

# GoFundMe: The gift that keeps on giving?



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**A**ustralians are a generous bunch. In 2018 Australians donated over \$10.5 billion to charities (Australian Charities Report 2018) and in 2019 Australia was ranked by GoFundMe as the third most generous country in the world. However, fundraising platforms can throw up complex legal issues ranging from tax and trust obligations to consumer and criminal law. Consumers such as organisers, beneficiaries and donors need more education, protection and certainty, and lawyers need to take care if they are advising them or holding funds derived from crowdfunding campaigns.

## Background

The advent of crowdfunding platforms has given many donors and beneficiaries the impression that traditional fundraising red-tape has been cut back to allow stakeholders to deal more directly with each other. The most well-known of these platforms is GoFundMe, popular in Australia and internationally. Launched over a decade ago in California, GoFundMe has raised over \$9bn through 120 million donations worldwide and it is estimated that 1 in 10 Australians have donated using the platform. Whilst crowdfunding platforms have allowed for an easy, often very personal, fundraising process that can be set up in a matter of minutes, it has also exposed well-intentioned users to new types of legal and ethical risks.

## Charitable fundraising laws

In Australia, fundraising laws are confusing and vary from state to state. The concept of fundraising is also defined differently in each jurisdiction. Such complexities have led to the founding of the #fixfundraising campaign led by supporters including Philanthropy Australia, Chartered Accountants Australia & New Zealand and the Governance Institute of Australia. The need for reform has been cast into an urgent light with the COVID-19 crisis as charities pivot to online fundraising at a time of great Australian hardship.

## Snapshot

- Billions of dollars are raised in crowdfunding campaigns around the world but the legal and financial risks of using these platforms are only just starting to be understood.
- Advising clients in this area, requires a consideration of many different areas of law including fundraising laws, tax law, Australian Consumer Law, fraud, defamation and trusts. Lawyers also need to monitor their professional obligations regarding their trust account if crowdfunds are held in trust.
- Reform is needed to provide greater clarity to campaign organisers, donors and beneficiaries.

In NSW, the *Charitable Fundraising Act 1991* (NSW) ('the Act') and the *Charitable Fundraising Regulation 2015* regulate fundraising appeals for charitable purposes. A charitable purpose is defined by the Act as including 'any benevolent, philanthropic or patriotic purpose'. This broad definition contrasts, for example, with the definition of charitable purpose under the *Collections Act 1966* (Qld) which is much more prescriptive. Any organiser of a crowdfunding campaign in Australia should consider the national and state or territory fundraising laws that might regulate their campaign.

GoFundMe makes it easier than ever before to raise funds. This means that donations have never flowed so freely around the world and in such large amounts. In an age of 'viral' donations, organisations may suddenly be faced with a large influx of donations and would do well to

ensure they are familiar with relevant fundraising and related laws, and have considered the scope of their campaigns before launching them. For example, the Port Macquarie Koala Hospital sought to raise \$25,000 during the bushfires and instead raised almost \$8 million from over 44,000 donors in over 95 different countries.

The scope of many crowdfunding campaigns stretches beyond charitable purposes, including helping to fund commercial enterprises or product development. The Australian Tax Office ('ATO') website identifies four main types of crowdfunding: (i) donation-based crowdfunding (the most relevant type of crowdfunding to this article, where contributors make a payment to a project or venture, without receiving anything in return); (ii) reward-based crowdfunding; (iii) equity-based crowdfunding; and (iv) debt-based crowdfunding. Crucially, the definition of donation-based crowdfunding does not distinguish between donations for charitable or commercial purposes meaning the guidance is generally phrased.



Whilst the Australian Charities and Not-for-profits Commission (‘ACNC’) and the ATO have published high-level guidelines, more could be done to educate users on compliance with charity and trust law as well as the tax impacts of crowdfunding for donors, organisers and beneficiaries.

