.

Justice Connect's Not-for-profit Law service obtained *pro bono* legal advice from Norman O'Bryan AM SC on the current and potential application of ACL provisions to fundraising activities. With his permission, Justice Connect have shared his advice with us.

Mr O'Bryan's advice was that the application of the ACL provisions to fundraising activities hinges on whether the fundraising activities can be considered to be "in trade or commerce" and, for some provisions, whether the fundraising activities also involved a supply of goods or services. Based on his advice we submit that the ACL does apply to many fundraising activities as currently drafted. However, this application of the ACL to fundraising activities is misunderstood - people often do not understand the extent of its application, or how it can be used to achieve redress for fundraising misbehaviour. If the application of the ACL to the particular type of fundraising activity depends on various technicalities (for example, the degree to which the fundraising is carried out professionally), there will be continued confusion and slow uptake of its protections and remedies.

The AICD submits that fundraising reform could be achieved through three simple steps:

1. minor amendments to the ACL to ensure application to fundraising activities is clear and broad;
2. repeal of state-based fundraising laws; and
3. work with other regulators (for example, the Australian Charities and Not-for-profits Commission, state-based regulators and self-regulatory bodies) to improve fundraiser conduct (including door-knocking, telemarketing and excessive spending of funds on third party services).

We stress that undertaking step 1 without also undertaking step 2 contemporaneously would amount to a failure of reform, and would mean that fundraisers need to continue complying with existing fragmented regulation along with the amendments to the ACL.

Recommended changes

We recommend that, at minimum, the following sections be extended to include specific application to fundraising activities:

- Section 18: Misleading and deceptive conduct (note, limited penalties and remedies apply);
- Section 20: Unconscionable conduct (note, broader penalties and remedies apply); and
- Section 50: Harassment.

By way of example, section 18 could be amended as follows:

"18 Misleading or deceptive conduct

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- (1) A person must not, in trade or commerce or in relation to fundraising activities, **or in relation to fundraising activities**, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in Part 3-1 [unfair practices] limits by implication subsection (1)."

We also recommend that "fundraising activities" be defined in the ACL. A definition could be drafted as follows:

"Fundraising activity" includes any activity the purpose or effect of which is the donation of money, goods or services by persons, but does not include the receipt of funds as consideration only for goods and services supplied through a business or professional activity (whether or not carried on for profit). An activity can be a fundraising activity even if nothing is received by the fundraiser.

We support further consultation and engagement of technical experts to refine the best approach for achieving the clear application of the ACL to fundraising activities.

We hope our comments will be of assistance to you. Should you wish to discuss any aspect of this submission, please contact our NFP Policy Adviser, Lucas Ryan via lryan@aicd.com.au or (02) 8248 6671.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'John Brogden', with a large, stylized flourish at the end.

JOHN BROGDEN

Managing Director & Chief Executive Officer