9 December 2016

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Via electronic lodgement: www.consumerlaw.gov.au

Australian Consumer Law Review: Interim Report

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are unrivalled.

Our members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies, as well as in the not-for-profit (NFP) and public sectors. They frequently are those with the primary responsibility for dealing and communicating with regulators such as the Australian Securities and Investments Commission (ASIC) and consumer law agencies and we have drawn on their expertise in this submission.

Governance Institute believes that good governance assists businesses to become more accountable, transparent and ethical in their dealings with all stakeholders including their customers. This allies the objectives of Governance Institute with the overarching objectives of the National Consumer Policy Framework that emphasises the prevention of unfair practices and enables the confident participation of consumers in fair and efficient markets.

Governance Institute has not commented on all parts of the Interim Report. We refer to the relevant questions to which we have provided a response.

1.2 Scope and coverage of the ACL

Option 1: Clarify the current application of the ACL to the activities of charities, not-for-profits and fundraisers, and investigate whether there are regulatory gaps that warrant intervention.

We submit that the current application of the Australian Consumer Law (ACL) to the activities of charities and other NFPs, including fundraising activities, is unclear.

There is a widespread misconception in the NFP sector (and among some professional advisers) that the ACL does not apply to fundraising. To resolve this, we recommend minor legislative amendments to put beyond doubt that the ACL applies to fundraising activities. This clarity would provide a solid foundation to support the repeal of outdated state and territory-based fundraising regimes.

Reports show that charitable giving in Australia amounted to $8614 million per annum (eight per cent of total NFP sector income and 0.57 per cent of gross domestic product).[1] This is a tremendous economic contribution which is underpinned by a regulatory framework that is fragmented, outdated and inconsistent and does not effectively accommodate new fundraising methods. NFPs have to waste significant amounts of time and money (wasting more than $15.08 million for charities alone) to meet outdated and fragmented fundraising laws across Australia.

The regime is so complicated that it results in both unintentional and deliberate non-compliance and minimal resources are directed to its enforcement. It creates risk for donors: they may not have a right of action or remedy where mischief occurs. That right of action is assured under the ACL.

Clarification of the current application of the ACL, with minor extensions of the ACL's current application to fundraising, would help drive reform in the states (and the Australian Capital Territory), and deliver a far better regulatory system that would appropriately apply to any fundraising activity anywhere in Australia.

The extension of the ACL should be supported by a single, voluntary code of conduct (developed by the sector in consultation with ACL regulators) that is applicable to all fundraisers and all types of fundraising activities (providing the mechanism to maintain some of the detailed matters concerning conduct prescribed in various of the current state-based laws).

The ACL is better regulation, not more regulation. It offers a practical solution, balancing risk with the need for a regulatory framework that supports ethical behaviour and donor protection, while providing the NFP sector with a means to efficiently and effectively fundraise in efforts to achieve their mission — for the benefit of all Australians.

This approach is supported by Governance Institute of Australia, the Australian Institute of Directors, the Australian Council of Social Services, Chartered Accountants Australia and New Zealand, the Community Council of Australia, CPA Australia and Philanthropy Australia. It is also supported by an increasing number of NFPs, their professional advisers and other bodies.

Summary of recommendations

Recommendation 1

Make the application of the ACL to NFPs clear by:

a) amending the definition of 'trade and commerce' in the ACL to ensure its application to fundraising is clear and broad, and
b) providing accompanying guidance materials including an Explanatory Memorandum, and regulatory approach statement and educational material.

If legislative change to the ACL is not possible, this clarification could be achieved by means of a legislative note.

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[1] Australian Bureau of Statistics, *Australian National Accounts: Non-Profit Institutions Satellite Account, 2012–13*, (Catalogue No 5256.0, 28 August 2015) table 7.1 <http://www.abs.gov.au/AusStats/ABS@.nsf/MF/5256.0>. Gifts comprised donations by individuals (46.4%), business (10.0%), foundations (5.5%), sponsorships (16.0%) and other fundraising (22.1%).

