

Statement on fundraising reform



AUSTRALIAN INSTITUTE
of COMPANY DIRECTORS



Statement

We call on all Australian governments to work together to provide charities and other not-for-profits with a nationally-consistent and fit-for-purpose regulatory regime.

More than 600,000 not-for-profits operate in Australia. Charities alone (which represent only 10 per cent of the broader not-for-profit sector) employ more than one million people and contribute over \$120 billion to the economy. They are supported by more than 6.1 million volunteers, generating a wage equivalent of \$15 billion each year. Charities and other not-for-profits deliver important community services. This includes health, welfare, education, the arts and culture, environmental protection and in a myriad of other areas that together form an essential part of Australia's social and economic infrastructure.

Although demand for these services is growing, government funding is decreasing. The motivation of not-for-profits to support as many people as possible often means they spend considerable time and effort raising funds from the public.

However, not-for-profits are forced to waste significant amounts of time and money to meet outdated and fragmented fundraising laws that differ considerably across Australia.

The fundraising regime wastes more than \$15 million every year for charities alone.

Across Australia's seven different fundraising regimes, there is variation in the requirements at each stage: from when and if a fundraising licence is needed; to how long a licence is valid; right through to what must be reported and when.

For smaller groups, it can be particularly difficult to navigate these complex laws. For larger ones (including many household names), resources are redirected from service delivery to compliance, with spending on fundraising 'admin' a significant deterrent to public giving.

The current regimes are outdated and do not effectively support fundraising across state and territory borders, or through digital platforms. Up to seven permissions may be needed to collect funds throughout Australia, including online.

These inefficiencies have a flow-on impact to the not-for-profit sector, the community and to the economy. Not-for-profits have been given a second-class regulatory regime for far too long.

Because the regime is so complicated it results in both accidental and deliberate non-compliance and minimal resources are directed to its enforcement. The current regime creates risks for donors, losses to productivity, barriers to innovation, and negatively impacts the sector's sustainability and growth.

We call on governments to provide charities, not-for-profits and the donors who support them with a nationally-consistent and fit-for-purpose regulatory regime.

There is a simple way to provide a better regulatory framework for fundraising – clarify and improve how it is covered by the Australian Consumer Law and repeal existing inconsistent and out-of-date state and territory regimes.

This would provide clarity to the sector and better protect donors from the small number of organisations involved in misconduct.

An improved fundraising regulatory regime will deliver benefits to all Australians.

Our proposed reforms would protect charities and other not-for-profits from unnecessary costs as they try to raise funds, support them to be more productive (including when they deliver government-funded services), and enable them to continue making a significant contribution to our economy and our society. These reforms are cost-neutral, would better protect donors, could be enforced by existing regulators and would be easier for the sector to understand and comply with.



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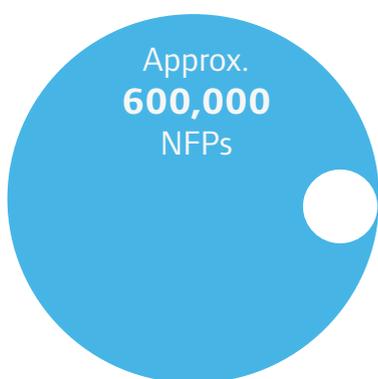


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Facts and figures



Approx.
60,000
charities



Donations contribute to:

- 13%**
of total income for large charities 
- 23%**
of total income for medium charities 
- 32%**
of total income for small charities 



6.1 million
people volunteer in Australia

Over **1 million**
Australians are employed by the sector

Australian Charities and Not-for-profits Commission (2014), Australian Charities Report 2014, www.australiancharities.acnc.gov.au
 Australian Charities and Not-for-profits Commission (2014), Cutting Red Tape Report, www.acnc.gov.au/ACNC/ACNC/Publications/Reports/CuttingRedTape.aspx
 Australian Bureau of Statistics (2015), '5256.0 - Australian National Accounts: Non-Profit Institutions Satellite Account, 2012-13', www.abs.gov.au/ausstats/abs@.nsf/mf/5256.0
 Australian Government Productivity Commission (2010), Contribution of the Not-for-profit Sector, www.pc.gov.au/inquiries/completed/not-for-profit/report
 JusticeConnect Not-for-profit Law (2016), Fundraising Reform, www.justiceconnect.org.au/fundraisingreform

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.

Norman O'Bryan AM SC

Dawson Chambers

10 August 2016

Proposal

Not-for-profits are forced to waste significant amounts of time and money to meet requirements of seven outdated and fragmented fundraising laws that differ considerably across Australia.

The Australian fundraising regime wastes more than \$15 million every year for charities alone.

We have developed a proposal to establish a modern approach to regulating fundraising. In three simple steps, Australia could move from its outdated and burdensome regime, to a modern, principles-based regulatory approach providing donor protection and positively guiding the conduct of fundraisers across the nation.

