



Law Council
OF AUSTRALIA

CROWDFUNDING

Guidance for Australian legal practitioners

18 December 2019

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 18 December 2019 are:

- Mr Arthur Moses SC, President
- Ms Pauline Wright, President-elect
- Dr Jacoba Brasch QC, Treasurer
- Mr Tass Liveris, Executive Member
- Mr Ross Drinnan, Executive Member
- Executive Member, Vacant

The Secretariat serves the Law Council nationally and is based in Canberra.

INTRODUCTION

There has been an increased public awareness of crowdfunding in recent years, following the advent and proliferation of web-based platforms that allow people to access social and fundraising networks previously out of reach. Ordinary people with limited influence can now campaign for a cause, promulgate a message, take a stand and, pertinently, seek the financial support to do so; whether in the name of a broader public policy or otherwise.

In the legal context, crowdfunding facilitates access to justice- particularly for those with limited financial resources and for cases too small to attract the interest of third-party litigation funders seeking a return on their investment.

To the extent that the availability of crowdfunding provides an additional means of funding litigation, it potentially expands the number of persons experiencing legal problems who can seek a legal resolution. However, the potential use of crowdfunding comes with enhanced risk for clients and their legal advisers, which need to be balanced when assessing whether there is any benefit in pursuing crowdfunding. It also may raise concerns for the public standing of the profession if there is perception that crowdfunding is being inappropriately used by some practitioners for revenue raising, or that it tends to make the affordability of justice dependent upon media or popular appeal.

The purpose of this *Crowdfunding: Guidance for Australian legal practitioners (Guidance Note)* is to draw the relevant ethical and professional issues to the attention of practitioners, to improve understanding of this modern phenomenon and allow practitioners to undertake appropriate risk management.

By highlighting these issues for consideration, the Law Council of Australia hopes to improve the profession's management of the crowdfunding of legal expenses and for the protection of the public.

In considering this issue, the Constituent Bodies of the Law Council of Australia (see page 3, above) were asked to nominate representatives to the Crowdfunding Working Group (**CFWG**). The CFWG responsible for the development of this Guidance Note are as follows:

Mr Steven Stevens	Chair
Dr Jacoba Brasch QC	Treasurer, Law Council of Australia
	Liaison, Law Council Executive
Ms Sarah Cherry	Victorian Bar
Mr Paul Evans	Law Society of Western Australia
Mr Robert Hudson	Law Society of Tasmania
Mr Hugh Macken	Law Society of New South Wales
Mr Jason Newman	Law Institute of Victoria
Ms Anna Reynhout	Australian Capital Territory Law Society
Mr Sean Richter	Law Society of South Australia
Mr. Yaseen Shariff	New South Wales Bar Association
Mr Stafford Shepherd	Queensland Law Society
Mr Jonathan Slater	Law Firms Australia
Mr Murray Hawkins	Secretariat, Law Council of Australia
Ms Tarryn Gaffney	Secretariat, Law Council of Australia

The CFWG would like to thank and acknowledge the submissions provided by Brendan Sydes and Nick Witherow of Environmental Justice Australia, David Morris of the Environmental Defenders Office NSW, and Isabelle Reinecke of the Grata Fund.

SUMMARY

This Guidance Note is not intended to be an exhaustive code. Practitioners involved in crowdfunded or potentially crowdfunded matters must turn their mind to all relevant issues specific to the particular case, whether or not those issues are specifically addressed in this Guidance Note.

Considering crowdfunding?

The possible availability of funding arrangements is one of a number of matters a solicitor may, depending upon the circumstances, be expected to raise with a client when giving clear and timely advice. In this context, practitioners ought to consider whether it is appropriate to advise clients about the availability of crowdfunding.

In order to provide full and proper advice, practitioners must 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. Set out below is a summary of the key issues to consider. However, it is not a substitute for the information contained in this Guidance Note.

Who crowdfunds?

There are a number of circumstances in which crowdfunding can arise in the course of legal proceedings. Each raise different ethical issues that should, as far as it is possible, be considered at the engagement stage. One such consideration is the extent to which the practitioner ought to be involved in the crowdfunding process.

Where the crowdfunding is left to the client, the practitioner should advise the client on relevant issues such as the different models available, the applicable regulations, and relevant legal issues (see Chapter 3). In these circumstances, practitioners must be mindful that their advice does not stray into financial product advice (which requires an Australian Financial Services License (**AFSL**)) (see page 30). In respect of the legal practitioner hosting or running a crowdfunding campaign, additional caution must be exercised. Lawyers must be aware of the appearance of conflicts or other conduct that may bring the profession into disrepute (see Chapter 2). Practitioners must also be mindful that any management of an equity-based crowdfunding campaign does not constitute the operation of a managed investment scheme (see page 30).

Practitioners are also advised to consider whether their professional indemnity insurance covers their involvement in any fundraising activities incidental to providing advice (see page 30).

For more information, please see Chapter 3.

Risk awareness

Practitioners must be mindful that online crowdfunding platforms can be used to conceal the origins and purposes of financial transactions, by providing a veneer of legitimacy to money laundering and other criminal activity. Crowdfunding also carries a significant risk of fraud.

It should be noted that solicitors and law practices are required by legislation and/or professional rules to be attuned to risk during their practice. Failure to have proper regard to risks relevant to the particular legal practice can have significant consequences for the practitioner.

For more information, please see Chapter 3.

Key considerations

Practitioners must be mindful that different regulatory frameworks apply to different models of crowdfunding. For more information on the different models and applicable regulations, please see Chapters 1 and 2.

Practitioners are also reminded that clients who are not familiar with the legal system and court processes will not be cognisant of the ramifications of their decisions. In addition, the nature of crowdfunding to some extent incentivises, for example, the disclosure of otherwise confidential information in the effort to lend additional legitimacy and weight to appeals.

Accordingly, standard practice should involve practitioners advising their clients about:

- the applicable regulations specific to the crowdfunding model to be used;
- any other applicable legislation or regulations, such as those applying to charities, or the *Family Law Act 1975* (Cth);
- the consequences of disclosing information about the case- including privilege/ waiver of privilege, the law of confidential information, and the requirement not to disclose information provided by another party under compulsion; and
- the risks and ramifications of making misrepresentations in crowdfunding appeals.

For more information, please see Chapter 3.

Use of funds

Practitioners should also address with clients the use of funds and surpluses. In the absence of an appropriate agreement, and subject to whether the arrangement between donors and the client can be construed as a trust (see pages 12 and 32), surplus crowd-raised funds are the property of the client and should be returned to the client upon the matter's conclusion or termination, unless otherwise directed by the client.

Practitioners should also address with clients what happens if insufficient funds are raised, and the possibility and impact of adverse costs orders.

For more information, please see Chapter 3.

Retainers and costs agreements

Practitioners are reminded that the same cost regulations apply regardless of the source of funds, that they must ensure that any invoices issued are reasonable and proportionate to the matter, and otherwise comply with the applicable costs regime.

Practitioners should also consider the extent to which the ethical issues arising from crowdfunding should be managed through the retainer. For example, retainers could include express termination clauses in the event that certain advice is not followed. This could cover express termination, for example:

- when clients, against advice, publish 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.

Retainers 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.

For more information, please see Chapter 3.

Negligence

Practitioners must be mindful that, in cases where the crowdfunding of legal expenses is a factor, failure to consider and/or address the matters discussed above could potentially amount to professional negligence.

For more information, please see Chapter 3.

1. BACKGROUND

What is crowdfunding?

Crowdfunding involves soliciting small contributions of funds from a large group of people, in pursuit of a particular goal or venture.¹ Typically, this involves internet platforms such as *Kickstarter*, *Chuffed* or *GoFundMe*. This can be anything from raising venture capital, to the funding of medical debts, to legal expense funding.

For the purposes of this Guidance Note, crowdfunding is restricted to public appeals for funds, usually initiated through a crowdfunding platform.

Crowdfunding, however, is an umbrella term a number of different funding models, each attracting different degrees and types of regulatory frameworks, and giving rise to different ethical and professional conduct implications.

In addition, the nature of the relationship between the person seeking funding and the donor, and therefore the applicable regulation, the relevant legal concepts and remedies, is largely determined by the highly variable language adopted by the person seeking funding (who more often than not does not have any legal training).

The inherent difficulty with crowdfunding is that those who initiate a crowdfunding appeal may generally be unaware of any relevant regulatory requirements or legal issues implicit in their choices, whether it be the model or crowdfunding platform selected or the wording of their appeal. Similarly, donees may be unaware of any regulatory or legal implications that might affect the way their donations are managed and expended. The circumstances of a crowdfunding appeal can therefore trigger a variety of problems and conflicts.

