justice connect
Not-for-profit Law

Submission to Fair Trading Governance Discussion Paper

'Improving governance within community organisations'

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About Justice Connect

Justice Connect was formed on 1 July 2013 when PILCH NSW (established in 1992) and PILCH Vic (established in 1994) formally merged.

We are a member-based organisation working with thousands of lawyers, including twenty of NSW and Victoria's largest law firms. We are financially supported by our members, federal and state government and philanthropic support, fee for services and donations. We are also supported by the in-kind contribution made by our pro bono lawyers.

We deliver access to justice through pro bono legal services to people experiencing disadvantage and the community organisations that support them.

We see the difference a legal remedy can make in peoples' lives and the benefit to society as a whole when rights are respected and advanced. We want to ensure that people experiencing poverty, homelessness or any other forms of disadvantage - as well as the community organisations that support them - are not further disadvantaged by being denied access to justice.

Our unique contribution is collaboration: by working with pro bono lawyers to develop and strengthen pro bono capacity and strategically match this with unmet legal need, we avoid duplication, ease access for clients and deliver a holistic response to disadvantage.

About Not-for-profit Law

Not-for-profit Law (**NFP Law**) (previously known as PilchConnect) is a specialist legal service established to provide free and low cost legal assistance to not-for-profit community organisations in Victoria and New South Wales.

NFP Law 'helps the helpers' by providing tailored legal information, advice and training to not-for-profit community organisations. By relieving the burden of legal issues, organisations can better focus their time and energy on achieving their mission - whether that's supporting vulnerable people, delivering community services, enhancing diversity or bringing together the community.

We are focused on improving access to legal help for not-for-profit community organisations, and on improving the legal landscape in which they operate.

Our policy and law reform work is focused on reducing red tape for the not-for-profit sector, helping not-for-profits be more efficient and better run, and ensuring that reform takes into account impacts on the not-for-profit sector. Our policy and law reform objectives include:

- **Better regulation for not-for-profits**: promoting efficiency and effectiveness in the regulatory approach to the not-for-profit sector
- **Improved legal structures**: advocating for an improved approach to available legal structures for NFP organisations and social enterprises in Australia
- **Simplified tax concessions**: Addressing complexity and inaccessibility within the current application of tax concessions for the not-for-profit sector
- **Oversight of reforms affecting not-for-profits**: Ensuring that policy development has adequate regard to the potential impact on the not-for-profit sector

We have drafted this submission to NSW Fair Trading's Discussion Paper ***Improved governance with incorporated associations*** (the **Discussion Paper**) as it fits into three of our four policy objectives.

Summary of recommendations

Our major recommendation is that NSW Fair Trading (**Fair Trading**) defer the proposals to amend the *Association Incorporation Act* 2009 (NSW) (**the Act**) until the full statutory review of the Act which is required[1] in 2014:

Recommendation 1: Incorporated associations often have limited resources and can struggle to stay up-to-date with, and comply with, too many legislative changes. Given a compulsory statutory review of the Act is required in 2014 , we recommend all 10 proposals are deferred for more detailed consideration as part of the review. This will allow time for the impact of these proposals to be fully assessed against the NSW Government's seven Better Regulation Principles.

If the NSW Government decide to continue with the proposed reforms, we make the following recommendations:

Recommendation 2: The proposal to require associations to appoint an external returning officer should be subjected to a full cost-benefit analysis of the impact on the sector before implementation. If the proposal does proceed, it should be limited to the following two circumstances:

- where at least 10 % of the membership or 5 members (whichever is the greater number) lodge a written request with the association's public officer at least 28 days prior to the election; or
- where Fair Trading directs an association to do so on the grounds of public interest.

Recommendation 3: The proposal for a public warning power is not supported without further details about the specific, relevant and serious offences which an association or person would need to be convicted of, before they could become the subject of a public warning. Further consideration also needs to be given to procedural fairness and natural justice requirements, given the significance of the proposed power on the ability of an association to operate effectively or for a person to participate in public life.

