

**FUNDRAISING INSTITUTE AUSTRALIA**

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**CONSUMER AFFAIRS AUSTRALIA and NEW ZEALAND  
Australian Consumer Law Review**

**SUBMISSION COVER SHEET**

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**SUBMISSION**

**December 2016**

**ABOUT FIA**

With over 1700 members, Fundraising Institute Australia is the largest representative body for the \$12.5 billion<sup>1</sup> charitable fundraising sector which is supported by some 14.9 million Australians. FIA members include charities operating domestically and internationally, as well as the organisations and professionals that provide services to them.

FIA advocates for the interests of the sector, administers a self-regulatory Code of Ethics, educates fundraising practitioners, promotes research and creates forums for the exchange of knowledge and ideas.

**THIS SUBMISSION**

FIA welcomes the opportunity to provide additional comments in response to further questions regarding fundraising activities and the ACL following release of the ACL Review Interim Report.

Throughout the Review, FIA has collaborated with a coalition of sector bodies who share FIA's interest in red tape reduction and fundraising regulatory reform. In this way, we hope to provide policy makers with a common, sector-wide position on the major reform challenges. Collectively, we agree that the current ACL Review provides a unique opportunity to reduce the regulatory burden on the charitable and not-for-profit sector. To that end, this submission makes positive references to elements of the submissions of other members of the coalition.

FIA argues that inconsistency across the regulatory landscape, especially at the state and territory level, is the greatest source of (regulatory) waste across the sector and gives rise to compliance gaps. Thus, we would frame the problem in terms of a gap in '**compliance**' not regulation.

As donors are not 'consumers', making donations subject to consumer law has certain challenges. FIA believes that a threshold issue for bringing charitable fundraising under the ACL is to clarify the status of 'gifts' and gain an explicit exemption for donations from any aspect of the ACL that could

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<sup>1</sup> Source: Giving Australia 2016

have the effect of calling into question the tax deductibility of donations to registered charities.

FIA also submits that further clarification is needed in respect of Section 5 of the ACL and fundraising.

Notwithstanding the challenges involved in extending the ACL to fundraising, FIA believes the current Review presents a unique opportunity to achieve reform, one that must not be missed. If CAANZ does not recommend positively in relation to fundraising reform, the outcome will be considerably more serious than another disappointment for fundraisers and the NFP sector.

**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?**

FIA agrees that further regulatory guidance as to the ACL’s application to fundraising would be helpful. Indeed, it has been noted time and again during the current Review that the ACL **already** applies to many aspects of fundraising activity, especially in circumstances where the conduct of fundraisers vis-a-vis consumers is at issue. In such circumstances, there is frankly an **obligation** on the regulator to provide information and education to both the fundraising sector and the wider community in order to explain consumer rights and fundraiser responsibilities.

We caution, however, that raising consumer awareness of rights in relation to fundraising will need to be managed carefully and in a manner that does not create unintended consequences.

**Gift Conditionality**

A key area of focus for FIA in respect of bringing fundraising explicitly under the ACL is the status of ‘gifts’. FIA has been concerned that if a gift is caught under the provisions of the ACL, such a characterisation could cause a gift to be no longer considered to be a gift by the Australian Taxation Office (ATO) leading to the perverse outcome that the giver cannot claim a tax deduction for it.

FIA has asked: does the fact that a charity could be required to refund a donation, for example, after a successful prosecution under the ACL for giving false and misleading information in the course of a fundraising campaign, change the **character** of that donation from being a gift? If this were found to be the case, FIA fears that the whole edifice of tax deductible giving could be undermined.

Taxation Ruling TR 2005/13 discusses what is a gift for the purposes of the taxation legislation. Paragraph 19 of the TR provides:

‘If the DGR fails to obtain immediate and unconditional right of custody and control of the property transferred, or less than full title to the transferred property is transferred, a gift deduction will not arise.’

Paragraph 226 of the TR provides:

‘Subsection 78A (3) ensures that paragraph 78A(2)(c) operates to deny a deduction where the terms and conditions under which the gift is made are such that the giver or the associate of the giver retains some control over the custody and/or use of the property.’

There is a concern, where a charity receives a donation after it has advertised or promised it would use the donation in a certain way, it would be regarded as imposing a condition sufficient to change the character of the transaction from a gift.

For example, in circumstances where the charity is perceived to have ‘promised’ that a donation will help cure a child’s blindness, build a house for a homeless family or a school for a needy community, it is conceivable that a donor who discovers their gift had not been used for the specific purpose for which they gave it could expect to be able to ask for the money to be returned.

Currently in the fundraising sector there are frequent disputes over decisions about how to apply funds that have been gifted to charitable foundations. If complainants formed the view that they could gain recourse under the ACL, this would further complicate matters. This illustrates the kind of unintended consequences that might result from a ‘clarification’ of the ACL’s application to the activities of charities.