Types of crowdfunding

As mentioned above, the existing regulation of crowdfunding in Australia is highly variable, depending on the model and wording adopted by the donee. Accordingly, it is necessary to consider the differing models in brief. Noting again that as crowdfunding is a relatively recent phenomenon, there are no settled definitions in this regard.

While these differing models can be characterised in various ways, generally speaking, crowdfunding is either:²

1. *Donation-based*: donors provide funds as a gift to support and fund a legal action, with no expectation of return or reward.
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.

¹ See Matt Vitins 'Crowdfunding and Securities Laws: What the Americans are Doing and the Case for an Australian Crowdfunding Exemption' (2012-2013), Vol 22(2), *Journal of Law, Information and Science*, 134, 92.

² Our analysis adopted the model break down as outlined on the Go Fund Me website: 'What is Crowdfunding? The Clear and Simple Answer', *Go Fund Me*, (online, <https://www.gofundme.com/c/crowdfunding>).

3. *Equity-based*: Equity-based or investment funding involves investors providing 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. This model is also, somewhat confusingly, sometimes referred to as ‘crowd-sourced funding’ as distinct from ‘crowdfunding’.

Much of the discourse on the subject of the crowdfunding of legal costs focuses on the donation-based model. However, not only have equity-based platforms been proposed for this purpose in Australia³, there is presently nothing to prevent a client from adopting such an option. Accordingly, when involved either directly or indirectly in crowdfunding, practitioners should expressly, and at the outset, consider the nature of the crowdfunding platform to be used and the terms and conditions.

It is also of note that many crowdfunding platforms are based outside of Australia, giving rise to jurisdictional issues when considering regulation and remedy. We do not consider the jurisdictional issues in any detail in this Guidance Note, but practitioners should nonetheless be aware of this issue.

The benefits of crowdfunding

When considering the degree of regulation that ought to apply to crowdfunding, one cannot ignore the public policy interest of promoting access to justice.⁴ Indeed, crowdfunding has developed as a means to provide access to the Courts and legal redress, particularly as the public funding of legal aid has been restricted by successive Governments. This is not to suggest that crowdfunding *should* fill the void in adequate legal aid funding, merely that it is a response to a lack of sufficient funding.

This issue was explained in the context of third-party litigation funding in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*, where the High Court stated:⁵

Mason P said that the policy of the law had changed: "[t]he law now looks favourably on funding arrangements that offer access to justice so long as any tendency to abuse of process is controlled". Mason P concluded that the present litigation should be regarded as falling within the principle that "[p]ublic policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation".

Litigation funding has achieved this to a degree. However, by virtue of seeking a return on their investment, commercial funders tend to prioritise claims of higher potential value and higher certainty of success.⁶ Furthermore, the recent High Court decision of *BMW Australia Ltd v Brewster* will likely increase caution as to the use of litigation funding for class actions in the Federal and NSW Supreme Courts,⁷ at least until a legislative response such as that

³ Sean Roche, ‘Helping you get justice by crowdfunding the law!’, *Independent Australia*, (online, https://independentaustralia.net/life/life-display/helping-you-get-justice-by-crowdfunding-the-law,8191_).

⁴ We note that there have not been any studies, as far as the CFWG is aware, on the degree to which crowdfunding has increased access to justice. Such studies were outside the scope and funding capacities of this project.

⁵ Which upheld the legitimacy of litigation funding see: *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at [65].

⁶ Australian Law Reform Commission, *Inquiry into Class Action and Third-Party Litigation Funders* (21 December 2018), 66.

⁷ *BMW Australia Ltd v Brewster* [2019] HCA 45, which held that the Federal and NSW Supreme Courts did not have the power under s33ZF of the *Federal Court of Australia Act 1976* (Cth) and s183 of the *Civil Procedure Act 2005* (NSW) respectively, to make Common Fund Orders. The effect of this is that litigation funders will have to be confident of the economic viability of the case at the commencement of proceedings, which may impact whether some cases are commenced at all.

proposed in Victoria.⁸ Crowdfunding removes these barriers to successful claims by offering funding for cases no matter the size, public interest or merit.

For example, crowdfunding is presently being used to fund public interest environmental litigation. Such environmental litigation generally struggles to attract commercial funders, who seek (at least the prospect of) significant financial return.⁹ One such case is when community advocacy group *GetUp* utilised crowdfunding in 2014 to challenge a decision of the Great Barrier Reef Marine Park Authority to approve the dumping of large amounts of dredged material into the Marine Park. Utilising the crowd-sourced funds raised by *GetUp*, the North Queensland Conservation Council Inc, represented by the not-for-profit Environmental Defenders Office Queensland, filed an application to review the decision in the Administrative Appeals Tribunal (**AAT**).¹⁰ The AAT ultimately ordered the cancellation of the permit when mounting public pressure saw the Federal Government ban the practice.¹¹

Crowdfunding therefore has the potential to meet the gaps between traditional funding options for many individuals and organisations. It serves a function in respect of access to justice that arguably ought to be facilitated. However, it should be noted that in many cases crowdfunding alone may not raise sufficient funds to fully fund the particular proceedings. Where litigation funding may preference high-value claims, crowdfunding may preference popular or controversial subjects and/or persons. Nevertheless, crowdfunding also offers the unique opportunity for direct engagement with the public in respect of important issues or litigation.

It is otherwise noted that, in the consultations undertaken in the preparation of this Guidance Note, some concerns were raised to the effect that any regulation of the crowdfunding of legal expenses would necessarily have a dampening effect on access to justice. The CFWG is sensitive to these concerns and has accordingly suggested a 'light touch' approach that, rather than limiting access to crowdfunding, would promote an ethical approach to the practice for the benefit of both the client and the practitioner.

⁸ The *Justice Legislation Miscellaneous Amendments Bill 2019* (Vic) grants the Victorian Supreme Court new powers to control class actions and funding fees, including the power to order contingency fees in class action proceedings.

⁹ Evan Hamman, 'Save the Reef! Civic Crowdfunding and Public Interest Environmental Litigation', (2015), (Vol. 15, issue 1) *QUT Law Review*, 159.

¹⁰ Evan Hamman, (n 9), 169.

¹¹ Through the insertion of regulation 88RA of the *Great Barrier Reef Marine Park Regulations 1983* (Cth); Evan Hamman, (n 9),170.

2. EXISTING REGULATION

It was mentioned above that the level and type of regulation applicable to the crowdfunding activity depends on the model of crowdfunding adopted. We address each of these models below, in turn, as well as the obligations triggered.

Donation-based Crowdfunding

Donation-based crowdfunding is not subject to the *Corporations Act 2001* (Cth) (**Corporations Act**) and ASIC oversight.¹² ‘Regulation’ therefore largely falls to the enforcement of civil remedies in the case of improper or unethical conduct, for example in the case of misleading representations inducing donations.

The difficulty with the crowdfunding context is that, being a relatively recent phenomenon based on internet platforms, many of the avenues to obtaining civil remedies are out of step with the digital age.

For example, donation-based crowdfunding is, in general, a gift; which has relatively few enforceable remedies in contract law. There is some authority to suggest a promise of a gift or donation can give rise to an enforceable contract if the donee makes specific return promises as to the use of the funds: for example, the construction of a specific building, could create a contract.¹³ This avenue is generally considered in the context of enforcing *against* the donor, rather than serving as a useful avenue of protection for a misled donor. This also assumes something of an interactive relationship to establish the requisite level of reliance of representation, something that does not exist in the online crowdfunding donor-donee context.

Promissory estoppel does not necessarily require an enforceable contract,¹⁴ and protects against both the unconscionable *enforcement* of a contract¹⁵ and the unconscionable *denial* of a contract.¹⁶ However, it is generally deployed in circumstances involving a binding contract (which, as discussed above, is not generally the case with donations and gifts) rather than as a cure for an absence of consideration¹⁷ (although there are some schools of thought that argue that this traditional approach is likely on the decline¹⁸).¹⁹ Nevertheless, these issues render promissory estoppel an imperfect vehicle for remedy in the crowdfunding context.

Similarly, the few avenues that are available for the voidance of gifts are undermined by the inherent distance within any relationship built via an internet-based crowdfunding platform. For example, in the absence of any direct, interactive relationship, remedies pursuant to the law of unconscionable conduct or undue influence are not available in this context.

¹² Vitins (n1) 96.