Recommendation 4: The proposal to require mediation before a member or members resort to litigation about internal disputes is supported. However this should not be implemented by requiring all associations using their own rules to change their rules. Instead, an amendment to the Act could require that, if internal dispute resolution in accordance with an association's rules fails, mediation is a compulsory step prior to commencing litigation.

[1] Section 109 *Incorporated Associations Act 2009* (NSW) requires the NSW Government to review the Act 5 years after its commencement.

Recommendation 5: Instead of practice directions, Fair Trading should issue best practice guidelines or fact sheets to assist defined classes, and various types of groups of associations. This would better fit with the intention of the Act, as acknowledged in the Discussion Paper, to allow associations to be largely autonomous with minimal involvement by the regulator.

Recommendation 6: The proposal for Fair Trading to have the power to ban people from serving on a committee should not proceed in its current form.

If some version of this proposal is to proceed, further consideration should be given to the appropriate threshold for exercising this power. This should be conviction by the courts of relevant, serious, specified offences (i.e. the particular offences or class of offences should be set out in a list in the legislation). In addition, Fair Trading should be required to consider a list of mandatory factors before imposing a ban. Those factors should require the decision-maker to consider the impact on the committee member and whether other less extreme measures are available to remedy the potential loss of public confidence in the associations sector.

In addition, any proposal needs to embed strong procedural fairness considerations including show cause notices and appeal rights.

Recommendation 7: The proposal to allow members to access to a cheaper jurisdiction to enforce rules is supported, although further consideration needs to be given to the most appropriate forum, and to resourcing the selected forum to understand and deal with association rules matters.

Recommendation 8: If NSW proceed with an amendment to include an oppressive conduct remedy in the Act, the Victorian model would work as a good basis. Further consideration needs to be given to whether the Local Court or NCAT is the most appropriate forum to hear these matters. The power to refer complex matters to the Supreme Court should be included. An order allowing the court to appoint a committee member should not be included.

Recommendation 9: The proposal to require conflict of interest disclosures in an association's committee meeting minutes is supported.

Recommendation 10: We do not support the need for a cancellation power, however should Fair Trading decide to proceed with an amendment to give itself power to deregister on public interest grounds, we recommend the Victorian *Association Incorporation Reform Act 2012* be used as the model on which to base the provisions.

Recommendation 11: We oppose the proposed power to prohibit 'misleading and deceptive conduct' of an association. The potential use of such a power to silence legitimate public debate is concerning and protection of an association's right to advocate for change (and not have such advocacy labelled as misleading by the government) has not been adequately discussed or justified.

General comments

NSW Government's commitment to reducing red-tape

The introductory remarks in the Discussion Paper note that the NSW Government supports a light touch approach to regulation and intends that associations be "*largely autonomous with minimal involvement by the regulator.*"[2] NFP Law agrees with this approach to the interpretation of the purpose of the Act, and we believe our comments reflect this approach.

We also commend the NSW Government's commitment to the Better Regulation Principles and reducing red-tape for both the business and community sector. The NSW Government Better Regulation Principles talk about establishing the need for government action, identifying the source, nature and scale of the problem with evidence and using data, and calculating the costs and impact of new regulation.

NFP Law believes this commitment to being thoughtful about the impact of regulation is particularly important for incorporated associations, which are often run by volunteers and lack the resources to deal with regulatory change.

The effects of staged legislative change on the sector

The NSW Government is proposing to make changes to legislation that will affect 37,000 community organisations across New South Wales. These associations have already faced the resource burden of significant changes to the Act in 2009 (commencing in July 2010) and a statutory review of the legislation is scheduled for 2014, which may see further changes.

Drawing on the experience of Victorian incorporated association law reform, we advise that staged legislative change is hard for the sector to cope with, and to keep up to date about. This experience has led us to believe that if changes are to be made to the Act, it would be best if they are implemented at the one time. Given the upcoming statutory review, unless the changes are urgent in nature, we recommend their deferral.

The Discussion Paper does not include empirical evidence about the nature or extent of association governance failures which the legislative proposals seek to remedy nor any information to support urgent government action. This makes it difficult for stakeholders to assess whether the additional burdens imposed by regulatory shifts are justified.

