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Australian Consumer Law Review: Issues Paper

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.

This submission follows the structure and outline of the Issues Paper and adopts the paragraph numbering used therein. Governance Institute has not commented on all parts of the Issues Paper or addressed all of the questions posed in it; we refer to the relevant questions to which we have provided a response.

Question 1: Do the national consumer policy framework's overarching and operational objectives remain relevant? What changes could be made?

Governance Institute supports the current national consumer policy framework and the legislative objectives as we support national consistency in consumer laws. We note that the Australian Consumer Law (ACL) replaced a piecemeal and fragmented legislative landscape of 17 existing Commonwealth, state and territory laws. We believe that nationally consistent consumer laws allow businesses to better meet their legal obligations and reduce business compliance costs. We also consider that a national framework assists consumers to develop greater familiarity with a single national law, which better enables consumers to access legal redress.

Question 7: Is the ACL's treatment of 'consumer' appropriate? Is $40,000 still an appropriate threshold for consumer purchases?

Governance Institute supports the current meaning of 'consumer' in the legislation and notes that claimants who may not fall under the $40,000 threshold are able to satisfy the second limb of the 'consumer' test if they are acquiring goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

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.

Governance Institute considers fundraising regulatory reform should be a critical law reform priority for state, territory and federal governments — it is an essential underpinning for 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.

Governance Institute is working with JusticeConnect, the Australian Institute of Company Directors (AICD), Chartered Accountants Australia and New Zealand (CAANZ), CPA Australia and other leading sector bodies on the need for fundraising reform. 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 has shared his advice with us and AICD, CAANZ, CPA Australia and the other leading sector bodies. We share the view that small changes to the ACL accompanied by repeal of state-based fundraising laws can achieve substantive law reform for the benefit of Australians and the NFP sector.

As advised by Norman O'Bryan AM SC, the application of 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.

Governance Institute and the other bodies noted above submit 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, self-regulatory bodies) to improve fundraiser conduct (for example, door-knocking, telemarketing, 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 amended ACL.

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

- s 18: Misleading and deceptive conduct [note, limited penalties and remedies apply]
- s 20: Unconscionable conduct [note, broader penalties and remedies apply]
- s 50: Harassment.

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

> 18 Misleading or deceptive conduct
> (1) A person must not, in trade or commerce 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 with and engagement of technical experts to refine the best approach for achieving the clear application of the ACL to fundraising activities.

Question 8: Are the ACL's general protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on business?
and
Question 9: Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.2? Are there any gaps to be addressed?

Governance Institute considers that the ACL operates in most instances as an effective deterrent to businesses acting in breach of its provisions and as such has improved the way in which businesses deal with their customers. However, Governance Institute questions how well consumers understand the various legal avenues of redress under the legislation and how this impacts on their ability to utilise the provisions. We note that depending on their grievance, consumers can institute proceedings in the Federal Court of Australia or lodge a claim with various state tribunals or courts. A consumer requires a certain level of sophistication in order to work out whether they have a claim and through what court or tribunal they can pursue it.

We are of the view that consumers should not be required to have nuanced knowledge of the applicable legal and regulatory framework to know how they can seek redress. It is a strong disincentive to seeking redress if consumers feel that they require legal advice before acting on their rights.

Governance Institute recommends that the relevant consumer bodies be charged with providing more guidance and information to consumers to better explain the ACL framework and to better educate consumers on how they can use the system to obtain a solution to their problem.

Materials such as short guidance notes, educational videos and short, accessible 'How To' guides are useful educational tools and are currently used by government agencies such as the Australian Securities and Investments Commission and the Australian Charities and Not-for-Profits Commission to inform consumers and those engaging with charities of their rights and could be adapted by consumer agencies to fill this knowledge gap. While we recognise that guidance is currently made available on the ACL website, we question whether it is 'consumer-friendly'. For example, we note that at present the fact sheets available on the ACL website can run to 42 pages in length — most consumers would not consider this to be accessible guidance. Any guidance should be tested with consumers to make sure it is enabling understanding.

Consumer guarantees

Governance Institute agrees that clear guidance is required from regulators on the definitions in the consumer guarantee provisions, particularly as to what constitutes a 'major' failure, in order to give greater certainty to businesses and consumers dealing with defective products and services. Consumers should also have clearer guidance as to their rights in relation to defective goods and how to enforce their rights under the consumer guarantees regime.

Addressing 'unfair' commercial practices

Governance Institute recommends that further guidance be issued on the meaning of 'norms of society' as it relates to the unconscionable conduct provisions of the law. Currently there are conflicting decisions on the degree of moral obloquy that should apply.