Recommendation 2:

Regulators should work with the sector to improve understanding of the ACL, fundraiser conduct and donor protection, primarily through education and guidance and in collaboration with peak bodies, sector-based intermediary bodies and professional advisers.

Recommendation 3:

Make minor changes to the ACL by:

a) explicitly applying sections 18, 20, and 50 to fundraising activities by adding a reference to 'fundraising activity' to these sections
b) applying sub-paragraphs 29 (e), (f), (g) and (h) to fundraising by creating a new section 29A 'False or misleading representations during a fundraising activity'
c) supporting these changes through a definition of 'fundraising activity' such as:

> '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.

Recommendation 4:

ACL regulators should, in undertaking these recommendations, consult with NFPs, peak bodies, sector-based intermediary bodies, professional advisers, consumers of NFP goods and services, donors and other relevant regulators and experts across Australia on the development of a regulatory approach.

Recommendation 5:

The sector, in consultation with the regulators, professional fundraisers and others, should work to develop a voluntary code of conduct to apply to all types of fundraisers and fundraising activities.

Q1: Would further regulator guidance on the ACL's application to the activities of charities, not-for-profits and fundraisers help raise consumer awareness and provide greater clarity to the sector? If so, what should be included in this guidance?

We welcome the confirmation in the Interim Report that the ACL applies to many activities undertaken by charities and NFPs and that it is also likely to cover a range of fundraising activities. Given this confirmation, we support the development of regulator guidance on the ACL's application to the activities of NFPs and fundraisers to raise consumer awareness and provide greater clarity to the sector.

However, there is currently considerable misunderstanding within the sector and among some professional advisers as to whether the ACL applies to fundraising. We believe providing regulator guidance alone is not sufficient to provide clarity to the NFP sector as to the application of the ACL.

We strongly recommend that only amendment to the law will provide the unequivocal clarification required for this reform to be successful.

We provide two options for how the law could be amended, and note our preference is for Option 1:

- **Option 1**: expand the definition of 'trade and commerce' and provide regulator guidance — this would address emerging issues such as crowdfunding and peer-to-peer arrangements, which are evolving rapidly and growing in popularity, or
- **Option 2**: add a Legislative Note to clarify the definition of 'trade and commerce' and make it clearer that the ACL does apply to NFP activities, including fundraising, and provide guidance.

It is essential that the application of the ACL be based on the sophistication of the fundraising activity, rather than the remuneration (or otherwise) of those who carry it out. **We submit that the example in the Interim Report relating to the question of whether volunteer fundraising is in trade or commerce (page 17, paragraph 5) is not correct.** Volunteers are commonplace in the NFP sector and, as workers, can be indistinguishable from paid employees. From the perspective of a consumer and in the interest of providing equal protection to all consumers and donors under the ACL, the remuneration (or otherwise) of the person undertaking fundraising activity should not be relevant to the assessment of whether the activity is in trade or commerce.

The issue is one of conduct (that is, not making misleading or deceptive representations) when fundraising on behalf of a NFP, regardless of which individual undertakes the activity (paid or unpaid worker). Further, it should be clear that the ACL applies to fundraising undertaken by third party commercial providers on behalf of a NFP.

Regulator guidance should include:

- a statement by CAANZ on the ACL's current application to the activities undertaken by, or on behalf of, NFPs
- the overarching policy goal of regulating fundraising
- the overarching regulatory approach (for example, emphasis on education especially for minor and unintentional breaches)
- accompanying plain language guidance to help NFPs and the public understand the statement
- the powers of ACL regulators and how they will be used in the broader multi-regulatory model, especially where activities are cross-jurisdictional, and
- the remedies that can apply when there are breaches of the ACL.

