

Australian Consumer Law Interim Report
Cancer Council Queensland Response

Cancer Council Queensland wishes to make comment on Section 1.2 of the Interim Report in so far as it relates to charities and not-for-profits.

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?*

Yes

- *If so, what should be included in this guidance?*

Guidance is needed as to when engaging in fundraising will be 'in trade or commerce'. In particular, when will fundraising by seeking donations be 'in trade or commerce'? It has been suggested, for example, that where a NFP uses a third party commercial operator to raise funds on its behalf the NFP would be operating 'in trade or commerce'. However, the methods that are used by third party commercial fundraisers are not dissimilar to the methods used by fundraising employees in large NFPs. So this distinction does not appear to be 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 a nominal/less than market price. However, it would helpful to have guidance on whether fundraising by selling goods or services will always be 'in trade or commerce'. Alternatively, will this depend on the relationship between the entity and the person to whom the conduct is directed? Is consideration of the relationship between the individual acting for the entity (i.e. the employee, volunteer or contractor) and the recipient also necessary? If so, would this mean that a volunteer conducting a cake stall with public customers is operating 'in trade or commerce' but if their customers are just friends or family member they are no longer operating 'in trade or commerce'?

Some examples would be helpful for the sector. For example, would a volunteer holding a ticketed event to raise funds for a NFP/community purpose (which is open invitation and publically advertised e.g. on the internet) be operating in trade or commerce? Alternatively, what if the volunteer only invited friends and family to the event? Would it make any difference whether the volunteer was an officer/responsible person of the NFP entity?

What if funds are raised in connection with participating in an event e.g. a fun run? In other words where an individual receives the benefit of participating in the event in return for paying a donation and/or raising funds does this constitute a 'supply of goods or services'? What if the individual is required to reimburse a NFP for the cost of participating an activity e.g. an overseas expedition, and is also required to raise a minimum amount in donations? Guidance (e.g. in the form of a publication on the ACL website) would be of assistance.

In all the above cases guidance from the regulator is preferable rather than waiting for the position to be clarified through case law.

2. *Are there currently any regulatory gaps with regard to the conduct of fundraising?*

If fundraising is not being conducted 'in trade or commerce' it will be necessary to consider what other regulations are available to prevent objectionable conduct. As noted in the Interim Report, the South Australian and Victoria fundraising acts prohibit misleading and deceptive statements in the conduct of a fundraising appeal. In Queensland it would be necessary to show that funds raised were not applied for the stated purpose. The other alternative is criminal prosecution for fraudulent conduct.

The inconsistency of state and territory fundraising legislation means that the regulatory gaps will be different in every state and territory.

Whilst this question only deals with regulatory gaps there should also be consideration given to the role of regulators in not only preventing/deterring objectionable conduct but also in facilitating and encouraging NFPs and educating the public. More work could and should be done by regulators to encourage and facilitate fundraising and the operation of NFPs more generally.

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?*

We are aware of a number of examples of individuals purporting to raise funds for a community or not for profit purpose where it is either not clear who is the ultimate recipient of the funds or alternatively where the recipient is clearly stated but it never actually receives the funds. In particular it is increasingly easy for individuals to raise funds for a cause by creating an on-line appeal through websites like www.gofundme.com. There is little, if any, oversight by regulators of the application of funds that are being raised through such sites. Generally a regulator will only be aware of wrong doing if it is reported to it. In addition, the operators of these sites expressly disclaim any liability and responsibility for oversight in relation to the receipt or application of funds raised. There is therefore a need for greater regulatory intervention in this area.

In addition to regulatory intervention there is also a need for more guidance, education, monitoring and enforcement by the regulator.

- *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?*

Generic, principles based protections are far preferable to detailed provisions (like those of current state and territory fundraising legislation). This is because they are more likely to have enduring application.

The fundraising industry prides itself on its innovation. It is constantly changing and adapting. Hence much state and territory legislation is outdated and unsuitable for the purpose. Regulation based on broad principles (coupled with industry self-regulation pursuant to industry codes) would simplify the regulation of fundraising, increase understanding of the laws that apply and increase compliance.

- *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?*

Any extension of the ACL to further regulate fundraising would have to be coupled with the reform of state and territory fundraising regulation otherwise it will have little benefit and will just add another layer of complexity to an already over regulated and under resourced sector.

In addition, if the ACL were extended to cover more fundraising activities, further consideration should be given to the appropriate penalties for non-compliance. The penalties that are currently applicable under the ACL may not be appropriate in all cases, for example, where an individual raises funds from friends and family to fund a community cause e.g. medical treatment for an individual.

Furthermore, the accessorial liability provisions may not be appropriate where a NFP is acting through a huge network of volunteers and has little or no knowledge nor control of their actions. In some cases a NFP may not even be aware that someone has raised funds on its behalf until after it has received the funds.

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

The two should be done in tandem. If state and territory regulators are not willing to consider significant reforms to state and territory laws and regulations then there is little to be gained by extending the ACL to all fundraising activities.

Cancer Council Queensland supports the reform and/or harmonisation of state and territory fundraising laws. However, regulators need to consider and consult with the sector as to what form this should take. If a complete repeal is contemplated this may have unintended consequences. For example, NFP entities that are not registered with the Australian Charities and Not-For-Profits Commission may no longer be subject to any registration nor reporting requirements.