Recommendation 1: Incorporated associations often have limited resources and can struggle to stay up-to-date with, and comply with, too many legislative changes. Given a compulsory statutory review of the Act is required in 2014 , we recommend all 10 proposals are deferred for more detailed consideration as part of the review. This will allow time for the impact of these proposals to be fully assessed against the NSW Government's seven Better Regulation Principles.

This is our main recommendation. We have gone on to make comments and specific recommendations on each individual proposal. We have done so in case the NSW Government decides to proceed with the proposed legislative changes prior to the statutory review. Therefore all of the following recommendations are made subject to Recommendation 1, which is that all proposal should be deferred.

[2] NSW Fair Trading, Discussion Paper: *Improving governance within incorporated associations*, October 2013 (**Discussion Paper**)

1. Independent returning officer

1.1 Proposal

The Discussion Paper proposes an amendment to the Act that would require certain incorporated associations to appoint a person external to the association as returning officer.

There are four categories of associations that it is proposed should be caught by this new requirement:

(i) associations with gross receipts exceeding $250,000 or assets exceeding $500,000

(ii) where 5% of members lodge a written request 28 days before election

(iii) where Fair Trading directs an association to (on public interests grounds)

(iv) where the association received in excess of $50,000 in government funding the previous year

It is proposed that regulations can be made to set the qualifications for the external returning officer and it is noted that associations would have to bear the cost of any fee charged by an external returning officer.

1.2 Discussion

The Discussion Paper recommends a wide range of incorporated associations be mandatorily required to appoint an external returning officer.

The Discussion Paper acknowledges that *'the costs (if any) of appoint the independent external returning officer would be borne by the association*.' The need to find a volunteer (non-member) who meets the qualification requirements of proposed regulations will impose a new administrative burden on NSW incorporated associations, many who may have been running committee elections without incident for 30 years. The cost will be administrative but could also be direct as there is a possibility that associations might have to pay a fee to an external provider to perform this role.

We are unaware of the extent of complaints about misconduct returning officers received by Fair Trading and whether there is any correlation between complaints and the particular groups of associations have been chosen [especially those in categories (i) and (iv) above].

The imposition of a requirement to appoint an external returning officer, which will have associated direct and administrative costs, is not justified within the Discussion Paper, and it is unclear why requirement that an association appoint an external returning officer merely because the have a certain level of revenue or assets or receive quite low levels of funding. In our view, a proportion of the members of an organisation are best-placed to determine this, as is Fair Trading where it has received allegations of misconduct.

Deferring this proposal until the statutory review will allow time for further analysis of the number of associations potentially affected by this proposed change, as well as a cost-benefit analysis of this proposal.

1.3 Recommendation

Recommendation 2: The proposal to require associations to appoint an external returning officer should be subjected to a full cost-benefit analysis of the impact on the sector before implementation. If the proposal does proceed, it should be limited to the following two circumstances:

- where at least 10 % of the membership or 5 members (whichever is the greater number) lodge a written request with the association's public officer at least 28 days prior to the election; or
- where Fair Trading directs an association to do so on the grounds of public interest.

2. Public warnings

2.1 Proposal

The Discussion Paper proposes an amendment to the Act to grant Fair Trading a public warning power which aims to give members of an association, funding agencies or the public information about "*offences committed by an association or its officers*".

2.2 Discussion

Not-for-profit organisations and the people involved in their operations rely heavily on their reputation to be effective. In the community sector, 'name and shame' provisions will have a dramatic impact on an association's ability to attract support and could significantly affect a person's ability to engage in public life. For this reason the need for such powers should be carefully considered and argued from a strong policy base.