The explanatory and educational materials should help NFPs and their advisers understand how the ACL applies to their activities generally, and in relation to fundraising specifically. They should:

- summarise the relevant provisions of the ACL and signpost the actual provisions, defences and penalties
- give practical examples of NFP activities that are clearly in, and those clearly out of scope
- provide guidance on how to comply with the ACL (in forms accessible by all parts of sector, including in writing (using case studies), visual and other multi-media), and
- outline the roles of the regulators and the approaches they will take.

Q2: Are there currently any regulatory gaps with regard to the conduct of fundraising? If so:

- **What is the extent of harmful conduct or consumer detriment that falls within these regulatory gaps or 'grey areas', and does it require regulatory intervention?**
- **Would generic protections, such as the ACL, provide the level of regulatory detail necessary to address identified areas of detriment? What would be the benefits and costs of this approach?**
- **Would there be any unintended consequences, risks and challenges from extending the application of the ACL to address regulatory gaps for fundraising activities? If so, how could they be addressed?**

As a basic principle, the use (and extension) of the ACL to regulate fundraising activities should not be based only on the concept of addressing any 'regulatory gaps' (or the extent of those gaps). The assumption that clarification or any extension of the ACL should only occur in response to regulatory gaps is prejudicial to the interests of reform and does not correctly conceptualise the current policy problem.

At present, there are differing definitions of fundraising activity; inconsistencies across jurisdictions; rules based on outdated forms of fundraising; and the constraints of state and territory boundaries.

These numerous problems involve both regulatory gaps and duplicative laws. **Inconsistencies cause regulatory gaps, in that there is confusion as to who the laws apply to and how they are applied.** There is, as such, no need for additional regulation, but rather a clarification of the existing regulation to address these gaps and address inconsistencies.

The regulatory gaps that would be addressed by clarification and extension of the ACL include:

- the existing state-based laws fail to adequately deal with new forms of fundraising, including fundraising through online platforms
- little enforcement of these laws means that a regulatory system that, while in place, is not otherwise monitored, and
- high levels of accidental or even deliberate non-compliance (because of the complex, burdensome and inconsistent laws), but non-compliance is generally in relation to procedural matters rather than serious misconduct.

Where there is misconduct, reforms making generic provisions of the ACL explicitly applicable to fundraising would provide the level of regulation necessary to address the areas of detriment. The ACL has a number of remedies capable of addressing extreme mischief. In addition, there may be circumstances that warrant the use of other laws (primarily the criminal code) in each state and territory. With its broad toolkit of remedies and enforcement options, the ACL can also deal with minor misconduct.

To further support reform, we recommend the development of a single, voluntary (self-regulatory) fundraising code of conduct that sits under the ACL framework (developed in conjunction with the NFP sector). The voluntary code would provide an opportunity to capture any (necessary) matters of detail about the conduct of fundraising activities (currently sitting in the state and territory laws and regulations).

The regulators with oversight of the ACL are the same regulators concerned with fundraising laws — the multi-regulator model continues to apply. Existing experience in regulating the fundraising activity of NFPs can be retained at the state and territory level. Using the ACL to

regulate fundraising (instead of state-based fundraising laws) would not involve additional costs for regulators — they would be cost-neutral. They will, however, save NFPs well in excess of $15 million annually and enable them to continue to make a significant contribution to our economy and our society.

In short, the purpose of state-based fundraising regulatory regimes is to enable and facilitate proper and lawful fundraising activity and to provide reasonable protections to donors. It is also intended to defend against unfair practices. Over time, these regulations have lost their relevance and have been rarely enforced. **Existing fundraising regulation is *hindering* fundraising and, in our view, could be repealed *immediately* even without any change to the ACL** (or a move from multiple existing codes to a single voluntary code of conduct under the ACL). As the Interim Report confirms, key provisions of the ACL already apply to many fundraising activities; our recommendations are to further improve its application but are not essential preconditions to the repeal of existing fundraising laws.