¹³ *Governors of Dalhousie College v Boullier* [1934] 3 DLR 593 at 597; *The National Trustees Executors & Agency Co Ltd v O’Hea* (1904) 29 VLR 814 at 821-2; NC Seddon & R A Bigwood, *Cheshire & Fifoot Law of Contract*, (Lexis Nexis Butterworths, 11th Australian ed, 201), 191.

¹⁴ NC Seddon & R A Bigwood (n 13) 71.

¹⁵ For example, a landlord who agreed to reduced rent will be estopped from claiming full rent: *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101; NC Seddon & R A Bigwood, (n 13) 65.

¹⁶ *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

¹⁷ “...generally speaking a plaintiff cannot enforce a voluntary promise because the promise may reasonably be expected to appreciate that, to render it binding, it must form part of a binding contract.” *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 403 as per Mason CJ and Wilson CJ.

¹⁸ NC Seddon & R A Bigwood, (n 13) 71.

¹⁹ *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 403.

Depending on the circumstances of the particular case, and whether the donee made representations as to the specific use of funds, it is possible that these donations give rise to a specific or special purpose trust. That is, should the client (the primary beneficiary) fail to use the donated funds for the stated purpose (legal expenses), a resulting trust would arise in favour of the donees²⁰ and funds may be recoverable through civil proceedings. This will depend on the construction of the relevant agreement, which will determine whether there was an intention to create such a resulting or secondary trust.²¹

Similarly, statutory remedies under the Schedule 2 of *Australian Competition and Consumer Act 2010* (Cth) (the **Australian Consumer Law**) are not straightforward in a pure donation-based crowdfunding model. Section 18 the Australian Consumer Law provides that a person must not, *in trade or commerce*, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. 'In trade and commerce' has generally been interpreted by the courts to exclude private transactions,²² and in the relatively limited case law on the subject, it appears that the courts are reluctant to consider charitable exchanges as 'in trade or commerce'.²³

Arguably, one of the few straight-forward avenues for a remedy for misleading conduct in the crowdfunding context is the now seldom-utilised tort of deceit. A tort of deceit is established when the plaintiff can show that the defendant:

- made a false representation;
- made the representation either knowing that it was false, or was reckless or careless as to whether it was false or not;
- made the representation with the intention that it be relied upon by the plaintiff;
- the plaintiff acted in reliance on the false representation; and
- the plaintiff suffered damage caused by the reliance on the false representation.²⁴

Now largely overtaken by statutory trade practices and then consumer law legislation, the tort of deceit nevertheless remains available, particularly in those cases that fall in the gaps of consumer protection legislation.²⁵

Of course, if no representations are made in relation to the exact use of the funds during or at the conclusion of the matter, understood by the plain and ordinary meaning,²⁶ then one

²⁰ See [Australasian Conference Association Ltd v Mainline Constructions Pty Ltd \(in liquidation\)](#) (1978) 141 CLR 335 at 353 per Gibbs CJ:

"... the decision in *Barclays Bank Ltd. v. Quistclose Investments Ltd.* That case is authority for the proposition that where money is advanced by A to B, with the mutual intention that it should not become part of the assets of B, but should be used exclusively for a specific purpose, there will be implied (at least in the absence of an indication of a contrary intention) a stipulation that if the purpose fails the money will be repaid, and the arrangement will give rise to a relationship of a fiduciary character, or trust."

²¹ *Re Nawah Goldmines Limited* [1955] 1 WLR 1080.

²² Kate Tokeley, 'When Not All Sellers Are Traders: Re-Evaluating the Scope of Consumer Protection Legislation in the Modern Marketplace' (2017), 39(1) *Sydney Law Review*, 59 (online, <http://classic.austlii.edu.au/au/journals/SydLawRw/2017/3.html>).

²³ In *E v Australian Red Cross Society* [1991] FCA 20 a patient was denied relief under the then s52 *Trade Practices Act 1974* (Cth) for receiving a blood transfusion infected with HIV. Among the reasons it was opined that receiving donated blood from a charitable organisation did not constitute 'in trade of commerce' [at 158].

²⁴ *Magill v Magill* [2006] HCA 51.

²⁵ Pam Stewart, 'Tortious Remedies for Deliberate Wrongdoing to Victims of Human Trafficking and Slavery in Australia' (2011) 34(3) *University of New South Wales Law Journal*, 898 (online, <http://classic.austlii.edu.au/au/journals/UTSLRS/2011/3.html>).

²⁶ See *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541, 553 and 561.

can argue that there is little basis for relief if the donor is not satisfied with the use of funds or the conduct of the donee.

Rewards-based Crowdfunding

Like donation-based crowdfunding, rewards-based crowdfunding is not subject to the Corporations Act.²⁷

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.

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.²⁸

Perhaps as a result of these additional protections against the donee as compared to donation-based crowdfunding, the CFWG could not find any examples of this model being utilised in the legal expenses context. Typically, it appears that this model is favoured by persons such as performance artists and musicians, who can offer exclusive promotional material or advance copies of works (such as albums) in exchange for donations.

While this model does not appear to be particularly relevant to the crowdfunding of legal expenses, we have addressed it in brief because there is nothing to prevent a person from engaging rewards-based crowdfunding for this purpose.

Equity-based crowdfunding

Equity-based crowdfunding is a complicated area, because the type of regulation that applies depends on the relevant terms and conditions of the crowdfunded project,²⁹ and on the type of entity seeking funds and the purpose for seeking the funds.

Some types of equity-based crowdfunding, such as those offering a direct financial reward, can amount to a 'financial product' under the Corporations Act.³⁰

Pursuant to section 763A(1) of the Corporations Act, a 'financial product' includes a facility through which a person makes a financial investment. A financial investment is defined in s763B to be when an investor provides a contribution and that contribution is used or attempted to be used to generate a financial return, and the investor has no day-to-day control over how the contribution is used to generate the return. Persons providing a financial product must be licensed³¹ and otherwise comply with the onerous requirements of the Corporations Act, overseen by the Australian Securities and Investments Commission (**ASIC**). Non-compliance can involve substantial penalties.

Other variations on the equity-based crowdfunding model, particularly those offering ownership or an equity interest in exchange for funds, will amount to a managed investment scheme under the Corporations Act. A managed investment scheme is an arrangement

²⁷ Vitins (n1) 96.

²⁸ Anne Matthew, 'Crowd-sourced equity funding: the regulatory challenges of innovative fintech and fundraising' (2017), Vol. 36 (1), *University of Queensland Law Journal* 41, 51.

²⁹ Vitins (n1) 96.

³⁰ Vitins, (n 1) 106.

³¹ Section 791A of the *Corporations Act 2001* (Cth).

where people contribute funds, which are pooled or used in a common enterprise to produce a financial or proprietary interest for the members, and where the members do not have any day-to-day control over the operation of the scheme.³² Managed investment schemes are subject to significant oversight under Chapter 5C of the Corporations Act and, like financial products, failure to comply can attract significant penalties.

Activities subject to regulation through the Corporations Act, and therefore to oversight by ASIC, are also subject to the prohibitions on misleading and deceptive conduct in section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and section 1041H of the Corporations Act (in addition to the s18 of the Australian Consumer Law, addressed above).

Further to the above, the *Corporations Amendment (Crowd-sourced Funding) Act 2017* (Cth) and the *Corporations Amendment (Crowd-sourced Funding for Proprietary Companies) Act 2018* (Cth) amended the Corporations Act and ASIC Act to further regulate *eligible public and proprietary companies* who engage in public crowd-sourced fundraising through an intermediary crowd-sourced funding service. Under this scheme, crowdsourcing intermediaries (including internet-based platforms) are required to hold an AFSL, which triggers the obligations under the Corporations Act, including:

- a) The obligation to act efficiently, honestly and fairly and comply with the conditions of the license and financial services laws (s912A);
- b) Addressing conflicts of interest (s912A);
- c) Having adequate resources, including financial, human and technological (s912A);
- d) Maintaining organisational competence to provide the financial service (s912A);
- e) Having adequate risk management systems (s912A);
- f) Having adequate compensation arrangements (s912B); and
- g) Having adequate dispute resolution processes (s912A).

Furthermore, all entities providing financial services with respect to a financial product, must comply with the ASIC Act, including the prohibitions on:

- a) Engaging in unconscionable conduct (ss12CA-12CC);
- b) Engaging in conduct that is, or is likely to be, misleading and deceptive (s12DA); and
- c) Making false or misleading representations (s12DF).