### Taxation

GoFundMe allows for two different types of fundraisers: standard fundraisers and charity fundraisers. Australia, along with the US, the UK and Canada, is one of the few countries where donations are guaranteed to be tax deductible if made to a certified GoFundMe charity fundraiser. To meet the criteria of a charity fundraiser, GoFundMe requires the campaign organiser to enter a name and the relevant identifying number (in Australia this is an ABN) and donations will be made through the PayPal Giving Fund in order to distribute the donation to the nominated charity. If the charity is not already listed on GoFundMe it may be necessary for the charity to enrol with the PayPal Giving Fund before securing charitable status. If the campaign is a certified charity fundraiser, the individual organising the fundraiser cannot withdraw the funds themselves.

In Australia most charities are registered with the ACNC, however without ACNC registration a charity will not be able to access the charitable concessions granted by the Federal Government such as income tax exemption, fringe benefit tax (‘FBT’) exemption, FBT rebate and GST charity concessions. For a donation to be deductible the recipient must be registered with the ATO as a deductible gift recipient (‘DGR’) but not all charities have DGR status. In general, donations made to an individual or an entity without DGR status are not normally tax deductible and donors should seek financial and legal advice before doing so.

It is essential that the charitable objects of any crowdfunding campaign are made clear, as how funds are used may affect whether such donations are assessable income of the organiser/promoter. Such an analysis may be complicated by whether an individual organises a crowdfunding campaign with or without the official involvement of the organisation or beneficiary in question. This is an emerging area of law and well-intentioned individuals may launch campaigns or donate funds expecting tax benefits which may not, in fact, be available.

### Limitations on use of funds

When undertaking a regulated fundraising appeal in NSW organisations should ensure that any money raised is given to the intended beneficiaries or used for the purposes for which it was obtained (*Justice Connect, Guide to Fundraising*). Charities in Australia should be transparent about their fundraising arrangements. The ACNC website states that ‘for example, a charity should not solicit donations with a statement that “100% of contributions will benefit those in need” if, in fact, a portion of donations will go towards the

administrative costs of the charity.’ Recent events have led to increased awareness of the limits that charity and trust law place on fundraising. Celeste Barber’s successful fundraising campaign raised around \$51 million dollars through GoFundMe. The page named the NSW Rural Fire Service (‘NSWRFS’) as the recipient and PayPal automatically remitted the funds. The Trustees of the NSWRFS sought advice under s 63 of the *Trustees Act 1925* (NSW) as to how the donations could be used considering public statements by Barber and donors that donations should be used in a wide variety of ways, including providing funds to other charities or fire services (*New South Wales Rural Fire Service & Brigades Donations Fund; Application of Macdonald & Or* [2020] NSWSC 604). The Court found that trust law did not permit the funds to be used other than for the benefit of the NSWRFS in line with its trust deed, observing that legal safeguards exist to ‘ensure a degree of certainty in the application of trust funds including charitable trust funds’ (Slattery J). The case demonstrates the potential conflict between good faith redirection of funds and the legal concept of charitable purpose.

### Misleading and deceptive conduct

The Australian Consumer Law (‘ACL’) contains provisions against misleading and deceptive conduct and unconscionable conduct. Fundraisers have been held accountable under the ACL for their failure to direct funds to the stated aims of the fundraiser. In 2017 Belle Gibson was ordered by the Court to pay penalties of \$410,000 for her misleading and deceptive claims about being diagnosed with brain cancer and her failure to donate part of the proceeds of her book ‘The Whole Pantry’ to charity as she had promised (*Director of Consumer Affairs Victoria v Gibson (No 3)* [2017] FCA 1148 (Penalties Judgment)). This case is germane despite Belle Gibson having used social and traditional media and not a crowdfunding platform. In a salient warning to platform hosts, Penguin Australia agreed to pay \$30,000 to the Victorian Consumer Law Fund for its role in the publication of Ms Gibson’s book.

### Fraud

The risk of fraud must also be considered by crowdfunding organisers. The recent indictment of former Trump staffer, Stephen Bannon, and three associates in the US, serves as a startling reminder. Bannon was indicted for conspiracy to commit wire fraud over the ‘We Build the Wall’ GoFundMe campaign that raised over \$25 million to build a wall along the southern border of the United States. The charges allege that Bannon schemed to transfer hundreds of thousands of dollars to himself and others from the campaign that promised 100 per cent of the funds to the mission and purpose of the campaign (*United States of America v Brian Kolfage Stephen Bannon Et Al* Indictment 20 Cr 412 US District Court Southern District of New York). In Australia, the ACNC has the power to investigate a fraud complaint and, where an