The ACL provides a better regulatory framework for fundraising. An improved fundraising regime will deliver benefits to all Australians.

Q3: Would extending the ACL to all fundraising activities be necessary or desirable to facilitate potential reforms of state and territory fundraising regulation?

Clarification and extension of the ACL is essential to support reform within states and the Australian Capital Territory (no fundraising regulation exists in the Northern Territory.) The purposes of the ACL are closely aligned with the purposes of existing state-based fundraising laws, particularly the prevention of practices that are unfair or contrary to good faith and are unconscionable or deceptive. The state and territory governments need comfort that if they repeal their fundraising laws, mischief that could harm donors or the public can be addressed either by criminal laws, charitable trust powers (under powers vested in state Attorneys-General), their incorporated association regimes, and/or the ACL.

We recommend extension of the ACL by:

- explicitly applying sections 18, 20 and 50 to fundraising activities by adding a reference to ‘fundraising activities’ to these sections
- applying sub-paragraphs 29 (e), (f), (g) and (h) to fundraising by creating a new section 29A ‘False or misleading representations during a fundraising activity’, and
- supporting the above reforms with a definition of ‘fundraising activity’.

1.2.6 Interaction between the ACL and ASIC Act

Q7: Should the ASIC Act be amended to explicitly apply its consumer protections to financial products?

Under this option, the Interim Report notes that:

> protections relating to the following conduct in the ASIC Act would be explicitly applied to financial products:

- misleading or deceptive conduct
- false or misleading representations
- offering rebates, gifts, prizes, etc.
- certain misleading conduct in relation to financial services
- bait advertising
- referral selling
- accepting payment without intending or being able to supply
- harassment and coercion.

Irrespective of the reforms at the Commonwealth level as regards financial services and the implementation of external complaints handling systems, Governance Institute is of the view that there is scope to clarify the application of the ASIC Act to cover financial products (rather than just services).

As we noted in our submission on the Issues Paper, it can be unclear as to where regulatory responsibility falls. For example, an area of particular confusion for the protection of consumers is the definition of 'financial product' and 'financial services' in the context of real property 'spruikers'. Such 'spruikers' issue alleged 'research' material and offer to fly potential investors to exotic locales in order to encourage them to make an investment decision in property under what are often high pressure 'boiler room' conditions. However, ASIC has no jurisdiction as a regulator for real property purchases unless the transaction falls within the definition of a managed investment scheme.

Governance Institute recommends that the ACL consumer protection provisions be copied across into Part 2 of the ASIC Act to promote consistency between financial services and non-financial services related conduct. This would improve the way financial services businesses behave when dealing with their customers.

We also recommend that the review harmonise the liability rules for misleading or deceptive conduct in the ACL and the ASIC Act so that there is greater consistency and application of the standards of liability.

3.1.3 Barriers to accessing information

Q55: What enhancements to existing communication channels would be most useful, and what is the level of consumer need? In a context of finite resources, what should be prioritised?
Q57: Are there other ways to enhance the accessibility of the ACL and related guidance material that should be considered?

Governance Institute commends CAANZ for recognising the need to improve the guidance available to consumers and businesses in relation to the ACL. **We recommend** the following for consideration, in recognition that there is considerable research in cognitive science on different learning styles. That is, research shows that narrative text, which is currently used for guidance on the ACL, does not suit all learning needs. Research shows that different learning styles include:

- visual (spatial – the preference is for using pictures, images, and spatial understanding)
- aural (auditory-musical) – the preference is for using sound and music
- verbal (linguistic) – the preference is for using words, both in speech and writing, and
- physical (kinesthetic) – the preference is for using the body, hands and sense of touch.

While physical learning is potentially not possible, guidance on the ACL could certainly include visual materials (for example, graphics and animation), aural materials (for example, podcasts), and verbal (for example, videos on YouTube, which would also suit visual learners). Those who

prefer written materials and reading in order to learn would benefit from short guidance notes and short, accessible 'How To' guides. We stress that these should be short, not 42 pages of dense text.