Services provided to an individual for personal or domestic purposes also have implied warranties that those services will be rendered with due care and skill,³³ and that the contract will be without any unfair terms.³⁴

While it is clear that equity-based crowdsourcing in all its forms is extensively regulated, in the litigation context we note that *third-party litigation funders* are specifically exempted from a number of requirements under the Corporations and ASIC Acts. It is therefore necessary to consider the extent to which equity-based crowdfunding in a legal expenses context can be considered third-party litigation funding.

³² Section 9 *Corporations Act 2001* (Cth).

³³ S12ED ASIC Act.

³⁴ Section ss12BF-12BM ASIC Act.

Third-party litigation funding

The Australian Law Reform Commission explains third-party litigation funding as follows:³⁵

Such funding involves a third-party (a litigation funder) with no direct interest in the proceeding agreeing to finance some or all of a party's legal costs (which can include solicitors' fees, counsels' fees and other disbursements) in return for a share of any proceeds of the litigation. Calculation of the funder's share of the proceeds is typically based on a percentage of the sum recovered or a multiple of the funding provided...

Following the abolition of the common law crimes and/or torts of maintenance and/or champerty in Victoria, New South Wales, the Australian Capital Territory, South Australia and Tasmania (although they remain torts in Queensland, Western Australia, Tasmania and the Northern Territory),³⁶ and the subsequent cases of *Movitor Pty Ltd (receivers and manager appointed) (in liq) v Sims (Re Movitor)*³⁷ and *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*,³⁸ litigation funding has become increasingly common in the Australian litigation landscape.³⁹

Particularly of interest is that in July 2013 third-party litigation funders were specifically exempted from the requirement to hold an AFSL (thereby the corresponding regulatory oversight), so long as the litigation funder has appropriate processes for managing conflicts of interest.⁴⁰

Third-party litigation funders were also exempted from the National Credit Code,⁴¹ and from the definition of managed investment schemes under the Corporations Act.⁴² Third party litigation funders are however still subject to the remainder of the regulatory requirements under the Corporations Act (including prohibitions on misleading conduct) and the consumer protection provisions in the ASIC Act,⁴³ discussed above. The [ASIC Regulatory Guide 248](#) provides extensive guidance and imposes obligations on litigation funders. For example, this requires that, in matters that have settled prior to the issue of proceedings, the terms of the settlement must be approved by counsel; who must be mindful of procedures and policies to protect the interests of class members.⁴⁴

Litigation funders operating under a trust structure must also comply with the relevant state, territory and common law applying to trusts.⁴⁵

Litigation funders are also subject to oversight from the court on a case-by-case basis. For example, in the Federal Court, third-party litigation funding arrangements including the solicitors' costs agreement must be submitted to the court for review.⁴⁶ The Federal Court

³⁵ Australian Law Reform Commission, (n 6) 49.

³⁶ Australian Law Reform Commission, (n 6), 64.

³⁷ (1996) 64 FCR 380.

³⁸ Which upheld the legitimacy of litigation funding see: *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

³⁹ Australian Law Reform Commission (n 6) 65.

⁴⁰ Corporations Amendment Regulation 2012 (Cth); Australian Law Reform Commission (n 6) 62.

⁴¹ National Credit Code in Schedule 1 of the *National Consumer Credit Protection Act 2009* (Cth), which replaced the state and territory Consumer Credit Codes.

⁴² Australian Law Reform Commission (n 6) 62, noting the impact of *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147, where the subject funding arrangement was found to be a Managed Investment Scheme.

⁴³ Australian Law Reform Commission (n 6) 62.

⁴⁴ Australian Securities and Investments Commission, *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013).

⁴⁵ Australian Law Reform Commission, (n 6) 62.

⁴⁶ Federal Court of Australia, *Class Actions Practice Note* (GPN-CA) (25 October 2016) [5]; Australian Law Reform Commission, (n 6) 64. Also see costs regulations for legal practitioners Chapter 2 of this paper.

of Australia's *Class Action Practice Note* requires disclosure of litigation funding charges to class members in a class action. It requires that the plaintiff lawyer be 'satisfied [that] class members have been provided a document that properly discloses those charges'.⁴⁷

Furthermore, in class actions, it is open to the Court, when exercising its power to approve a settlement under section 33V of the *Federal Court Act 1936* (Cth) to resist settlement approval if it finds that a litigation funder's commission and all associated fees were not adequately and properly disclosed to all funded class members from the outset. Such a power not only exists but, in so far as the commission and fees charged may be found to be excessive, the Federal Court⁴⁸ has expressed a willingness to either refuse a settlement or impose fair terms.⁴⁹

In *Blairgowrie Trading Ltd v Allco Finance Group Ltd (No 3)*, Beach J noted:

*... I consider that as part of any approval order under s 33V, I have power in effect to modify any contractual bargain dealing with the funding commission payable out of any settlement proceeds. It may not be a power to expressly vary a funding agreement as such. Rather, it is an exercise of power under s 33V(2); for present purposes it is not necessary to invoke s 33ZF... If I make an order that out of monies paid by a respondent, a lesser percentage than that set out in a funding agreement is to be paid to a funder, that is an exercise of statutory power which overrides the otherwise contractual entitlement.*⁵⁰

There are clear correlations between third party litigation funders and crowdfunding, and *prima facie* crowdfunding can, and by some is, understood to be a subset of third-party funding. There is however one key difference: in third party litigation funding, the identity of the 'funder' (or funders) is straightforward.

This much was acknowledged by the Australian Law Reform Commission:⁵¹

A much wider range of funding models has emerged and different funding methods continue to evolve. In addition to portfolio funding or law firm financing, some types of financing are increasingly a form of private equity, where third-party funders take an equity position in the claimant entity and, as such, gain control over its investment (in the litigation) through traditional corporate governance. Additionally, some funders now establish Special Purpose Vehicles (SPVs) to receive investment funds from a variety of sources including pension funds and educational trusts. Funders are also securitising their investments.

Unlike the scenario described above, with funds raised through crowdfunding websites there is no degree of overarching control exercised by the funder, whether via selection criteria, corporate governance or through contract. The funds provided are within the control of the client and/or legal practitioner, depending on the arrangement between them. Section 171 of the [Legal Profession Uniform Law \(Uniform Law\)](#) defines a third-party payer to mean a non-client who "is under a legal

⁴⁷ Federal Court of Australia, (n 46) [5.5].

⁴⁸ Please however note the impact for the recent decision of *BMW Australia Ltd v Brewster* [2019] HCA 45: which held that the Federal and NSW Supreme Courts did not have the power under s33ZF of the *Federal Court of Australia Act 1976* (Cth) and s183 of the *Civil Procedure Act 2005* (NSW) respectively, to make Common Fund Orders.

⁴⁹ *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [7]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and admin apptd) (in liq) (No 3)* [2017] FCA 330 (31 March 2017) [101]; *Mitic v OZ Minerals Ltd (No 2)* [2017] FCA 409 (21 April 2017) [26]-[31]; *HFPS Pty Ltd (Trustee) v Tamaya Resources Ltd (in liquidation) (No 3)* [2017] FCA 650 (13 June 2017) [105]; *Perera v GetSwift Ltd* [2018] FCA 732 (23 May 2018) [365] (Lee J).

⁵⁰ *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and admin apptd) (in liq) (No 3)* [2017] FCA 330 (31 March 2017) [101].

⁵¹ Australian Law Reform Commission, (n 6) 49.

obligation to pay all or any part of the legal costs” or “has already paid all or a part of those legal costs under such an obligation”.⁵² This obligation can arise “by or under contract or legislation or otherwise”.⁵³ In the absence of any contracts addressing the issue (as can be the case with third party litigation funders), any costs orders (for example) still fall to the client and it is questionable whether the Courts would deem crowdfunding to be third-party funding in those circumstances.

Regardless of whether, depending on the relevant terms, crowdfunding may be a form of third party litigation funding; whether it is subject to the same level of regulatory control as the latter is also problematic. It is unclear whether the courts would intervene to the same extent as we have seen in third party litigation funding, although it is open to them. While there is currently limited published case law on crowdfunding, to the extent that the available case law addresses this topic it appears that crowdfunding is not being treated in the same way as third-party litigation funding.⁵⁴

Depending on the particular facts of the case, practitioners ought to be aware of these issues and the extent to which the crowdfunding efforts of any particular case:

- a) trigger any regulatory obligations;
- b) could amount to third-party litigation funding; and
- c) the extent to which (a) is impacted by (b).

Charities

Practitioners must be aware that in addition to the aforementioned regulation in this area, clients that are registered charities are subject to additional regulation and obligations.

