



ETHICS AND PRACTICE UNIT GUIDE¹ CROWDFUNDING²

Introduction

1. Crowd-funding has obvious access to justice benefits and can be a valid and valuable source of funding for legal services.
2. The purpose of this document is to improve understanding of crowd-funding and highlight the relevant ethical and professional issues so that practitioners can engage in appropriate risk management.
3. The availability of funding arrangements is one of a number of matters a legal practitioner may be expected to raise with a client. Legal practitioners should consider whether it is appropriate to advise clients about the availability of crowdfunding. In order to provide such advice practitioners should educate themselves about the relevant regulatory frameworks and the professional and ethical matters they must consider in any matter where the client's legal expenses are crowdfunded.
4. This Guide is not intended to be an exhaustive code. Practitioners acting in relation to crowdfunded matters must turn their mind to all relevant issues specific to the particular case regardless of whether those issues are addressed in this Guide. Practitioners hosting or running a crowdfunding campaign must in particular turn their mind to additional issues that are not canvassed in this Guide.³
5. Many crowdfunding platforms are based outside of Australia which gives rise to jurisdictional issues. Jurisdictional issues are not canvassed in this Guide but practitioners should be aware of the possibility they will arise.

What is Crowdfunding?

6. Crowdfunding involves soliciting small contributions of funds from a large group of people for a particular purpose including the funding of legal expenses.
7. Crowdfunding platforms include *Kickstarter*, *Chuffed* or *GoFundMe*.
8. Crowdfunding involves a number of different funding models, each attracting different regulatory frameworks and giving rise to different professional obligations.
9. The inherent difficulty with crowdfunding is that those who initiate a crowdfunding appeal may be unaware of any relevant regulatory requirements or legal issues. Similarly, donees may

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² The information provided in this Guide has been sourced from the Law Council of Australia's [Crowdfunding Guidance Note](#). The Society recognises and acknowledges the Law Council's contribution.

³ See page 30 of the Law Council of Australia's [Crowdfunding Guidance Note](#).

be unaware of any regulatory or legal implications that might affect the way their donations are managed and expended. This can trigger a variety of problems and conflicts.

Crowdfunding Models

10. Crowdfunding can be:

- 10.1. *Donation-based*: donors provide funds as a gift to support and fund a legal action, with no expectation of return or reward; or
- 10.2. *Rewards-based*: the organiser of the crowdfunding campaign offers some sort of reward in exchange for the donation. This may be a service, a physical item such as an advance copy of a book, private shows or access to exclusive events; or
- 10.3. *Equity-based*: investors provide funds on the basis that they receive a percentage of equity in the venture or receive some sort of return based on defined terms and conditions.

11. The donation-based model is the most common but examples of all models are operating in Australia.

Regulation

12. The level and type of regulation that will apply to the particular of crowd-funding activity depends on the model of crowdfunding adopted.

13. Donation-based crowdfunding is not subject to the Corporations Law and is largely regulated via the enforcement of civil remedies in contract, tort and equity.

13.1. This is problematic because of the lack of a personal relationship or dialogue between crowdfunding donor and donees and the ensuing inability to establish an enforceable contract or reliance or to apply remedies available under the laws of unconscionable conduct or undue influence or the tort of deceit.

13.2. Statutory remedies under the *Australian Competition and Consumer Act 2010* (Cth) have limited scope because 'in trade and commerce' has generally been interpreted by the courts to exclude private transactions and the limited case law on the subject indicates that the courts are reluctant to consider charitable exchanges as 'in trade or commerce'.

13.3. In the end, if no representations are made in relation to the exact use of the funds civil and statutory remedies will be limited.

14. Rewards-based crowdfunding is also not subject to the Corporations Act.

14.1. However, unlike the donation-based model, the existence of a promise of a reward opens avenues for civil remedy under contract law, discussed above, or under the Australian Consumer Law.

14.2. Section 18 of the Australian Consumer Law prohibits misleading and deceptive conduct in trade or commerce, and section 29 offers consumer protections against false or misleading representations about goods and services, including the 'pre-ordering' and the provision of promotional materials or gifts (in exchange for funds) in the context of rewards-based crowdfunding.

14.3. This model does not appear to be particularly relevant to the crowdfunding of legal expenses but there is nothing to prevent a person from engaging rewards-based crowdfunding for this purpose.

15. Equity-based crowdfunding is complicated because the type of regulation that applies depends on the terms and conditions of the crowdfunded project, the type of entity seeking funds and the funding purpose.

- 15.1. Some types of equity-based crowdfunding, such as those offering a direct financial reward, can amount to a 'financial product' under the Corporations Act which imposes licensing and other requirements under the Corporations Law.
 - 15.2. Equity-based crowdfunding models offering ownership or an equity interest in exchange for funds will amount to a managed investment scheme under the Corporations Act.
- Third-Party Litigation Funding
16. Third-party litigation funding involves a litigation funder with no direct interest in the proceeding agreeing to finance some or all of a party's legal costs in return for a share of any proceeds of the litigation.
 17. Third party litigation funders are subject to various regulatory requirements under the consumer protection provisions in the ASIC Act and the Corporations Law. In particular, from 22 August 2020, operators of litigation funding schemes will generally need to hold an AFS licence and each litigation funding scheme will need to be registered. For more information, visit ASIC's [litigation funding information page](#).
 18. Litigation funders operating under a trust structure must also comply with the relevant State, Territory and common law applying to trusts.
 19. In the Federal Court, third-party litigation funding arrangements must be submitted to the court for review. In Federal Court class actions disclosure of litigation funding charges to class members is required. It is also open to the Court to refuse settlement approval if it is not satisfied that there has been proper disclosure.
 20. The key difference between third party litigation funding and crowdfunding is that there is a clearly defined legal relationship, involving mutual obligations, between the donor and donee.