The reference to Fair Trading being able to publish information about 'offences committed by an association or its officers', without any further details as to the type or seriousness raises the following questions:

- Is it proposed that Fair Trading be able to publish details of any offences by persons involved in an association / an association or just those offences under the Act?
- If it is proposed the public warnings cover offences under legislation other than the Act, will the power be limited to specified offences that are of significant seriousness and are relevant to the ability of a person to be involved in the governance of an association or the ability of an association to operate?
  - For an example see s 206B of the *Corporations Act 2001* which specifies the individual, serious offences that mean a person is disqualified from managing a corporation.
- Is it proposed that public warnings can only be made in relation to circumstances where a person or association has been convicted by a court for an offence under the Act?
  - The reference to section 86A of the *Fair Trading Act* 1987 (NSW) is concerning as that power gives Fair Trading the ability to issue public warnings about businesses or persons where they believe it is in the public interest to do so (i.e. no requirement for conviction by a court of an offence).
  - Section 133 of the *Food Act 2003* (NSW) would be a better model for a power like this – where the only people or entities that can be named are those who have been convicted by a court of an offence under the *Food Act* and where all timeframes for appeal have expired.
  - Have sections 91 and 93 of the Act (which allows all committee members to be liable for the actions of one committee member, and for offences to be dealt with by penalty notice). The potential for a committee member to inadvertently get caught up in behaviour committed by another committee member, and become the subject of a public warning, must be guarded against.

Given the significant impact of the proposed power, the details of the procedural fairness and natural justice requirements should be well spelt out. This would include requirements around the ability of Fair Trading to only use the public warning power as a last resort only, where it is in the public interest to do so (setting out mandatory factors for Fair Trading to consider), and after all appeal rights have expired.

2.3 Recommendation

Recommendation 3: The proposal for a public warning power is not supported without further details about the specific, relevant and serious offences which an association or person would need to be convicted of, before they could become the subject of a public warning. Further consideration also needs to be given to procedural fairness and natural justice requirements, given the significance of the proposed power on the ability of an association to operate effectively or for a person to participate in public life.

3. Dispute mediation

3.1 Proposal

The Discussion Paper proposes an amendment to the Act to require incorporated associations to have mediation as part of their mechanism for dispute resolution.

3.2 Discussion

The Act requires associations to have rule about the resolution of internal disputes (Item 6, Schedule 1) but does not currently prescribe the form and content of the dispute resolution clause. While the model rules have a clause requiring mediation, many associations who use their own rules may not have this requirement in the internal dispute resolution clause of their rules.

This proposal appears to mandatorily require associations to amend their rule about dispute resolution to include mediation.

If the proposal is to change Item 6 of Schedule 1 to require mediation as part of the internal dispute mechanism, this would mean that all of the 37,000 associations across NSW that have their own rules would be required to change their rules to comply with this new requirement. In our view, this administrative burden and cost is not justified given:

- the low numbers of disputes proceeding to this stage (85 disputes in 2010/2011 out of 37,000 associations); and
- the amount of change NSW associations have had to go through as part of the 2009 legislative change and the upcoming 2014 statutory review

An alternative way to implement compulsory mediation before Supreme Court action could be an amendment to the Act (i.e. the Act itself rather than the Schedule 1 rule topic items) to provide that after an internal dispute procedure is completed in accordance with an associations rules, neither the association or the member can proceed to the Supreme Court (or alternative forum if available) until mediation is completed.

It is noted that the impact of the compulsory requirement for mediation on the resources and capability of the Community Justice Centre needs to be explored.

3.3 Recommendation

Recommendation 4: The proposal to require mediation before a member or members resort to litigation about internal disputes is supported. However this should not be implemented by requiring all associations using their own rules to change their rules. Instead, an amendment to the Act could require that, if internal dispute resolution in accordance with an association's rules fails, mediation is a compulsory step prior to commencing litigation.

4. Mandatory practice directions

4.1 Proposal

The Discussion Paper proposes an amendment to the Act to give Fair Trading the power to issue practice directions.

The proposal is based on the assertion that governance and accountability issues:

> "seem to arise more frequently where an association employs staff, receives significant grant funding or receives funding from a number of different sources"

4.2 Discussion

The Discussion Paper acknowledges that:

> "...the intention of the [incorporated associations] legislation is that associations be largely autonomous with minimal involvement by the regulator".

However this proposal:

> "...enables the Commissioner for Fair Trading to give practice directions to defined classes, types or groups of associations directing then to operate in a certain way"

Further details are needed about the proposed legal status of 'practice directions'. Will the proposed directions be legally binding on associations? Will there be enforcement powers for non-compliance? We are also concerned about how a practice direction will interact with the multiple contractual requirements usually imposed on an association when they receive government funding.