Each state and territory, with the exception of the Northern Territory, have their own laws regulating fundraising by charities.⁵⁵

For example, in New South Wales only religious bodies, small fundraisers (where the gross annual fundraising is \$15,000 or less), universities and local councils are exempt from these requirements.⁵⁶ All other organisations that fundraise for charitable purposes must otherwise comply with the [Charitable Fundraising Act 1991](#), the [Charitable Fundraising Regulation 2015](#) and [Standard Authority Conditions](#).⁵⁷ This is in addition to any other applicable regulation (addressed above).

⁵² Section 171(1) Uniform Law.

⁵³ Section 171(2) Uniform Law.

⁵⁴ The available published case law addresses crowdfunding in passing but not the extent to which the relevant campaign complied with the applicable regulation. For example, in *Anees and Minister for Immigration and Border Protection (Migration)* - [2016] AATA 1090 the Tribunal addressed a misleading crowdfunding campaign in the context of the credibility of a witness (who ran the campaign) testifying that the applicant was a “fit and proper person” for the purposes of a review of a Migration decision: see [67]. It did not assess the extent to which the campaign violated any regulations.

⁵⁵ Australian Charities and Not-for-profits Commission, ‘Information for charities, donors and fundraisers about the use of crowdfunding’, (accessed October 2019), (online: <https://www.acnc.gov.au/for-public/helping-charity/crowdfunding-charities-and-public>).

⁵⁶ Fair Trading NSW, Charitable Fundraising Guidelines, (accessed October 2019) 7-8 (online, https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0006/371283/Charitable-Fundraising-Guidelines.pdf).

⁵⁷ Fair Trading NSW, (n 56).

Furthermore, if the charity has deductible give recipient (**DGR**) status, it will also have tax obligations. This will vary according to factors such as the crowdfunding model adopted and whether the charity is carrying on an enterprise.⁵⁸

Where the client engaging in fundraising is a charity, practitioners must be mindful of the above issues and advise their clients accordingly.

Family Law

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:

(1) A person who publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:

- (a) a party to the proceedings;
- (b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or
- (c) a witness in the proceedings;

commits an offence punishable, upon conviction by imprisonment for a period not exceeding one year.

This places significant limitations on parties seeking to crowdfund the legal expenses associated with such proceedings. Clients, however, are likely unaware of such restrictions unless specifically advised.

Family law practitioners should consider enquiring with their clients as to whether they have engaged in (or intend to engage in) crowdfunding for legal expenses and advising them of s121 accordingly.

Regulation of lawyers in Australia

The existing regulatory framework applying to lawyers sets out a number of core standards to be observed when their clients seek to use, or seek advice about, the crowdfunding of legal costs.

Lawyers are subject to professional and statutory obligations that are designed to promote the highest standards of professional conduct and ethical standards in the provision of legal services to clients, which include obligations to act only in accordance with the lawful instructions of clients. These ethical rules include prohibitions on lawyers from assisting clients to further any unethical, improper or illegal conduct.

In respect of the potential use of crowdfunding to finance legal proceedings, some of the relevant regulation includes:

- a) regulatory obligations applying to third-party litigation funding (addressed above);

⁵⁸ Please see Australian Taxation Office, 'Tax basics for non-profit organisations: A guide to tax issues affecting non-profit organisations including charities, clubs, societies and associations' (accessed December 2019), (online, https://www.ato.gov.au/uploadedfiles/content/sme/downloads/nonprofit16966tax_basics_for_non_profit_organisations.pdf).

- b) the ban on charging contingency fees in all states and territories;⁵⁹
- c) general criminal provisions are applicable: for example, Division 400 of the *Criminal Code 1995* (Cth), which prohibits the dealing with monies, whether knowingly or negligently, that are, or at risk of being, the proceeds of crime;⁶⁰ and
- d) legal profession legislation enacted in all Australian states and territories.

In relation to the latter, the Uniform Law, adopted in New South Wales and Victoria, can be used as a guide. Chapter 4 of the Uniform Law is concerned with business practice and professional conduct. The objectives of that chapter are ‘... to ensure appropriate safeguards are in place for maintaining the integrity of legal services’. Detailed provisions have been enacted relating to, for example, trust money and trust accounts, and business management and control (including compliance audits and management system directions).

In addition, Part 4.3 of the Uniform Law regulates the charging of legal costs and the making of costs agreements between legal practitioners/firms and clients (and also third party payers of legal costs).⁶¹ For example, section 172 provides that the legal costs charged are no more than what is fair and reasonable in all the circumstances, including that they are:

- a) proportionally and reasonably incurred; and
- b) of a proportionate and reasonable amount.

Section 173 similarly requires that law practices refrain from acting in a way that unnecessarily results in increased legal costs, including unnecessary delay. Section 174 to 178 addresses the costs disclosure obligations to the client, and sections 179 to 185 govern costs agreements. In respect of any costs disputes that may arise, sections 196 to 205 address the costs assessment process to be used to resolve cost disputes.

These sections include provisions which govern costs disclosure and charging obligations to third-party payers (both associated and non-associated third-party payers). For example, section 176 of the Uniform Law sets out costs disclosure obligations to third party payers.

Chapter 5 of the Uniform Law provides a scheme for the discipline of the Australian legal profession. This includes, for example, the initiation and prosecution of proceedings by the designated local regulatory authority. The disciplinary framework applies to conduct that amounts to either ‘*unsatisfactory professional conduct*’ or ‘*professional misconduct*’. Such conduct includes a contravention of the Legal Profession Uniform Rules made under Part 9.2 of the Uniform Law. In addition, there is a duty imposed on independent regulators of the legal profession, including the Legal Services Council and designated local regulatory authorities, to report suspected offences after an investigation or otherwise.

The [Australian Solicitors’ Conduct Rules \(ASCR\)](#), presently adopted in South Australia, Queensland, New South Wales, Victoria and the Australian Capital Territory; were made as the *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015* under Part 9.2 of the Uniform Law applying to Australian legal practitioners in New South Wales and Victoria, and have been adopted in the other three jurisdictions under applicable laws or procedures applying in each of those respective jurisdictions. The ASCR prescribe certain

⁵⁹ For example, s183 Legal Profession Uniform Law Application Act; Victorian Law Reform Commission, ‘Litigation Funding and Contingency Fees’, (Accessed October 2019) (online, <https://www.lawreform.vic.gov.au/content/3-litigation-funding-and-contingency-fees>). Please note that at the time of writing that the *Justice Legislation Miscellaneous Amendments Bill 2019* (Vic) was before the Parliament of Victoria. The Bill provides for the Victorian Supreme Court to be granted new powers to control class actions and funding fees, including the power to order contingency fees in class action proceedings.

⁶⁰ In the comparable jurisdiction of the United Kingdom, cases such as these have resulted in prison terms: *R v Duff* [2002] EWCA Crim 2117; *R v Griffiths* [2006] EWCA Crim 2155.

⁶¹ This is largely replicated in non-Uniform state and territory Legal Profession Acts: for example, section 300 of the *Legal Profession Act 2006* (ACT).

standards of behaviour that lawyers must observe. They are intended to assist solicitors to act ethically and in accordance with principles of professional conduct. A breach of the rules is ‘... *capable of constituting unsatisfactory professional conduct or professional misconduct, and may give rise to disciplinary action by the relevant regulatory authority ...*’⁶².

Some of the relevant provisions have been excerpted below, along with the relevant [Legal Profession Uniform Conduct \(Barristers\) Rules 2015 \(Australian Barristers Rules\)](#).

Rules concerning the provision of advice and acting on lawful instructions

In Chapter 3, we address the preliminary issues requiring consideration when a client seeks to crowdfund their legal expenses, including the matters that ought to be the subject of advice.

The fundamental obligations of legal practitioners in providing advice on these matters are encapsulated in Rules 7 and 8 of the ASCR.

Practitioners are required to consider the true purpose for which funds were raised and the extent to which they may be furthering or obscuring any illegal or criminal purpose such as money laundering.

In the crowdfunding context, a practitioner might receive funds from unknown donors, and thereby would be unable to ascertain whether or not the donation was made for a proper or lawful purpose.

ASCR Rule 8 addresses the practitioner’s obligation to know their client and to only act on lawful instructions:

Rule 8: Client instructions

8.1 A solicitor must follow a client’s lawful, proper and competent instructions.

Rule 8 therefore requires a legal practitioner to “know their client”, to check that the advice to be provided is in relation to a lawful activity and, among other things, does not breach any laws relating to fundraising.

Rule 7 of the ASCR relates to the provision of advice:

Rule 7: Communication of advice

7.1 A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement.

7.2 A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client’s best interests in relation to the matter.

⁶² Rule 2.3 *Australian Solicitors’ Conduct Rules*.