False and misleading representations

Governance Institute is of the view that further clarity is required as to when individual liability for corporate fault or corporate liability applies. While we have reservations about the concept of derivative liability, especially where people have no power to influence the offence committed by the body corporate, but are held liable by reason of their formal position in the corporation, rather than for any actual acts or omission, we have no problem with accessorial liability, as a form of direct liability for intentional and knowing participation in a corporate breach.

We acknowledge that derivative liability is already recognised in various Commonwealth, state and territory statutes and that the social goal of a responsible corporate compliance culture is desirable. We also recognise that to the extent that derivative liability creates potential liabilities on the part of directors and officers, it provides significant incentives for directors and officers to put in place effective risk-management arrangements to ensure that the corporation complies with its obligations. It has been suggested that 'accessorial liability alone may not create sufficient incentive, given that the general principles of this type of liability require a person to have actual knowledge, or be wilfully blind, about certain corporate conduct'.

An argument is made at times that those making decisions on behalf of the organisation, even at middle management levels, are making representations as individuals and derivative liability should be extended to a wider category of persons. Limiting the scope of derivative liability to directors and executive officers may thwart compliance efforts in corporations, as those responsible for particular aspects of consumer law do not necessarily take 'ownership' of the corporation's obligations.

We are of the view that derivative liability should be limited to directors and officers with the power to influence corporate conduct, that is, the persons attracting personal liability for a corporate breach should be those who have both the authority to make decisions about the organisation as a whole and the power to enforce them. In practice, there are few individuals in a corporation with the power to make these decisions.

For example, compliance managers in financial services corporations are likely to report to more senior managers and, ultimately, to a member of the executive committee, which has the power

to make and enforce decisions concerning these areas of responsibility. The compliance managers should not be held liable for any breach of legislation as a result of actions or inactions by the executive committee, when they have not had the power to make and enforce the relevant decisions.

Furthermore, we note that, if additional liabilities are introduced beyond those which apply to directors and officers, inequity may be introduced. Directors' and officers' liability insurance (D&O) policies provide insurance coverage for directors and officers but, at present, may not provide coverage for other employees. There are many limitations on the extent of coverage that insurance companies will provide beyond directors and officers, with the result that other employees may not have the benefit of insurance coverage. Individuals should be entitled to the benefit of insurance coverage against the risk of personal liabilities, yet imposing derivative liability on individuals other than directors and officers may place some individuals at risk without the benefit of insurance.

The language of misleading conduct provisions in the ACL, referring to a person engaging in conduct, has been interpreted by the courts as meaning that employees can be the primary representors of misleading conduct in addition to their company also being primary representors.[1] There is thus a double liability imposed on the company and on the individuals, even where the individuals were not acting in a separate individual capacity but were acting as the 'directing mind and will' of the company. In light of the fact that the general misleading or deceptive conduct provision in s 18 of the ACL has no defence and requires no specific knowledge or intent, Governance Institute recommends that consideration be given to restricting derivative liability and requiring individuals to be assessed for accessorial liability only. This would leave the company (as employer) as the appropriate focus of liability and would require accessorial liability against individuals. Where an individual had the requisite knowledge to constitute knowing involvement this would be appropriate.

Question 17: Does the current approach to defining a 'financial service' in the ASIC Act create unnecessary complexity in determining if certain conduct falls within the scope of the ACL or the ASIC Act? How could this be addressed?

Governance Institute considers that the provisions concerning financial services in the ACL, the ASIC Act and the *Corporations Act 2001* (Cth) are broadly synergistic but that slight differences in wording and approach between these provisions give rise to a great deal of uncertainty, in turn resulting in a considerable compliance burden for business. For example, the Corporations Act applies to financial products and services, but has different deeming provisions and defence and liability rules from the ACL, which is also different from the overlapping provisions in the ASIC Act. We note that in the decision *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028 at [948] the judge stated that the courts should not have to wade through such 'legislative porridge'.

Such inconsistency is unhelpful and can have the effect of undermining the intent of the legislation which is to improve the way businesses behave when dealing with their customers. We recommend that the review harmonise the liability rules for misleading or deceptive conduct in the ACL, the ASIC Act and the Corporations Act so that there is greater consistency and application of the standards of liability. We also recommend that any changes to 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.

Furthermore, 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

[1] See for example, *Houghton V Arms* [2006] HCA 59.

'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. We contend that there should be greater clarity as to where regulatory responsibility falls.

Question 19: Are the remedy and offence provisions effective?

Governance Institute supports greater consistency between the penalties imposed across the jurisdictions in order to provide more certainty for business.

We also support the legislation recognising that a corporation has implemented a compliance culture, so that this can be recognised by the courts. At present, this is determined by the regulator alone.

We look forward to seeing the results of the review.

Yours sincerely

Steve Burrell
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