A variety of such useful educational tools is currently used by government agencies such as the Australian Charities and Not-for-Profits Commission to inform those engaging with charities of their rights and could be adapted by consumer agencies to fill this knowledge gap.

Above all, any guidance should be 'user-friendly' and tested with consumers first to make sure it enables understanding.

Even within a context of finite resources, consumer regulators could develop guidance suited to different learning needs and utilise channels such as social media to disseminate them and make them easy to access. For example, video costs are now nowhere near as expensive as they were previously and it is possible to create short videos at no great expense. Most videos disseminated on social media are very short (no more than three minutes), although they may also link to a longer video. It is free to post to YouTube.

Indeed, one of the most useful outcomes of this review would be an improvement in the guidance offered by all consumer regulators on the ACL. One possibility is also for the consumer regulators to make contact with the ABC to assess if any parts of their popular TV show *The Checkout* could be made available at either no cost or low cost, as this deals with consumer issues in many instances, covering both rights and remedies in an accessible manner.

The other matter that needs serious consideration is the provision of a central consumer website to operate as a single 'one-stop shop' containing hyperlinks which lead consumers to the relevant site appropriate to their complaint, depending on their responses to some simple gateway questions. A consumer enquiry could therefore be funnelled to the website of the relevant regulator such as ASIC, ACCC or the consumer affairs websites of the states and territories, depending on the information provided in their responses. To that end, a 'take the quiz' field could be developed to ascertain consumer rights in a similar fashion to the Fair Work Commission website where, for example, an employee is able to determine if they are eligible to bring an unfair dismissal claim. Similarly, the ATO has recently introduced a short quiz to assist organisations determine the distinction between a contractor and an employee. ACL regulators could also cooperate to achieve greater standardisation of layout and language of their websites to ensure each one has a consistent look and feel in order to give consumers a more streamlined and user-friendly experience. At the moment, for example, not only is there no consistency in layout and language between the home page of the NSW Government's Department of Fair Trading and the ACCC – the former, which is the ACL regulator for NSW, does not even refer to the ACL on its home page. A single entry point to the state and federal regulators would reduce confusion amongst consumers and promote the active sharing of intelligence between agencies. This would require ACL regulators at the Commonwealth, state and territory levels to undertake greater cooperation and consultation than they currently do.

One of the objectives of the ACL is to meet the needs of vulnerable and disadvantaged consumers. We consider that these consumers often fall within the category of those who find the ACL framework the most confusing and require more assistance in order to avail themselves of any remedy. In order to redress this imbalance, the ACL must be presented and communicated in the simplest possible way. Governance Institute recommends that ACL regulators consider cooperating with organisations in the social justice sphere to present information on their websites concerning the ACL framework and consumer rights. These social justice websites could also contain hyperlinks to the relevant ACL regulator websites to enable consumers to access relevant information by way of a simple 'click through'.

Q56: To what extent would a stand-alone version of the ACL be used by consumers and businesses? How should it be formatted, and what additional information (if any) should it contain?

Governance Institute is of the view that, particularly in light of finite resources, a stand-alone version of the ACL is not a priority. While this may be appreciated by lawyers and legal advisers, consumers are most unlikely to wish to read the legislation. They need access to guidance on the legislation and their rights and remedies available to them, rather than the legislation itself.

5. OTHER ISSUES

Q8: Amend section 12DC of the ASIC Act to address inconsistencies with other consumer protection provisions in the ASIC Act

Section 12 DC refers to representations in connection with the sale or grant of a financial product that includes an interest in land. This is a new concept in the ASIC Act and is not consistent with conduct that is defined to be a financial service in section 12 BAB. Amending the provision to refer to supply or possible supply would make it more consistent with the other provisions of the ASIC Act. Governance Institute supports this.

Yours sincerely

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