Rule 7.1 builds upon, and is reinforced by, Rule 4.1 (which is addressed below). The requirement to provide one's client with clear and timely advice is to enable the client to make informed choices about actions to be taken during the course of a matter.

This includes both the requirement to address all relevant legal issues in the provision of advice and to provide the advice in an accessible manner. This means that practitioners are required to advise in relation to all relevant legal issues in respect of crowdfunding when it is a relevant issue in a particular case.

Practitioners are reminded that they must take reasonable steps to keep up to date with developments relevant to their legal practice, as part of achieving the duty of competence to their client.⁶³ Practitioners should accordingly educate themselves in this area, or potentially risk professional negligence proceedings and/or sanction from the designated local regulator. To the extent that the practitioner requires specialist expertise, it is then incumbent on him or her to alert the client and/or source the required expertise.⁶⁴

In respect of the accessibility of advice, this acknowledges that clients cannot be informed, make properly informed choices and give proper instructions if they do not understand the nature of the advice being provided to them. This is connected to access to justice- clients cannot access justice if they do not understand their options or the advice provided. Practitioners accordingly have an ethical and professional obligation to provide advice on all relevant options open to a client, including whether to settle a matter rather than proceed to litigate, and the alternative cost implications and funding means available to them (be it legal aid, crowdfunding or the like).

Rules concerning other fundamental ethical duties

The relevant ASCR is below:

Rule 4: Other fundamental ethical duties

4.1 A solicitor must also:

4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;

4.1.2 be honest and courteous in all dealings in the course of legal practice;

4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;

4.1.4 avoid any compromise to their integrity and professional independence; and

4.1.5 comply with these Rules and the law.

The equivalent Barristers' Rules are:

Rule 3: The object of these Rules is to ensure that barristers:

(a) act in accordance with the general principles of professional conduct;

⁶³ See *Law Society of New South Wales v Moulten* [1981] 2 NSWLR 736 at 751; and *Council of the Law Society of New South Wales v Sandroussi* [2012] NSWADT 40 at [39]; Dal Pont GE, *Lawyers' Professional Responsibility* (Thomson Reuters, 2017), 116-117.

⁶⁴ See the discussion in: *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 108.

- (b) act independently;*
- (c) recognise and discharge their obligations in relation to the administration of justice; and*
- (d) provide services of the highest standard unaffected by personal interest.*

Rule 4: These Rules are made in the belief that:

- (a) barristers owe their paramount duty to the administration of justice;*
- (b) barristers must maintain high standards of professional conduct;*
- (c) barristers as specialist advocates in the administration of justice, must act honestly, fairly, skilfully, bravely and with competence and diligence;*
- (d) barristers owe duties to the courts, to their clients and to their barrister and solicitor colleagues;*
- (e) barristers should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients; and*
- (f) the provision of advocates for those who need legal representation is better secured if there is a Bar whose members:*
 - (i) must accept briefs to appear regardless of their personal beliefs;*
 - (ii) must not refuse briefs to appear except on proper professional grounds; and*
 - (iii) compete as specialist advocates with each other and with other legal practitioners as widely and as often as practicable.*

These rules establish the fundamental ethical duties set out in ASCR and Barristers' Rules, and are the foundation for other, more specific, rules (such as ASCR Rule 7).

The key concepts embodied in these rules are that lawyers are to act in the best interests of their clients and to avoid any compromise to their own integrity and professional independence.

Rules concerning disreputable conduct and public confidence in the legal profession

The relevant ASCR is below:

Rule 5: Dishonest and disreputable conduct

5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:

5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or

5.1.2 bring the profession into disrepute.

The equivalent Barristers' Rule is:

Rule 8: A barrister must not engage in conduct which is:

- (a) dishonest or otherwise discreditable to a barrister;*
- (b) prejudicial to the administration of justice; or*
- (c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.*

Rule 5 of the ASCR and Rule 8 of the Barristers' Rules address the important public policy reasons for preserving public confidence in the legal profession and the administration of justice. Conduct that undermines public confidence in the profession, the courts and the administration of justice both discourages compliance with the legal system and restricts access to justice. A general public that is distrustful of lawyers and the legal system is less likely to seek redress.

Practitioners must be mindful that their conduct in respect of the crowdfunding of legal expenses does not discredit the profession, for example if their efforts appear to prioritise the interests of the practitioner in getting paid (or paid an excessive amount) over the interests of the client.

Rules concerning the client's best interests and the interests of the lawyer

The relevant ASCR is below:

Rule 12: Conflict concerning a Solicitor's own interests

12.1 A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule.

[12.2 to 12.4 are not relevant for our purposes].

The equivalent Barristers' Rules are:

Rule 35:

A barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person.

Rule 101

A barrister must refuse to accept or retain a brief or instructions to appear before a court if:

[101(a) is addressed above]

(b) the client's interest in the matter or otherwise is or would be in conflict with the barrister's own interest or the interest of an associate;

[101(c) to (n) is not relevant for our purposes].

These rules address the fact that the relationship between solicitor and client is of a fiduciary character, and one of influence. These rules reflect the application of fiduciary duties in this context and provide that lawyers must not:

- engage in situations where their own interests conflict or may conflict with the duty owed to the client except with the latter's fully informed consent; and/or

- profit from the position of solicitor except with the client's fully informed consent.

This is particularly relevant in the crowdfunding context, where practitioners may be assisting, or providing advice in relation to, the raising of funds to pay for their own fees.

Rules concerning the independence of the legal practitioner

The relevant ASCR is below:

Rule 17: Independence- avoidance of personal bias

17.1 A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client or of the instructing solicitor (if any) and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable.

17.2 A solicitor will not have breached the solicitor's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's instructions, simply by choosing, contrary to those instructions, to exercise the forensic judgments called for during the case so as to: 17.2.1 confine any hearing to those issues which the solicitor believes to be the real issues;

17.2.2 present the client's case as quickly and simply as may be consistent with its robust advancement; or

17.2.3 inform the court of any persuasive authority against the client's case.

17.3 A solicitor must not make submissions or express views to a court on any material evidence or issue in the case in terms which convey or appear to convey the solicitor's personal opinion on the merits of that evidence or issue.

17.4 A solicitor must not become the surety for the client's bail.

The equivalent Barristers' Rule is:

Rule 48: Independence

A barrister must not receive any money or property by way of loan from any client, the relative of a client or a business entity of which a client is a director, partner or manager, during the course of a retainer with that client unless the ordinary business of the client, client's relative or the business entity includes lending money.

These rules build upon the conflict issues raised above.

In circumstances where a practitioner may be assisting in the process of raising funds which will be used to pay his or her own fees (particularly when those fees are sourced from third parties with limited recourse such as donation based crowdfunding), the practitioner must ensure that his or her independence, and obligations to exercise independent judgment and act in the best interests of the client, are not compromised.

For example, in cases where significant funds have been raised, the certainty of payment may risk inviting perceptions that it could motivate practitioners to continue proceedings, when early settlement will result in a better outcome for the client, or where new evidence calls into question the merits of the case.

Rules concerning misleading and deceptive conduct

The relevant ASCR is below:

Rule 36: Advertising

36.1 A solicitor or principal of a law practice must ensure that any advertising, marketing, or promotion in connection with the solicitor or law practice is not:

36.1.1 false;

36.1.2 misleading or deceptive or likely to mislead or deceive;

36.1.3 offensive; or

36.1.4 prohibited by law.

This rule is connected to Rule 5 ASCR and Barristers' Rule 8, both of which are addressed above. These rules prohibit a solicitor or barrister from engaging in dishonest or disreputable conduct, or in conduct which otherwise brings the legal profession into disrepute. Rule 36 ASCR expands upon the prohibited conduct to include the making of false or misleading representations.

In the crowdfunding context, this includes a prohibition of facilitating misleading facts, or exaggerated claims of the prospects of success in order to induce donations under a crowdfunding campaign to pay one's own fees.

Rules concerning the paramount duty to the administration of justice

Connected to ASCR Rule 8, discussed above, are the Rules relating to the administration of justice. The relevant ASCR is below:

Rule 3: Paramount Duty to the Court and the Administration of Justice

3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

The equivalent Barristers' Rule is:

Rule 23: A barrister has an overriding duty to the court to act with independence in the interests of the administration of justice.

These rules set out the fundamental ethical principle that the paramount duty of a lawyer is to the court and the administration of justice.