Charities

21. Registered charities engaging in crowdfunding are subject to additional regulation and obligations under statute.

Family Law

22. Practitioners advising family law clients considering crowdfunding need to have regard to section 121 of the *Family Law Act 1975* (Cth), which prohibits the publication of the identities of parties subject to family law proceedings.
23. This places significant limitations on parties seeking to crowdfund the legal expenses associated with such proceedings.
24. Family law practitioners should ask clients whether they have engaged or intend to engage in crowdfunding for legal expenses and advising them of s121 accordingly.

Professional Obligations

25. Lawyers are subject to professional obligations that are designed to promote the highest standards of professional conduct and ethical standards in the provision of legal services to clients.
26. Conduct rules requiring that practitioners act only in accordance with the lawful instructions of clients and in the client's best interests prohibit them from:
 - 26.1. assisting clients to further any unethical, improper or illegal conduct; and
 - 26.2. engaging in any conduct or activity that might create a conflict of interest.

27. Statutory trust accounting and costs disclosure requirements must also be considered.

Fraud, Money Laundering and Other Criminal Activities

28. Online crowdfunding platforms can be used to conceal the origins and purposes of financial transactions by providing a veneer of legitimacy to criminal activity.
29. Legal practitioners are required by legislation and/or professional rules to:
- 29.1. be attuned to risk during their practice;
 - 29.2. avoid any compromise to their integrity and professional independence;
 - 29.3. not engage in conduct that will be prejudicial to, or diminish the public confidence in, the administration of justice, or bring the profession into disrepute; and
 - 29.4. properly manage the business and professional affairs of the law practice, including supervision of staff (practitioner and non-practitioner employees) on an ongoing basis.
30. A failure to observe and apply these requirements when advising on crowdfunding issues can leave a practitioner exposed to disciplinary action, prosecution⁴ and negligence claims.
31. For more information on how practitioners can manage risks in relation to money laundering see the Law Council of Australia's [Anti-Money Laundering Guide](#).

Confidentiality and Privilege

32. There is a risk of clients engaging in crowdfunding to disclose confidential or privileged information about their case in order to increase funding returns. This may have negative or even devastating consequences for their legal matter.
33. Practitioners should be aware of this and, as a matter of standard practice, ensure that clients are advised about the consequences of disclosing information about the case.
34. This should be an issue that is addressed as a matter of routine in initial consultations or meetings with the client.

Misrepresentation

35. The risk of misrepresentation is high in the crowdfunding context.
36. Practitioners should be alive to, and advise their clients on, the following:
- 36.1. How use of certain wording might trigger legal remedies or penalty.
 - 36.2. What constitutes a misrepresentation.
 - 36.3. Misrepresentations regarding the use of funds.
 - 36.4. The relevant law and penalties (depending on the model adopted), for example sections 18 and 29 of the Australian Consumer Law, section 1041H of the Corporations Act and sections 12DA, 12CA- 12CC and 12DF of the ASIC Act.
37. Any representations made on crowdfunding platforms, social media and the like will potentially be subject to subpoenas and discovery they are the subject of separate proceedings.

Use of Funds and Surpluses

38. Practitioners should address the following issues with clients:
- 38.1. What happens if insufficient funds are raised - will the client contribute funds or discontinue proceedings and, if the latter, what will happen to the funds raised?

⁴ For example, see Division 400 of the *Criminal Code* 1995

- 38.2. The possibility of adverse costs orders and, in the absence of any agreements with litigation funders or the like, that the client will be liable to pay. In the event that insufficient funds are raised to cover this eventuality, such costs orders would be payable from the client's own funds.
- 38.3. The potential impact of crowdfunding on costs orders.
39. Where amounts donated to a crowdfunding campaign exceed the professional fees and other costs incurred or awarded, and the client retains those surplus funds, the issue of whether it is appropriate for the client to "profit" from the legal action arises.
40. It is a matter of public policy that parties to legal action can recover losses but the extent to which they can enjoy a profit from the action raises ethical concerns of which the legal practitioner should be aware.

Negligence

41. Legal practitioners must provide professional services with reasonable care and skill. Failure to be aware of and address the issues raised in the Guide could amount to professional negligence. Examples include:
- 41.1. Where the client's choice of crowdfunding platform and/or language has triggered obligations under the ASIC Act, which the client fails to comply with due to a lack of awareness and advice.
- 41.2. Where the client informs the practitioner of the crowdfunding campaign, and representations in that campaign lead to ancillary proceedings due to a lack of advice.
- 41.3. A lack of advice about the consequences of disclosing confidential information leads to a waiver of privilege that adversely impacts the client's proceedings.
42. Practitioners must guard against straying into the provision of financial advice and should satisfy themselves that the services they are providing are limited to legal advice.

Terms of Engagement

43. Practitioners should consider the extent to which the ethical issues arising from crowdfunding should be managed via the written terms of engagement.
44. Practitioners should consider whether they are sufficiently expert in the area of crowd funding to provide advice in that context. If not, they should limit their retainer accordingly and turn their mind to whether they should advise a client to consider seeking separate legal advice about crowd funding.
45. There should be a termination clause in the event that advice is not followed. For example, clauses stating that express termination may occur if the client, against advice, publishes legal advice on the crowdfunding website and/or when clients, against advice, publish and/or refuse to remove false statements and misrepresentations on the crowdfunding platform.
46. The terms of engagement can also address how funds should be managed. For example, a retainer could require clients to transfer crowd-raised funds into trust. Retainers could also address what happens in the case of a shortfall or surplus of funds.
47. Clauses such as these will not alleviate practitioners from their obligations to provide competent advice and to act in the client's best interests but they can focus attention on certain issues and trigger awareness of the need for risk management.