We do not believe the sector would benefit from the inclusion of practice directions in the legislation, which is designed to allow organisations to self-govern. In our experience, not-for-profits are keen to operate effectively and welcome guidance about legal and regulatory matters. NFP Law receives approximately unique 150,000 visitors to our legal information web-portal per year, indicating a willingness to be compliant and self-educate.

We predict that if Fair Trading issued best practice guidance fact sheets for, say, associations that employ staff or associations that receive grant funding' this would be very welcomed by the sector. No legislative power is required for Fair Trading to issue best practice guidance, and we feel this is a preferable outcome for all parties.

4.3 Recommendation

Recommendation 5: Instead of practice directions, Fair Trading should issue best practice guidelines or fact sheets to assist defined classes, and various types of groups of associations. This would better fit with the intention of the Act, as acknowledged in the Discussion Paper, to allow associations to be largely autonomous with minimal involvement by the regulator.

5. Banning powers

5.1 Proposal

The Discussion Paper proposes an amendment to the Act to give Fair Trading the power to:

(i) ban a person from holding a position of a management committee of an association for a period of up to 5 years; or

(ii) place restrictions on a person's participation as an office-holder of an association

5.2 Discussion

As previously noted in our discussion of Proposal 3 (public warnings), incursions into the rights to freedom of association and a person's ability to participate in public life should not be undertaken lightly and should be justified by a solid policy rationale. It is also critically important that such measures take into account the requirements of natural justice and procedural fairness.

The *Corporations Act* provisions for banning a person from managing a corporation are quite detailed and enumerate specific, serious offences as being the threshold that must be met before the significant measure of disqualifying a person from managing a corporation is imposed. For example, under s.206B(1)(i) of the *Corporations Act* a person is banned from managing a corporation if they are convicted of an offence that:

(i) is a contravention of [the Corporations} Act and is punishable by imprisonment for a period greater than 12 months; or

(ii) involves dishonesty and is punishable by imprisonment for at least 3 months; ...

Similarly, under the *Australian Charities and Not-for-profit Commission Act* 2012 (Cth), the power to suspend or remove a responsible person for non-compliance or contravention of the Act is fettered by a list of compulsory factors the Commissioner must take into account. These mandatory considerations acknowledge the significance of the power to remove a person from an essentially private association.[3] Also, Governance Standard 4 which addresses the suitability of responsible person (i.e. committee members) basically cross refers to the offences set out in s 206B of the Corporations Act.

In contrast Fair Trading's proposal is that they have a power to "*ban a person who has been found guilty of breaching this Act or other NSW or Commonwealth laws on the basis that the person is not a fit and proper person to hold office in an association*". In our view, this is too broad a statement and not high enough a threshold to trigger use of the power being proposed. The test of 'fit and proper person' is vague and allows Fair Trading too much discretion to intervene in the private affairs of civil society organisations.

5.3 Recommendation

Recommendation 6: The proposal for Fair Trading to have the power to ban people from serving on a committee should not proceed in its current form.

If some version of this proposal is to proceed, further consideration should be given to the appropriate threshold for exercising this power. This should be conviction by the courts of relevant, serious, specified offences (i.e. the particular offences or class of offences should be set out in a list in the legislation). In addition, Fair Trading should be required to consider a list of mandatory factors before imposing a ban. Those factors should require the decision-maker to consider the impact on the committee member and whether other less extreme measures are available to remedy the potential loss of public confidence in the associations sector.

In addition, any proposal needs to embed strong procedural fairness considerations including show cause notices and appeal rights.

[3] See section 35-10 (2) ACNC

6. Enforce rules in Local Court

6.1 Proposal

The Discussion Paper proposes an amendment to the Act to allow a member of an association to apply to the Local Court for an enforcement order, rather than requiring a member to go to the Supreme Court.

6.2 Discussion

The ability for members to be able to have recourse to a cheaper jurisdiction than the Supreme Court is supported.