That is, for the legal system to function the lawyer must conduct him or herself in such a way that facilitates efficient and effective processes of the court in the exercise of judicial functions,⁶⁵ and maintains the integrity of the system.⁶⁶ From this flow specific duties of the lawyer as an officer of the court. This was addressed in, for example, *Rondel v Worsley*,⁶⁷ where Lord Reid said:

⁶⁵ See *Rondel v Worsley* [1969] 1 AC 191, 227-228, per Lord Reid.

⁶⁶ See *Moti v The Queen* (2011) 245 CLR 456 and *JB v The Queen* (No 2) [2016] NSWCCA 67; see also *Warren v Attorney-General for Jersey* [2011] 1 AC 22, 32, and *R v Maxwell* [2010] 1 WLR 1837.

⁶⁷ [1969] 1 AC 191.

*[Counsel] has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.*⁶⁸

In this way, clear ethical lines are drawn in circumstances where otherwise conflicting obligations may exist. Practitioners are reminded that where any ethical conflict arises, their duty to the court and the administration of justice are paramount in dealing with that conflict.

These rules are relevant to all matters, regardless of whether crowdfunding is involved. Nevertheless, it is noted that crowdfunding campaigns can incentivise certain unethical behaviours to elicit donations.

Rules in relation to supervision

Practitioners also have ethical obligations to supervise the provision of legal services by solicitors for whom they are responsible, to observe all the of the ethical obligations outlined above:

Rule 37: Supervision of Legal Practitioners

37.1 A solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter.

Senior practitioners can be sanctioned by the relevant state or territory local regulator should they fail to properly supervisor their junior staff, should those staff breach the ASCR or any other applicable regulations. Sound practice management accordingly should involve training junior staff about the risks and issues raised in this Guidance Note, and for senior staff to ensure that matters involving the crowdfunding of legal costs are being properly managed.

⁶⁸ At 227.

3. GUIDANCE FOR PRACTITIONERS

Introduction

A challenge with regulating crowdfunding to meet legal expenses is that we are attempting in many cases to regulate client behaviour, by regulating the behaviour of their lawyers.

To some extent this is already achieved in those areas of law that oblige practitioners to determine the source of funds. For example, Rule 19.04 of the Family Law Rules⁶⁹ requires that practitioners specify the source of the funds for the costs paid or to be paid in a notice of costs, unless the court orders otherwise. Similarly, Division 400 of the Criminal Code⁷⁰ requires persons (including practitioners) to consider the source of funds.⁷¹

Nonetheless, whether a client:

- a) misled donors to the crowdfunding campaign; and/or
- b) misused funds received through the crowdfunding platform, before it came into the control of the legal practitioner; and
- c) received donations in excess of what are needed to meet legal costs;

will not necessarily be known by their legal practitioner at the time their services are engaged.

To some extent, this has always been risk: a client may source litigation funds from family members, friends, colleagues and neighbours, and the legal practitioner would often not be privy to (and therefore unable to influence or control) the interactions leading to the provision of funds, nor the conditions under which they were provided. However, to some extent the law (and the proximity of the family or personal connections) is better equipped to manage these direct, interactive relationships, as addressed in Chapter 2 in relation to unconscionable conduct or undue influence.

Notwithstanding these difficulties, some overseas jurisdictions have attempted to regulate crowdfunding in this way. The United States in particular has had a number of state professional regulators consider this issue.

The District of Columbia Bar released '[Ethics Opinion 375: Ethical Consideration of Crowdfunding](#)' in November 2018. This opinion only addresses donation-based crowdfunding and focuses on litigation crowdfunding by clients versus crowdfunding by lawyers. In respect of the former, the opinion does not find lawyers accepting funds crowdsourced by clients to be unethical, but warns of the risk of fraud, money laundering and other criminal activities and the need to take reasonable precautions to avoid engaging in illegal conduct. The opinion further highlights the risk of clients disclosing confidential information in the course of sourcing funds and the need to consider the moral, economic, social and political factors that may be relevant to the client's situation.⁷²

In respect of a lawyer who assists or controls the crowdfunding for legal expenses, the opinion highlights the need for informed consent, fee agreements addressing issues such

⁶⁹ Family Law Rules 2004 (Cth).

⁷⁰ Criminal Code 1995 (Cth).

⁷¹ For more information see page 30, below.

⁷² Karen Rubin, 'Fees a crowd? D.C. bar issues opinion on ethics of crowdfunding', (24 January 2019), *The Law for Lawyers Today*, (online, <https://www.thelawforlawyertoday.com/2019/01/4228/#page=1>)

as when there is a surplus or shortfall of funds, putting crowdfunded fees in trust and returning surplus fees to the client following the conclusion of the matter.⁷³

While equity-based crowdfunding is not specifically addressed in the opinion, the District of Columbia Bar's Rules of Professional Conduct address this to some extent in the context of preserving the professional independence of the lawyer in [Rule 5.4](#). This Rule prohibits the sharing of legal fees between a lawyer and non-lawyer ('fee-splitting'), except in certain circumstances (not including equity-based crowdfunding), such as "*nonlawyer professionals [who] work with lawyers in the delivery of legal services.*"⁷⁴

Equity-based litigation funding arrangements are otherwise prohibited in [New York](#) on the basis of fee-splitting,⁷⁵ and litigation funding arrangements must be disclosed to the Court in [California](#) and Wisconsin.⁷⁶

Similarly, the Philadelphia Bar Association Professional Guidance Committee considered the ethics of lawyers accepting crowdfunded legal funds in their [Opinion 2015-16](#) and deemed it permissible, so long as:

- a) It does not impact the lawyer's duty of loyalty to the client or duty to exercise independent judgment.
- b) The lawyer does not imply that the funders will have any control over the litigation.
- c) The lawyer does not reveal any confidential information without the client's informed consent, except for those disclosures where consent is implied in order for the lawyer to carry out representation. In obtaining informed consent the client must be provided with adequate information and explanation about:
 - a. the material risks; and
 - b. the reasonably available alternatives to the proposed course of conduct.Care should be taken to limit the information revealed about the client to the minimum required to achieve the purpose.
- d) Lawyers are to ensure that no false statements of material fact or law, or false and misleading communications are made to non-clients (i.e. donors).

The Opinion also emphasised the use of fee agreements (within that jurisdiction's particular regulatory context) and that crowdfunded monies be placed in trust.

The CFWG has considered these approaches when making the following recommendations regarding practice management.

Preliminary matters for consideration

Availability of crowdfunding

As has been addressed above, lawyers have a duty to act in the best interests of a client in any matter in which the solicitor represents the client (ASCR Rule 4.1). This is reinforced by the principle that the client should be provided with clear and timely advice so as to be

⁷³ Karen Rubin, (n 72),1.

⁷⁴ District of Columbia Bar, *Rules of Professional Conduct*: Rule 5.4- Professional Independence of a Lawyer, Comment [7], (online, <https://www.dcbar.org/bar-resources/legal-ethics/amended-rules/rule5-04.cfm>).

⁷⁵ Karen Rubin, 'Contingent litigation funding agreements for law firms impermissible, says NYC Bar' (13 September 2018), *The Law for Lawyers Today*, (online, <https://www.thelawforlawyerstoday.com/2018/09/4058/>).

⁷⁶ Karen Rubin, 'Litigation funding spotlighted in WI disclosure statute, NY ethics opinion' (19 April 2018), *The Law for Lawyers Today*, (online, <https://www.thelawforlawyerstoday.com/2018/04/3854/>).

able to make informed choices about action to be taken during the course of a matter (ASCR Rule 7.1).

The provision of advice to a client about the possible availability (if any) of funding arrangements such as legal aid or pro bono services is one of a number of matters a solicitor may, depending upon the circumstances, be expected to raise with a client in giving clear and timely advice.⁷⁷

In this context, practitioners ought to consider whether it is appropriate, given the facts and circumstances of each individual case, to advise client about the ability of crowdfunding for their legal expenses.

Who undertakes the crowdfunding?

There are a number of circumstances in which crowdfunding can arise in the course of legal proceedings. Clients can approach a legal practitioner having already raised funds, or seek to raise funds well after proceedings have been commenced to address a shortfall in personal funds. However, our consultations to date suggest that the typical scenario is that clients generally engage in crowdfunding after an initial consultation and estimate of costs from the legal practitioner.

Each of these scenarios raise different ethical issues for consideration. To the extent that funds have already been raised, practitioners should turn their minds to matters such as:

- The model of crowdfunding adopted and whether any particular obligations have arisen as a result of that choice;
- The representations made by the client on the crowdfunding platform and the extent to which those representations are accurate;
- Whether the client has disclosed any information on the crowdfunding platform that is damaging to their case;⁷⁸
- Whether the client has used any of the crowd-raised funds to date and for what purpose; and
- Whether the crowdfunding activity was likely motivated by any other purpose, for example the concealment of the true origins of the funds.