We submit that it would be of significant assistance to the charity and not-for-profit sector to move forward with the current discussions about uniform fundraising legislation if there were clarity around this issue.

FIA has asked the ATO if it regards a donation which might, by a subsequent event be required to be repaid (such as under a court order due to a finding under legislation), to be a gift (at the time it is received) such that it can be claimed as a tax deduction. Unfortunately, a response from the ATO had not been received before the due date of this submission. We respectfully request the opportunity to make a supplementary submission on this point once the (non-binding) ruling has been received from the ATO.

FIA believes that a threshold issue for bringing charitable fundraising under the ACL is to clarify the status of gifts and to gain an explicit exemption from any aspect of the ACL that could call into question the tax deductibility of donations.

## Donations for promotional purposes

FIA submits that further clarification is needed in respect of Section 5 of the ACL and fundraising. Page 15 of the ACL Review Interim Report states, in part:

"Under Section 5 of the ACL donations where no sales are involved (including donations received by a third party or contractor acting on the charity's behalf) do not involve supplies of goods or services unless the donation is for a promotional (marketing) purpose."

Section 5 of the Australian Consumer Law which is set out in Schedule 2 of the Competition and Consumer Act 2010 (Cth) states:

- (1) For the purposes of this Schedule, other than Parts 3-3, 3-4, 4-3 and 4-4<sup>2</sup>:
  - (a) a donation of goods or services is not treated as a supply of the goods or services unless the donation is for promotional purposes; and
  - (b) receipt of a donation of goods or services is not treated as an acquisition of the goods or services unless the donation is for promotional purposes.
- (2) For the purposes of Parts 3-3, 3-4, 4-3 and 4-4:
  - (a) any donation of goods or services is treated as a supply of the goods or services; and
  - (b) receipt of any donation of goods or services is treated as an acquisition of the goods or services.

FIA understands this section has the effect of excluding donated goods or donated services from the application of certain provisions of the ACL unless they are for promotional purposes.

Section 29 provides that a person [whilst engaged in conduct falling within the definition of 'in trade or commerce'] must not, *in connection with the supply of goods and services*, make false and misleading representations (about those goods or services). Section 5 excludes **donated** goods or services from that provision.

FIA understands the effect of this is that, where a person (including a not-for-profit entity) makes a false and misleading statement about goods or services which the person is **donating** to another, the recipient of the donated goods or services does not have a remedy under s 29 ACL, unless the goods or services were for promotional purposes.

However it is not clear that other sections of the Act might still apply to the transaction, for example where the conduct complained about is also caught under s18. Could an explanatory note be added under s 5 to make this clearer?

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<sup>2</sup> which essentially relate to product safety and information standards

It needs to be made clear whether the reference to 'for promotional purposes' will have the result that 'donations' of goods and services which are undertaken as part of a fundraising activity are in fact caught by the consumer protection provisions. However, since 'donation' and 'for promotional purposes' are not defined in the ACL, it will be impossible to have certainty until the scope of the Section 5 exclusion has been clarified.

**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?**

**A gap in 'compliance' not regulation**

FIA argues that inconsistency across the regulatory landscape, especially at the state and territory level, is the greatest source of (regulatory) waste across the sector and gives rise to compliance gaps. Thus, we would frame the problem in terms of a gap in 'compliance' not regulation, arising from the proliferation of inconsistent regulation, especially at the state level.

Compliance is a bigger challenge for smaller charities and foundations that have fewer resources to bring to bear. The most recent research shows that the majority of NFPs are aware of risk management practices and actively implement them. Where lack of compliance occurs, it is because of budgetary constraints i.e. smaller NFPs may not be able to afford the level of administration necessary for compliance.

In 2010, FIA and the National Roundtable of Nonprofit Organisations sponsored the PPB Not for Profit Risk Survey 2010<sup>3</sup>. PPB surveyed the risk management practices of not for profit organisations and compared them to the key components of the Standard of Risk Management AU NZ ISO 31000:2009.

The outcome was encouraging: over 70% of respondents indicated they placed a high level of importance on risk management practices and understood the link between risk management and the organisation's ability to

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<sup>3</sup> <https://www.ppbadvisory.com/news/d/2010-07-21/not-for-profits-potentially-at-risk>

achieve its outcomes. Larger NFPs had a more corporate structure with more sophisticated and mature systems in place to identify and manage risk, which is to be expected, especially in view of the survey finding that implementation of risk management practices had a significant relationship to a NFP's budget; smaller organisations did not have sufficient capacity to devote resources to risk management policy and practice.

However, less than half the survey participants had risk management identification and training. This is an area where the ACNC has been able to respond with practical guidance and assistance, in particular to smaller, under-resourced NFPs who benefit from risk management guidance included in the ACNC information portal.

