

8 December 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 (Interim Report)

The Australian Institute of Company Directors (AICD) is pleased to provide a submission in response to Consumer Affairs Australia and New Zealand's Interim Report on the Australian Consumer Law (ACL) Review. This submission is addressed to the focus of the application of the ACL to charities and not-for-profits in the context of fundraising.

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 39,000 includes directors and senior leaders from business, government and the not-for-profit (NFP) sectors.

The need for reform

The AICD is working with leading sector bodies on the urgent need for fundraising reform. To this end, the AICD is a campaign partner of the *Joint statement on fundraising reform* available at aicd.com.au/fundraisingreform. This statement sets out our vision for a nationally-consistent regulatory regime for fundraising, with the Australian Consumer Law (ACL) at its heart.

Australia's NFP sector is operating in an increasingly competitive marketplace. More and more, NFPs are expected to compete against one another and private providers in the provision of government-funded services. Some of the regulation of NFPs is cumbersome, out-of-date, and inhibits the sector's ability to compete fairly in these open markets. Fundraising, which is regulated under seven separate regimes (and the ACL), is an example of the fragmented and complex regulatory environment in which NFPs operate.

Further, these regulations are significant inhibitors to innovation in the sector. Given the significance of the NFP sector's contribution to the Australian economy and community, the flow-on effects second-class regulation are deeply concerning. The regulation of fundraising wastes more than \$15 million¹ a year in compliance costs for charities alone (which

¹ Australian Charities and Not-for-profits Commission, *Cutting Red Tape: Options to align State, Territory and Commonwealth charity regulation*, 23 February 2016, <<http://australiancharities.acnc.gov.au/visualisations/explore-all-charities/>>, (accessed 20 November 2016)

represent only 10 per cent of the broader NFP sector). This is money that could otherwise be directed to Australians in need.

Australian businesses would not be expected to accept a second-class regulatory regime. The AICD believes that the review of the ACL provides an opportunity to deliver a much-needed reform to the regulatory environment for NFPs.

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.

The AICD strongly supports the clarification of the application of the ACL to the activities of charities, NFPs, and to fundraising.

The current application of the ACL is unclear and there is significant misunderstanding in the NFP sector (including among some professional advisers) and the broader community on how it applies to fundraising.

The AICD notes the framing of this consultation question around the concept of a “regulatory gap”. The AICD considers that the assumption that clarification to the ACL is dependent on the presence of a regulatory gap is prejudicial to the interest of reform as it does not correctly conceptualise the policy problem in the regulation of fundraising.

There is currently regulatory duplication and regulation that is unnecessary, burdensome and not fit-for-purpose. For example, the current regime doesn’t effectively capture fundraising across state and territory borders, or fundraising undertaken by digital mediums, both now commonplace.

This, together with the uncertainty about the application of the ACL, gives rise to regulatory gaps. The AICD believes this context is of critical importance, as the overall goal of this reform should be regulatory reduction and simplification, not additional regulation.

The AICD submits that the regulatory gaps associated with fundraising could be resolved through the effective clarification and extension of the ACL to ensure its application to fundraising activity is clear and broad.

Question 1

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?

The AICD welcomes the confirmation in the Interim Report that the ACL applies to many activities undertaken by charities and NFPs, including fundraising.

Further guidance from regulators on the application of the ACL would be greatly beneficial in supporting the sector, its professional advisers and the broader community to build a more complete understanding of the application of the ACL to fundraising and the approach that regulators will take to its enforcement.

Legislative amendment to the ACL needed

There is considerable misunderstanding about the application of ACL to fundraising activities. Although guidance would be helpful, guidance alone will not provide sufficient clarity about the application of the ACL.

The AICD strongly recommends that only amendment to the law will create the unequivocal clarification required to provide certainty about the application of the ACL to fundraising.

There are two potential options for how the law could be amended (the AICD recommends Option A):

- A) Expand the definition of 'trade and commerce' to explicitly include fundraising activity;
or
- B) Create a Legislative Note to clarify the definition of 'trade and commerce' and make it clear that the ACL does apply to NFP activities, including fundraising.

Any legislative amendment should be supported by appropriate education and guidance, however guidance alone will not resolve the existent regulatory problem. Guidance without legislative change would amount to failure of reform.

Focus of regulatory guidance

Regulator guidance should include:

- An explanation of the ACL's application to the activities undertaken by, or on behalf of, NFPs (coverage of the ACL) including practical examples;
- The overarching policy goal of regulating fundraising;
- The regulatory approach that ACL regulators take to regulating fundraising;
- The powers of ACL regulators and how they will be used under the multi-regulator model, especially where activities are cross-jurisdictional; and
- The remedies that can apply when there are breaches of the ACL.

Guidance should help NFPs and their advisers understand how the ACL applies to their activities generally, and in relation to fundraising specifically.