investigation discloses criminal activity, to refer the matter to the Australian Federal Police (‘AFP’) or relevant prosecuting agency (*Operational Procedure – ACNC Protected Information Procedure*). After the ‘Black Summer’ bushfires, the AFP reported a number of bushfire-related fundraising scams, resulting in a number of individuals being charged for obtaining a financial advantage by deception (also known as fraud) under (*Criminal Code Act 1995* (Cth) and state law (*Crimes Act 1900* (NSW))). In January 2020, the Australian Competition & Consumer Commission also issued warnings in relation to fake bushfire crowdfunding. The serious implications of inappropriate use of funds raised reinforces the need for national oversight, as well as education and warnings for crowdfunding organisers and donors.

### Defamation, freedom of speech & hate speech

Posting a GoFundMe campaign can expose campaign organisers to defamation action by individuals with grievances about the manner in which they have been portrayed. In the case of *Markwell v Solberg & Anor* [2020] FCCA 1751, the respondent established a GoFundMe page which described the applicant as being a perpetrator of domestic violence, a claim which he was forced to defend. Similarly, in *Tate v Duncan-Strelec* [2019] NSWSC 1383, Gold Coast Mayor Tom Tate sued Amanda Duncan-Strelec in defamation, on the basis of the allegedly defamatory content she created about him on the GoFundMe platform.

Sometimes a GoFundMe campaign may breach the platform’s contractual rules because of the nature of the content shared. Israel Folau’s online fight for his version of freedom of speech began with a post that stated ‘Warning drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists, idolators hell awaits you’ on Instagram and ended with GoFundMe pulling his fundraising appeal, although the campaign continued on another platform. A spokesperson for GoFundMe said after a ‘period of evaluation’, the site had ruled Folau’s campaign violated its terms of service. Crowdfunding campaigns like Folau’s highlight the tensions between speech which offends and freedom of speech.

In February 2020, Yarraka Bayles posted a video of her distressed and disabled son, Quaden, on the internet to highlight the impacts of school bullying. When a US comedian saw the video he established a GoFundMe campaign to raise funds to send the young Aboriginal boy with achondroplasia dwarfism to Disneyland, but few could have imagined the relentless racist, violent trolling and stalking that Quaden and his family would suffer as a result of that one ‘good deed’. Tweets circulated that Quaden was an actor, the video was a fake and the GoFundMe campaign was a moneymaking scam. The Twitter storm ended up in a defamation suit against Miranda Devine and NewsCorp which was settled before hearing, but Quaden’s case highlights the impacts on the innocent beneficiaries of third party GoFundMe campaigns.

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### Crowdfunding for lawyers

Advocates of crowdfunding litigation have long argued that the ability to access funds from multiple donors enables access to justice for complainants by facilitating remedies that would otherwise be out of reach to them. The reality, however, is that the expansion of crowdfunding litigation has been the driver of multifaceted professional, ethical and practical considerations that the community, courts and the legal profession are compelled to carefully work through (see: Arthur Moses SC, ‘Opinion piece: Crowdfunding litigation: A problem or a solution?’, *Australasian Lawyer*, July 17, 2019). Given the media attention paid to high-profile crowdfunded litigation, the Law Council of Australia established a committee to investigate the concerns associated with this model to explore the ethics at the heart of crowdfunded litigation. This resulted in the release in December 2019 of *Crowdfunding: Guidance for Australian legal practitioners*. The guidance states that the Law Council may in future consider recommendations for the introduction of specific regulatory measures or ethical rules, although there are no recommendations of that nature at this stage. Lawyers need to think twice about holding the proceeds of crowdfunding campaigns in trust or take great care to manage their professional and ethical obligations.

### Conclusion

As crowdfunding increases in popularity, there is a need to provide clarity and protection to organisers, donors, beneficiaries, the legal profession and their clients against potential harm. Crowdfunding platforms should display clear user warnings about the potential legal and tax risks, including transparency regarding fees – or perhaps face legal action for failing to do so. Lawyers need to take special care to inform themselves about issues surrounding crowdfunding and actively protect themselves in order to ensure that they comply with their ethical and legal obligations. **LSJ**

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