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Garry Clements
Chair
Consumer Affairs Australia and New Zealand

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Dear Garry

Reforming Australia's fundraising laws to reduce unnecessary burdens on not for profit entities and improve consumer protection

CPA Australia represents the diverse interests of more than 155,000 members in 118 countries. Our vision is to make CPA Australia the global accountancy designation for strategic business leaders. We make this submission on behalf of our members and in the broader public interest. We have restricted our comments to the potential reform of Australia's fundraising laws through the Australian Consumer Law (ACL).

Over the last decade, there has been discussion on whether to abolish or harmonise fundraising laws in Australia. It is argued that the current State and Territory-based regulatory framework is fragmented, burdensome and rarely enforced; it is 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.

We therefore consider that Australia's fundraising laws are in need of reform across all levels of government. Appropriately designed and implemented reforms should make fund raising for Australia's not-for-profit sector more effective, while providing better levels of consumer protection.

CPA Australia has been working with Justice Connect, the Governance Institute of Australia, Australian Institute of Company Directors and Chartered Accountants Australia and New Zealand to promote reforms to Australia's fundraising laws. As part of this collaboration, 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.

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.

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 "trade or commerce" and, for some provisions, whether the fundraising activities also involve a supply of goods or services.

Based on his advice we consider **that the ACL does apply to many fundraising activities as currently drafted**. However, this application of the ACL to fundraising activities is misunderstood, as the public often does 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.

CPA Australia submits that holistic fundraising reform could be achieved through three steps:

1. minor amendments to the ACL to ensure its 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 to comply with existing fragmented regulation along with the amended ACL. We also note that a nationally coordinated process involving both federal and state/territory lawmakers would be critical to achieve holistic reform.

Recommended changes

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

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

By way of example, section 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 as follows:

“Fundraising activity” includes any activity whose purpose or effect 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 are supportive of further consultation to refine the best approach for achieving the clear application of the ACL to fundraising activities.

For further information, please contact Ram Subramanian, CPA Australia’s Policy Adviser - Reporting on (03) 9606 9755 or ram.subramanian@cpaaustralia.com.au.

Yours sincerely



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