Legal Advice from Norman O'Bryan AM SC

My overarching view is that the Australian Consumer Law (ACL) currently applies to regulate most ordinary not-for-profit fundraising activities.

How the ACL works now

The ACL operates federally under the Competition and Consumer Act (Cth). The ACL is applied to all jurisdictions through the Australian Consumer Law Application Acts that exist in all States and Territories. The ACL is very wide in scope. For example, section 12 of the Australian Consumer Law and Fair Trading Act 2012 (Vic) says:

> 12 Application of Australian Consumer Law
>
> (1) The Australian Consumer Law (Victoria) applies to and in relation to—
>
> (a) persons carrying on business within this jurisdiction; or
>
> (b) bodies corporate incorporated or registered under the law of this jurisdiction; or
>
> (c) persons ordinarily resident in this jurisdiction; or
>
> (d) persons otherwise connected with this jurisdiction.
>
> (2) Subject to subsection (1), the Australian Consumer Law (Victoria) extends to conduct, and other acts, matters or things, occurring or existing outside or partly outside this jurisdiction (whether within or outside Australia).

All of the Application Acts are in similar terms. Through section 12 above and its equivalents in each State and Territory, the ACL has the potential to regulate every commercial and non-commercial activity in every Australian State and Territory, whether that activity is undertaken by a person or corporate entity.

The extent to which a particular provision of the ACL applies to regulate the conduct of a person or entity (and the remedies that apply to any breach), depends on the wording of the particular provision. Many provisions of the ACL apply to conduct that is “in trade or commerce”. This phrase has a wide meaning.

By way of example, a key provision of the ACL is section 18(1) which simply says: “A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”. Section 2 defines “trade or commerce” very broadly, so as to include “any business or professional activity (whether or not carried on for profit)” and “business” includes “a business not carried on for profit”. Not-for-profits raising money are covered by section 18(1) because, in my view, fundraising is usually a “business or professional activity”, whether or not the not-for-profit is itself (in an overall sense) operating as a business or professional activity. It is the fundraising (the activity), rather than the not-for-profit (the organisation, whatever its legal structure may be) that is the focus.

Because of these broad definitions, the misleading and deceptive conduct provision of the ACL applies to many (if not all) not-for-profit fundraising activities.

How the ACL could work as part of reform to not-for-profit fundraising laws

I have also been asked about what could be done to clarify and broaden the scope of the ACL to appropriately cover not-for-profit fundraising activities. While I consider that the ACL already applies to most, if not all, fundraising activities, I understand the need for a clearer and explicit application, and I agree that the reform suggestions as have been proposed in Justice Connect's Not-for-Profit Law service submission to the review of the ACL are feasible and easily implemented. I note other stakeholders have endorsed the proposal. The reform proposal would not require the States to refer to the Commonwealth any of their State legislative powers because an appropriate mechanism has already been applied through the inter-governmental ACL framework. The ACL is regularly amended to add, subtract and modify its provisions, and those amendments automatically flow through to all the States and Territories via the relevant application acts.

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