However, we recommend further consideration be given as to whether the Local Court is the most appropriate alternative jurisdiction, or whether others may be more suitable. The Local Court retains many of the disadvantages of the Supreme Court, in that in relies on pleadings, exposes parties to the application of costs orders and matters may not be resolved quickly . In the Victorian jurisdiction, we have seen association matters in the Magistrates Court be repeatedly adjourned and result in significant legal costs for both parties, without a resolution being reached.

The NSW Civil and Administrative Tribunal (**NCAT**) may be a more suitable forum to resolve disputes as to rules. The significant advantages for these clients in being able to take action in NCAT include:

- low costs: a small filing fee and then no legal costs generally (vexatious matters could have costs imposed)
- easy for people to self represent: no need for pleadings and rules of evidence don't apply
- legal representation only with leave: this could serve to reduce legalistic arguments and reliance on technicalities, as well as level the playing field etc.
- quick
- NCAT members would develop better familiarity with issues
- NCAT members not subject to same demands facing local court magistrates with busy civil, criminal lists
- the availability of conciliators

The Tribunal could develop procedures to screen out applications lacking merit at the first return date.

In the Victorian experience, many magistrates are unfamiliar with the incorporated association legislation, and are also reluctant to interfere with the internal workings of civil society organisations. As a result, Fair Trading should consider the resourcing implications of training staff from the selected court or tribunal about the Act and the associations sector.

6.3 Recommendation

Recommendation 7: The proposal to allow members to access to a cheaper jurisdiction to enforce rules is supported, although further consideration needs to be given to the most appropriate forum, and to resourcing the selected forum to understand and deal with association rules matters.

7. Oppressive conduct remedy

7.1 Proposal

The Discussion Paper proposes to insert an oppressive conduct remedy into the Act.

7.2 Discussion

It appears that Fair Trading is planning to base the proposed oppressive conduct remedy on s 68 of Victoria's *Incorporated Association Reform Act 2012* (Vic). This allows the Magistrates Court to make a broad range of orders against the association where there is a finding of oppressive conduct.

We refer to our comments on Proposal 6 Power to Enforce Rules in Local Court, and suggest the government consider whether NCAT would be the more appropriate jurisdiction to hear these kinds of matters.

The Discussion Paper asserts that the oppressive conduct remedy should include an order for the removal or appointment of a committee member. If Victoria's model is used, the power of the court to order a person to do a specified act or thing [s 68(4)(d)] is potentially broad enough to remove a committee member in appropriate circumstances (i.e. because of their oppressive conduct). However, having a court or tribunal appoint a person to a committee is a power that in our view, has not been justified in the Discussion Paper. Given the policy rationale that associations should be largely autonomous, the oppressive conduct remedy should not include the power for a court or tribunal appointed committee members.

On the issue of complex oppressive conduct matters, it is noted that in both s 68 and s 220 of the Victorian *Incorporated Association Reform Act 2012* (Vic), the Magistrates Court can refer the matter to the Supreme Court. This is a good option for very complex issues that might be more appropriately resolved in the Supreme Court.

7.3 Recommendation

Recommendation 8: If NSW proceed with an amendment to include an oppressive conduct remedy in the Act, the Victorian model would work as a good basis. Further consideration needs to be given to whether the Local Court or NCAT is the most appropriate forum to hear these matters. The power to refer complex matters to the Supreme Court should be included. An order allowing the court to appoint a committee member should not be included.

8. Disclosure of interests

8.1 Proposal

The Discussion Paper proposes an amendment to the Act to require that in addition to entering conflicts of interest disclosures in an association's disclosure register (section 31), disclosures should also be included in associations' committee minutes or published to all members.

8.2 Discussion

The disclosure of conflicts of interests in committee minutes is supported, in the interest of best practice governance and transparency. The additional requirement of publishing conflict of interest disclosures to all members seems excessive and if proceeded with, should be limited to those associations that do not make their committee meeting minutes available to members.

8.3 Recommendation

Recommendation 9: The proposal to require conflict of interest disclosures in an association's committee meeting minutes is supported.

9. Cancellation of registration

9.1 Proposal

The Discussion Paper proposes an amendment to the Act to give Fair Trading the power to cancel the registration of an association, based on the threshold test of if Fair Trading believes it is in the public interest to do so.