Our proposed three simple steps to achieve fundraising reform are:

- 1. Clarification and minor amendments to the Australian Consumer Law (ACL) to ensure application to fundraising activities is clear and broad**
- 2. Repeal of fragmented state and territory fundraising laws, and**
- 3. Work with regulators and self-regulatory bodies to provide guidance to fundraisers to continue to improve fundraiser conduct.**

The ACL is a regulatory framework jointly enforced by all Australian governments. Clarifications about the ACL's current application to fundraising and minor amendments would create a fit-for-purpose national regulatory regime. The ACL is well understood by the community, provides donors with access to a range of protections against misbehaviours by fundraisers and is equipped with a better tool-kit for proportionate enforcement. It is a fundamentally better way to regulate fundraising.

Clarification of the ACL's application alone would provide a solid foundation on which to repeal state and territory laws, reducing red tape and creating a national streamlined regulatory regime.

Undertaking step 1 without also undertaking step 2 would mean not-for-profits would have to continue complying with existing fragmented regulation along with the amended Australian Consumer Law, creating further red tape.

We note that some states are considering repealing their fundraising laws in advance of amendments to the ACL. We support this approach even prior to our recommended improvements to the ACL being settled, as a range of other laws apply to mitigate risks associated with fundraising misconduct (for example, existing provisions in the ACL and criminal laws).

“We have developed a proposal to establish a modern approach to regulating fundraising.”

Case study

The regulatory regimes at state and territory levels that control fundraising are inconsistent, and create unnecessary complexity and inefficiencies for fundraisers. This is particularly true for cross-border fundraising, or fundraising online, where not-for-profits are forced to spend significant time and money navigating the different requirements imposed upon them in different jurisdictions.

Fundraising regulation places an undue burden on a sector that is often time and recourse poor. The following fictional case study and timeline illustrate the complexities faced by groups seeking to fundraise.

Common scenario – Riding 4 Resources

Riding 4 Resources (R4R) is a not-for-profit that has tax concession charity (TCC) and deductible gift recipient (DGR) status. R4R aims to improve the school resources that are provided to disadvantaged students. For example, R4R provides textbooks and school uniforms, as well as funding guest speakers, excursions and improvements to school property that are all aimed at improving access to education and enriching the educational experience of disadvantaged students. R4R has two staff members.

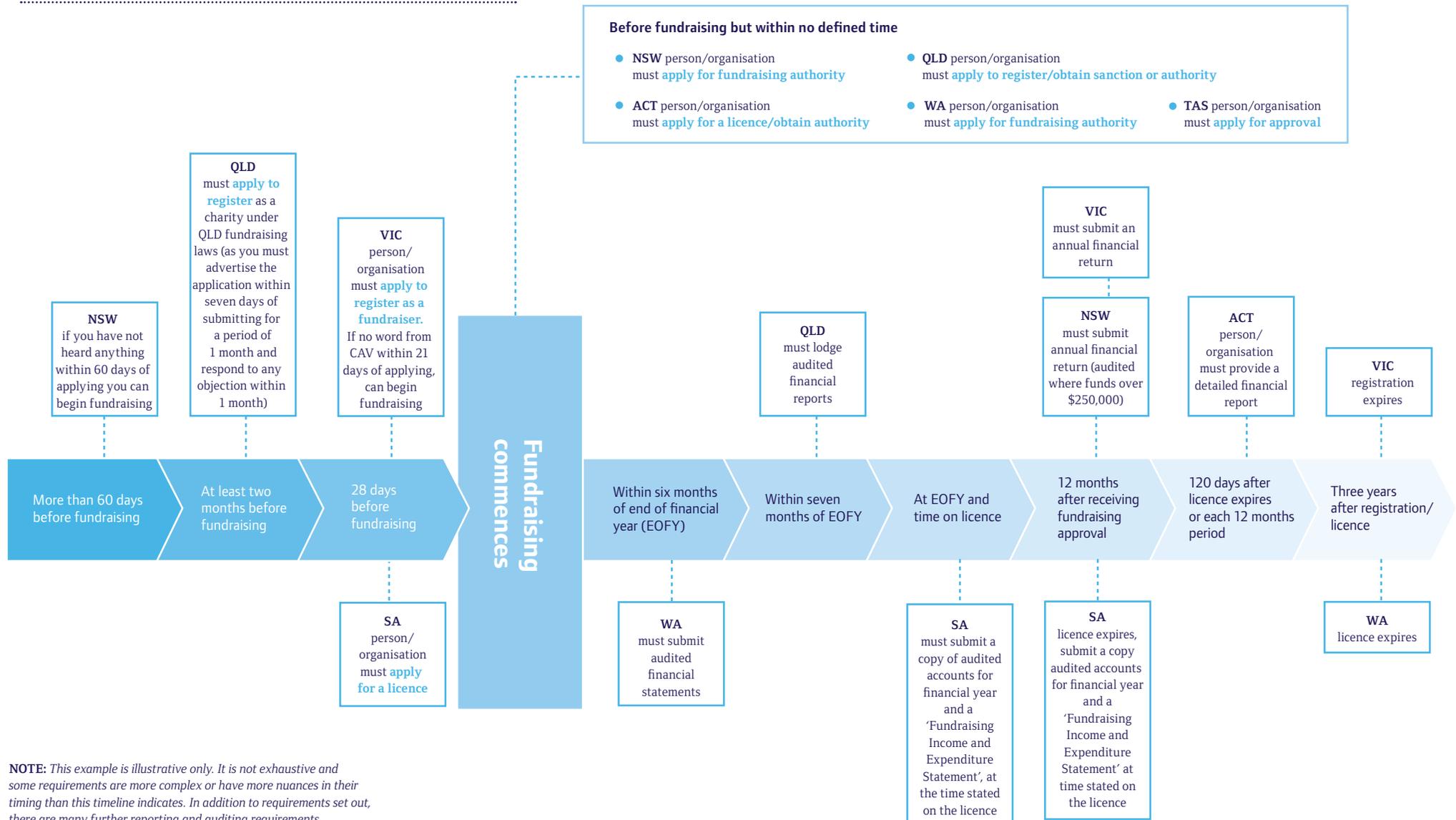
R4R conducts fundraising by organising bike-riding events and races. Participants pay to be part of an event, and are asked to contribute further funds through seeking sponsorship of their ride through family and friends.