Application of the ACL to volunteers

One of the benefits of the ACL is that it applies to all Australians engaged in the prescribed relevant activities (as traders or consumers/donors). The Interim Report suggests that fundraising undertaken exclusively by volunteers should be out of scope for the ACL.

It is the activity of fundraising which is the focus of the existing provisions of the ACL, rather than who undertakes it and whether they are remunerated. The effective operation of the ACL as a regulatory instrument for fundraising is dependent on this and the AICD believes that this should not be altered as a consequence of this review.

The AICD submits that the example in the Interim Report relating to the question of whether volunteer fundraising meets the definition of 'in trade or commerce' (page 17, paragraph 5) is incorrect. 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.

By extension, it should also be clear that the ACL also applies to fundraising activity undertaken by third party commercial providers and guidance should explain this.

Question 2

**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?**

The issue of a 'regulatory gap'

The regulation of fundraising is duplicative, burdensome and not fit-for-purpose. This, together with the uncertainty about the application of the ACL, gives rise to regulatory gaps

Every Australian state and territory (except the Northern Territory) has its own fundraising regime in addition to the ACL which already covers fundraising. At present, there are differing definitions of fundraising activity; inconsistencies in regulatory requirements across jurisdictions; regimes based on outdated forms of fundraising; and a failure to successfully regulate activity between state and territory boundaries.

Because the current regulatory regime is inconsistent and not fit-for-purpose, it effectively creates regulatory gaps. Resolving these gaps does not require additional regulation, but rather a clarification and extension of existing regulation (the ACL), accompanied by repeal of state and territory regimes.

There are a number of gaps that could be resolved through legislative clarification and extension of the application of the ACL to fundraising.

Current application of the ACL

It is not in doubt that the ACL applies to fundraising. Regulators currently apply the ACL to the regulation of fundraising and clarification and extension of the ACL will make it clear to donors and fundraisers how this law will be applied.

Many state and territory regulatory regimes for fundraising have provisions that mirror the ACL. It appears to be discretionary as to which regulatory regime is applied in a compliance context, creating confusion and uncertainty for donors and consumers.

For example, in the current case of *Director of Consumer Affairs Victoria v Annabelle Natalie Gibson & Anor*, Consumer Affairs Victoria has used section 18 of the ACL rather than section 7 of the *Fundraising Act 1998* (Vic) which is very similar.

In this context, consumers/donors have no certainty as to which regulatory regime protects their rights when making a donation, and which remedies are available in cases of misbehaviour.

Clarifying the ACL will provide greater certainty and consistency in its application by regulators to fundraisers and donors by making it clear which regime will be used in the regulation of fundraising.

Coverage of serious breaches

There are a number of misbehaviours associated with fundraising that may fall outside of the ACL or may be significant enough to warrant the use of an alternative regulatory instrument. It should be noted that actual examples of such misbehaviours are very rare.

For the purposes of this consultation, the AICD notes that these misbehaviours are generally caught under alternative regimes such as the criminal code in each respective state and territory, the remit of the Attorney-General in their capacity as protector of charities, the incorporation regime for associations and companies, and the regulations that apply to charities under the Australian Charities and Not-for-profits Commission (ACNC) as relevant.

The discussion paper released by the New South Wales Government contemplating the repeal of the *Charitable Fundraising Act 1991* (NSW) provided commentary on this matter, noting that alternative regulatory instruments (such as the criminal code) are available to address serious breaches associated with fundraising. The paper also highlights that there is no evidence that existing fundraising laws provide better protection than these general laws.

Question 3

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

In order to achieve substantive reform to the regulation of fundraising, action must be taken by state and territory governments. However, to the extent that the application of the ACL to fundraising activities is currently unclear (or insufficient), it presents a barrier to reform at the state and territory level. It is therefore necessary that the ACL be clarified and extended to support state and territory governments to play their part in the reform process.

There are some areas of regulation currently covered by state and territory legislation that would not be covered by the ACL (such as regulations around the wearing of name badges while undertaking fundraising activity). The AICD considers that these matters do not warrant regulatory intervention and that removing these requirements presents significant opportunity to cut unnecessary red tape for the NFP sector.

The AICD believes that many of these obligations could be more appropriately covered by a voluntary, self-regulatory code of conduct developed by fundraising industry leaders. Indeed, existing codes already cover many of these matters and could be further developed and promoted in partnership with ACL regulators and other government agencies (such as the ACNC).

There also would be significant benefits to the administration of the ACL under the multi-regulator model if taken together with a repeal of state and territory regulatory regimes. Existing resources (including employees) could be deployed on the enforcement of the ACL and proactive compliance such as through education, rather than processing licence applications and other less impactful work. This would ensure that the existing specialist expertise in fundraising regulation is retained and redeployed to more effective regulatory activities to promote greater compliance with the law.

The overall effect of such a reform would be cost neutral for government; enable a more strategic application of existing compliance resources; significantly reduce red tape for not-for-profits; and markedly improve the consumer protection framework for donors.

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



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