9.2 Discussion

The Discussion paper notes that there may be situations where *'the conduct of an association is such that its registration should be removed'*. It would be good to know the kind of scenarios Fair Trading has in mind for using a power that would strip an association of its incorporated status, with significant adverse consequences for the association. Given that NSW incorporated association legislation has been without this power for many years, it would be good to have more information as to the reasons it now needs to be introduced.

The Discussion Paper incorrectly asserts that s.489EA Corporations Act gives the ASIC the power to order the winding up of a company if it has reason to believe that making the order is in the public interest. In fact that section requires a number of detailed, cumulative factors to be met before ASIC can order the winding up (e.g. evidence they have not been carrying on a business for over 6 months) as well as consideration of the public interest.

The Discussion Paper refers to a power in Queensland's incorporated associations legislation to cancel registration of an association on the basis of the regulator determining that it is in the public interest to do so. Victoria's incorporated association legislation also has a registrar-initiated, public interest cancellation provision. However there are also jurisdictions where this power is not present in association incorporation law, such as South Australia.

If Fair Trading proceeds with a cancellation provision, ss 127-130 of Victoria's *Association Incorporation Reform Act 2012* would serve as a fair model, given the adverse consequences of such an action for the association's ability to continue to operate. The Victorian provisions require the regulator to issue a certificate to the association to provide them with details of the grounds of the cancellation, and the association has the ability to appeal the certificate to the Supreme Court of Victoria prior to the cancellation taking effect.

9.3 Recommendation

Recommendation 10: We do not support the need for a cancellation power, however should Fair Trading decide to proceed with an amendment to give itself power to deregister on public interest grounds, we recommend the Victorian *Association Incorporation Reform Act 2012* be used as the model on which to base the provisions.

10. Misleading or deceptive conduct

10.1 Proposal

The Discussion Paper proposes an amendment to the Act to give Fair Trading the power to prohibit an association from engaging in conduct that is misleading or deceptive, or is likely to mislead or deceive.

10.2 Discussion

Fair Trading has argued that s 18 of Australian Consumer Law (**ACL**) may not apply to associations on the basis that the impugned conduct must occur when the association is conducting trade or commerce.

We note that trade or commerce is broadly defined in the ACL to include any business or professional activity whether carried on for profit or not (s 2). This would be adequate to cover a range of activities associations often undertake like selling goods or providing services. There are also other powers in the ACL which allow the relevant regulator to take action about the way information is provided and enforce standards about goods and services supply.

The Discussion Paper does not give any indication of the other kinds of misleading and deceptive conduct that Fair Trading is trying to prevent. It would be helpful to have details of the 'ill' that a particular law reform initiative is trying to remedy to better understand its need. This is in line with Principle 1 of the NSW government's own Better Regulation Principles: the need for government action should be established.

A broad 'misleading and deceptive conduct' power is concerning because of the possibility that it could be used to silence legitimate public debate. The Discussion Paper proposes that the threshold to use the power would be 'that the Commission consider it is in the public interest to do so'. There is a suggestion that Fair Trading would take into account the 'interests in allowing associations to express alternative viewpoints' when making this decision and balance this against the 'harm that may be caused to the public by allowing an association to provide misleading information'. In moving into the realm of public advocacy, is it misleading to express views that differ from government policy? In addition to the lack of evidence as to the need for this power, the threshold proposed for such a far-reaching power is not set high enough.

10.3 Recommendation

Recommendation 11: We oppose the proposed power to prohibit 'misleading and deceptive conduct' of an association. The potential use of such a power to silence legitimate public debate is concerning and protection of an association's right to advocate for change (and not have such advocacy labelled as misleading by the government) has not been adequately discussed or justified.

References

Legislation cited

Commonwealth

Australian Charities and Not-for-profits Commission Act 2012 (Cth)

Australian Consumer Law [*Competition and Consumer Act 2010* (Cth) 2010]

Corporations Act 2001 (Cth)

New South Wales

Associations incorporation Act 2009 (NSW)

Victoria

Associations incorporation Reform Act 2012 (Vic)