Traditionally, R4R has only hosted events and fundraised in Victoria, and only worked with Victorian schools. In 2016 they are expanding their service to assist schools in NSW and ACT as well as Victoria. To support this expansion, they plan to host their biggest event yet, a 14-day bike trail ride from Melbourne to Canberra. Riders can join the ride at various starting points in Victoria, NSW and ACT, and funds raised by riders from different states and territories will be directed to programs in the jurisdiction in which a particular rider resides.

In addition to the new cross-border fundraising event, the newly appointed marketing manager has created the website www.r4r.com.au and has recruited ambassadors in each state and territory to promote the event and attract donations. People who visit the site can find out information about R4R's purpose and activities, as well as their upcoming events. People can also make donations to R4R directly through the website.

As a result of these activities, R4R is likely to be considered to be fundraising in Victoria, NSW and ACT, and may even receive funds from people in every state and territory in Australia. R4R understands that through its expanded activities, it now needs to consider fundraising laws outside of Victoria. As the funding regulation is so complex and confusing, they end up engaging a lawyer to provide them with advice about their compliance obligations. In addition to more detailed advice, the lawyer provides R4R with the timeline depicted on the following page.

Case study timeline



Partners

Australian Council of Social Service (ACOSS)

ACOSS is a national voice for people affected by poverty, disadvantage and inequality. Our vision is for a fair, inclusive and sustainable Australia where all individuals and communities have the opportunities and resources they need to participate fully in social and economic life. We are concerned that, on latest estimates, there are 603,000 children living in poverty in Australia and we advocate action to reduce child poverty and improve life chances, including through access to quality education for all children.

Australian Institute of Company Directors (AICD)

The AICD is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director education, director development and advocacy. Our membership of more than 38,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

Chartered Accountants Australia and New Zealand

Chartered Accountants Australia and New Zealand is a professional body comprised of over 115,000 diverse, talented and financially astute members who utilise their skills every day to make a difference for businesses the world over. Members are known for their professional integrity, principled judgment, financial discipline and a forward-looking approach to business which contributes to the prosperity of our nations. We focus on the education and lifelong learning of our members, and engage in advocacy and thought leadership in areas of public interest that impact the economy and domestic and international capital markets.

Community Council for Australia (CCA)

CCA is an independent non-political member based organisation dedicated to building flourishing communities by enhancing the extraordinary work undertaken by the charities and not-for-profit sector in Australia. CCA seeks

to change the way governments, communities and not-for-profits relate to one another. It does so by providing a national voice and facilitation for sector leaders to act on common and shared issues affecting the contribution, performance and viability of not-for-profits in Australia. Our success will drive a more sustainable and effective charities and not-for-profit sector in Australia making an increased contribution to the well-being and resilience of all our communities.

Governance Institute of Australia

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are second to none. Our active membership base of more than 7,000 company secretaries, governance professionals and risk managers ensures that Governance Institute is at the cutting edge of knowledge of issues and support of sound practice in the continuous evolution of governance and risk management.

Justice Connect

Justice Connect is a registered charity and accredited community legal centre that provides legal help to vulnerable people and to the charities and other not-for-profit organisations that support them. Not-for-profit Law is Justice Connect's specialist service for these organisations. It provides direct legal advice, refers organisations for pro bono assistance on complex matters, undertakes sector capacity building by providing an extensive information hub (nflplaw.org.au) and legal education program, and advocates to improve laws that affect the Australian not-for-profit sector.

CPA Australia

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. A number of CPA Australia members work within the not-for-profit sector. Our members provide valuable services (both paid and pro-bono) as public practitioners and through direct involvement in the governance and management of charitable and not-for-profit entities.

Philanthropy Australia

Philanthropy Australia's purpose is to serve the philanthropic community to achieve more and better philanthropy. As the national peak body we serve a community of funders, social investors and social change agents working to achieve positive social, cultural, environmental and community change by leveraging their financial assets and influence. Informed, independent and with reach and credibility, Philanthropy Australia gives its members a collective voice and ability to influence and shape the future of the sector and advance philanthropy.

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