There are, of course, remedies available for fraud or misappropriation such as criminal sanctions. Implementation of preventative steps has proven to effectively reduce the incidence of fraud or misappropriation. Since the inception of the BDO Not-for-Profit Fraud Survey in 2006, there has been a steady decline in the number of respondents who have suffered a fraud<sup>4</sup>. Organisations are increasingly identifying systemic failures such as poor internal controls, poor segregation of duties and no mechanisms for reporting fraud as key fraud risk factors. FIA believes the ACNC has played an important educational role in encouraging organisations to implement measures to reduce the risk of fraud or misappropriation.

### **Potential unintended consequences of extending the ACL**

Donors are not 'consumers' in the sense contemplated by the ACL, therefore the extension of the ACL to the charitable fundraising sector will require certain 'work-arounds' in order to avoid unintended negative consequences for the sector.

Throughout the Review process, FIA has flagged a number of circumstances in which there is the potential for consumers to become confused about whether, for example, warranty and cooling off provisions related to the purchase of consumer goods and services might extend to donations. For example, under the ACL a 10 day cooling off period applies to contracts for supply of goods or services. Consumers will need to be provided clear information explaining that this requirement does not apply to charities because:

- charities do not have enforceable agreements with donors because the donation is voluntary and does not constitute consideration, which is an essential requirement for an enforceable contract;
- charities, being non-profit organisations, are not suppliers for the application of certain provisions of the ACL; and

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<sup>4</sup> Although the 2014 survey noted an increase in the average size and total quantum.  
<https://www.bdo.com.au/getattachment/Insights/Surveys/Not-For-Profit/BDO-Not-For-Profit-Fraud-Survey-2014/BDO-Not-For-Profit-Fraud-Survey2014.pdf.aspx>

- charitable donations are voluntary payments made without expectation of receiving a return and are not goods or services within the meaning of the ACL.

An additional layer of consumer protection is provided through the FIA Code. In accordance with best practice in professional fundraising, FIA requires its members to ensure that donors are able to cancel ongoing donations or pledges at any time.

## The role of self-regulation

As part of its system of self-regulation for the fundraising sector, FIA administers its own Code. This Code is currently under review. So far, the review has identified a strong preference for the revised Code not to go into areas covered by black letter law. Instead, the revised Code is likely to address itself to better practice in relation to dealing with people in vulnerable circumstances, respecting peoples' preferences in receiving charitable appeals, achieving greater board accountability and oversight of fundraising activities, and improving standards of conduct between charities and their suppliers. In that context, it would be unlikely for the FIA Code, on its own, to fill regulatory 'gaps' that resulted from, for example, a decision by one or more states to repeal their fundraising laws.

The FIA Code is mainly concerned with 'ethics in fundraising'. While donors benefit from a fundraiser's ethical approach to fundraising, they are only one constituency to do so. Others include the beneficiaries of fundraising, the people who work in fundraising, the charities who rely on the resources that fundraising brings, and the wider community that benefits from the work charities are able to do in support of their mission thanks, in large part, to fundraising. From an 'ethical' standpoint, fundraisers have obligations to all these stakeholders.

Many of the issues that give rise to demands for tougher regulation of fundraising are the result of tensions between a fundraisers' ethical duties to donors on the one hand, and beneficiaries on the other. The fundraiser has a duty to maximize the funds available to assist the beneficiaries of its work. However this sometimes results in asking donors too much or too often. In a recent submission to the British House of Lords, the fundraising think tank Rogare advances the argument that it is **beneficiaries**, not donors, who are the true 'consumers' of charitable fundraising:

"...donors are not consumers, and so do not require equivalent levels of 'consumer' protection.

Consumption is (Lee et al 2011): The process by which people acquire, use and dispose of commodified goods including ideas, services, products, brands and experiences.

A consumer is therefore someone who acquires, uses (i.e. they acquire for their own use) and disposes of commodified goods. This doesn't describe the process of donating to a charity: donors rarely acquire and

use commodified goods from a charity, and when they do (such as buying from a Christmas catalogue), they are already protected by established consumer protection legislation. But it does describe the process that beneficiaries go through when they acquire and use a nonprofit organisation's products and services. Beneficiaries are a charity's true consumers.<sup>5</sup>

Under a future regulatory regime for the charitable fundraising sector that has the ACL as its over-arching umbrella and consumer protection as its focus, FIA believes there will continue to be an important role for its Code to establish an ethical framework that seeks to balance broader community interests, including those of charity beneficiaries who often lack a voice in policy debates.

### **Volunteers versus paid staff**

The Interim Report raised the possibility of differentiating between charity volunteers and paid staff. FIA strongly rejects this proposition on the grounds that it is unworkable.

Justice Connect has said that the example in the Interim Report on the question of whether volunteer fundraising is in trade or commerce is not correct. FIA agrees. JC's contention is that the application of the ACL should be based on the sophistication of the fundraising activity, not the remuneration or otherwise of those who carry out the fundraising function. FIA also supports this view.

Cancer Council Queensland argues that the distinction is not logical. 'It appears clear that the consumer guarantees will apply whenever a NFP is supplying goods or services in trade or commerce, even where these are being provided for nominal/less than market price.' FIA concurs, adding that creating such a distinction would create confusion and add costs particularly for small to medium charities and should not be proceeded with on grounds of impractical application.

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<sup>5</sup> Rogare evidence to House of Lords Select Committee on Charities 5 Sept. 2016

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

The Justice Connect submission has proposed that “a Legislative Note to clarify the definition of ‘trade or commerce’ and make it clearer that the ACL does apply to NFP activities, including fundraising, and provide regulator guidance” is the best way to support the repeal of existing fragmented, outdated, complex fundraising laws that are not fit for purpose. FIA agrees with this approach.

FIA invites CAANZ to consider what would be the result of not proceeding to make recommendations in relation to fundraising in this Review. Fundraisers have had their hopes raised in the past that the existing regulatory regime would be aligned or harmonized but these efforts have come to nothing.

In the past there have been Productivity Commission recommendations for actions and discussion papers from the former NFP Reform Agenda but they have not been proceeded with. More recently momentum for reform in this area has been building with the expectation that the ACL Review is the best opportunity and avenue for a positive outcome.

Momentum has built because of the increasing number of government as well as non-government organisations calling for, contemplating or actually enacting reform:

- The Australian Charities and NFP Commission (ACNC) has a specific mandate to achieve red tape reduction and has actively supported the ACL route.
- State governments including NSW and Queensland have initiated fundraising reviews. The NSW Charitable Fundraising discussion paper (July 2016) saw a role for an amended ACL if its fundraising legislation were to be repealed.
- South Australia’s amendments to its Collection for Charitable Purposes Act came into effect on 1 December this year. This amendment reduced red tape for SA charities operating by not requiring annual financial reports from charities already registered with the ACNC demonstrating that State governments are prepared to align their regulation in this area.

Should CAANZ fail to act on fundraising reform it will halt the momentum because there are not alternative strategies readily available. The ACNC does not have the necessary legislative powers and too many fundraising organisations are outside its ambit.

Should the interested government and non-government parties start working on the alternative of the states and the ACT voluntarily surrendering their powers, the process would take years and its prospects for success would be dubious at best.

If CAANZ does not recommend positively in relation to fundraising reform, the outcome will be considerably more serious than another disappointment for fundraisers and the NFP sector. State and the ACT governments will have to re-think their strategies, protection for donors will lessen as fundraising inevitably moves to digital platforms and the lack of a consistent national approach will continue to undermine the sector.

In the Interim Report, CAANZ asked the sector to justify why the ACL should be extended to cover fundraising. FIA submits that CAANZ should consider the costs and consequences of not doing so.

## **Summary and Conclusions**

FIA believes the current Review presents a not-to-be-missed opportunity to begin a process of regulatory reform to reduce the costly administrative compliance burden on fundraising due mainly to inconsistent State laws.

### **1) Need for further regulatory guidance**

- as donors are not 'consumers', making donations subject to consumer law has certain challenges
- raising consumer awareness of rights in relation to fundraising will need to be managed carefully and in a manner that does not create unintended consequences
- a threshold issue for bringing charitable fundraising under the ACL is to clarify the status of gifts and to gain an explicit exemption from any aspect of the ACL that could call into question the tax deductibility of donations
- further clarification is needed in respect of Section 5 of the ACL and fundraising.

### **2) Regulatory gaps**

- inconsistency across the regulatory landscape, especially at the state level, is the greatest source of (regulatory) waste across the sector and gives rise to compliance gaps
- the costs associated with a patchwork of state regulation continues to be a challenge for charities and foundations, increasing the risk of compliance gaps
- the ACNC has played a significant role in addressing regulatory gaps, especially in areas of NFP governance monitoring and education
- self-regulation, including the FIA Code, will continue to have an important role in promoting high standards of ethics in fundraising
- it would be unlikely for the FIA Code, on its own, to fill regulatory 'gaps' that resulted from, for example, a decision by one or more states to repeal their fundraising laws

- FIA believes there will continue to be an important role for its Code to establish an ethical framework that seeks to balance broader community interests, including those of charity beneficiaries who often lack a voice in policy debates.
- 3) Extending the ACL to facilitate state reforms
- the costs and consequences of not extending the ACL to cover fundraising could be serious
  - a Legislative Note to clarify the definition of 'trade or commerce' and make it clearer that the ACL does apply to NFP activities, including fundraising, and provide regulator guidance is the best way to support the repeal of existing fragmented, outdated, complex fundraising laws that are not fit for purpose.

End of Submission