These issues should be considered at the engagement stage, including the degree to which these matters could (or should) be addressed and/or managed in the retainer (see page 38 for more information).

If the crowdfunding campaign is initiated either during established proceedings or following engagement, the practitioner will have different obligations and considerations. One such

⁷⁷ It is noted that Rule 16A of the *Australian Solicitors' Conduct Rules (SA)* deals with legal aid applications, as did Rules 45 and 46 of the former *Professional Conduct and Practice Rules 2013 (NSW)*.

⁷⁸ For example, whether the client (or their supporters) have breached, by engaging in crowdfunding, provisions such as s121 of *the Family Law Act* by impermissibly identifying a party to the proceedings; a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or a witness in the proceedings. In such cases, a cease and desist undertaking to court may be warranted.

consideration is the extent to which the practitioner ought to be involved in the crowdfunding process.

Where the crowdfunding is left to the client, the practitioner should nevertheless advise the client on relevant issues such as the different models available, the applicable regulations, issues such as misrepresentation, confidentiality of information and waiver of privilege (see page 32-39 for more information). They should also address these issues, as well as the management of funds, in their initial advice and retainer (see page 38 for more discussion).

However, it should be noted in these circumstances that practitioners must be mindful that their advice does not stray into financial product advice (which requires an AFSL), particularly in the context of equity-based crowdfunding. Financial product advice is defined in section 766B(1) of the *Corporations Act* to mean a recommendation that could be reasonably regarded as being intended to influence the client into making a decision in relation to a particular financial product or class of financial products.⁷⁹ Section 766B(5) exempts lawyers from requiring a AFSL so long as the advice provided is “*in his or her professional capacity, about matters of law, legal interpretation or the application of the law to any facts*” and “*except as may be prescribed by the regulations- any other advice given by a lawyer in the ordinary course of activities as a lawyer, that is reasonably regarded as a necessary part of those activities*”.⁸⁰

In respect of the legal practitioner hosting or running a crowdfunding campaign, additional caution must be exercised. There is nothing *prima facie* preventing a lawyer from providing this assistance to a client, and it is notable that lawyers already assist clients with obtaining legal aid and third-party litigation funding. Nevertheless, lawyers must be aware of the appearance of conflicts (see ASCR Rule 12) or other conduct that may bring the profession into disrepute (see ASCR Rule 5, addressed in Chapter 2). Practitioners must also be mindful that any management of an equity-based crowdfunding campaign does not constitute the operation of a managed investment scheme.⁸¹

Practitioners are also advised to consider whether their professional indemnity insurance covers their involvement in any fundraising activities incidental to providing advice. Practitioners have obligations to have professional indemnity insurance at all times while holding a practising certificate and should be mindful (as should regulators) as to whether new or novel areas of practice are covered by such insurance.⁸²

Irrespective of the degree of direct involvement of the practitioner, it is imperative that donors are not left with the impression that they have any say or sway in the conduct of the proceedings, and that any consent obtained from the client in respect of these matters is properly informed.⁸³

⁷⁹ [766B\(1\)](#) *Corporations Act 2001* (Cth).

⁸⁰ [766B\(5\)](#) *Corporations Act 2001* (Cth). See also ASIC Regulatory Guide 36- Licensing: Financial Product advice and dealing (June 2016), (online, <https://download.asic.gov.au/media/3889417/rg36-published-8-june-2016.pdf>).

⁸¹ ASIC, ‘Do you need a AFS licence’, (accessed September 2019) (online, <https://asic.gov.au/for-finance-professionals/afs-licensees/do-you-need-an-afs-licence/>).

⁸² The Law Society of South Australia has advised that it is unlikely that practitioners engaging in crowdfunding directly (as opposed to simply providing advice about crowdfunding) would fall within definition of legal service as defined in the South Australian PII Policy. Accordingly, it is unlikely that such activities would be covered by professional indemnity insurance, as least in South Australia.

⁸³ These issues have been addressed at length in the District of Columbia Bar’s Ethics Opinion 375: District of Columbia Bar, ‘Ethics Opinion 375: Ethical Consideration of Crowdfunding’, (November 2018) (online, <https://www.dcbbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-375.cfm>).

Risk of fraud, money laundering and other criminal activities

Practitioners need to be mindful that online crowdfunding platforms can be used to conceal the origins and purposes of financial transactions by providing a veneer of legitimacy to criminal activity.

It should be noted that solicitors and law practices are required by legislation and/or professional rules to:

- be attuned to risk during their practice;⁸⁴
- avoid any compromise to their integrity and professional independence;⁸⁵
- 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;⁸⁶ and
- properly manage the business and professional affairs of the law practice, including supervision of staff (practitioner and non-practitioner employees) on an ongoing basis.⁸⁷

Failure to have proper regard to risks relevant to the particular legal practice can have significant consequences for the practitioner. Using the example of inadvertent involvement in money laundering, solicitors and law practice principals alike run the risk of findings of unsatisfactory professional conduct or professional misconduct should they, or the law practice, become embroiled in money laundering.

For example, in *Council of the Law Society of NSW v Galloway*,⁸⁸ a solicitor was found guilty of professional misconduct, fined and had conditions attached to his practicing certificate for a failure, among other things, to report a series of significant cash transactions to the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) pursuant to his obligations under the *Financial Transaction Reports Act* 1988. It is notable that his failures were found not to be dishonest so much as negligent, for his failure to properly supervise the management of the firm's trust account.⁸⁹

Solicitors also run the risk of prosecution pursuant to Division 400 of the *Criminal Code* 1995. Division 400 of the Code not only addresses deliberate involvement in money laundering, but includes offences for dealing with the proceeds of crime where “*the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires)...*”.⁹⁰ In the comparable jurisdiction of the United Kingdom (although with broader cash transaction reporting obligations imposed on solicitors than in Australia), cases such as these have resulted in prison terms.⁹¹

⁸⁴ For example, Chapter 4 of the *Uniform Law* is concerned with business practice and professional conduct. The objectives of that chapter are ‘... to ensure appropriate safeguards are in place for maintaining the integrity of legal services’. Detailed provisions have been enacted related to, for example, trust money and trust accounts, and business management and control (including compliance audits and management system directions).

⁸⁵ Rules 3 and 4 ASCR; Rule 23 Barristers’ Rules.

⁸⁶ Rules 3 and 5 ASCR; Rules 8 and 23 Barristers’ Rules.

⁸⁷ See, for example, Chapter 4 and s34 of the Uniform Law; Rule 37 of the Australian Solicitor’s Conduct Rules (NSW, Vic, QLD, ACT, SA); Section 701 *Legal Profession Act 2007* (QLD); Section 584 *Legal Profession Act 2008* (WA); Section 588 *Legal Profession Act 2006* (ACT); Section 698 *Legal Profession Act* (NT); and Section 644 *Legal Profession Act 2007* (Tas).

⁸⁸ *Council of the Law Society of NSW v Galloway* [2012] NSWADT.

⁸⁹ *Council of the Law Society of NSW v Galloway* [2012] NSWADT at [7].

⁹⁰ Section 400 *Criminal Code* 1995.

⁹¹ *R v Duff* [2002] EWCA Crim 2117; *R v Griffiths* [2006] EWCA Crim 2155.

For further information on how to manage these risks in general, please see the following linked document: [Law Council's Anti-Money Laundering Guide for Legal Practitioners](#).

Another issue of concern to practitioners is the extent to which exaggerations in a crowdfunding campaign, in the effort to induce donations, amounts to fraud. This will depend on the facts of the particular case, however practitioners who are indifferent to, or fail to properly advise their clients on, the content of their client's crowdfunding campaigns run the risk of exposure to sanction on a number of grounds including:

- Division 133 of the Criminal Code;
- where a trust may arise on the facts of the case,⁹² sanction by the relevant local regulator for failures under legal profession laws, for example Chapter 4 of the Uniform Law or under Rule 5⁹³ of the ASCR; and
- civil proceedings for professional negligence,⁹⁴ with the potential of the disgorgement of the legal fees paid.⁹⁵

Confidential information

Clients who are not familiar with the legal system and court processes will not be cognisant of the ramifications of their decisions to the same extent as a lawyer. Moreover, the nature of crowdfunding to some extent incentivises the disclosure of information in the effort to lend additional legitimacy and weight to appeals to the public to fund legal costs. There is accordingly a considerable risk of clients disclosing too much information, or even advice, in efforts to solicit funds.

It is therefore appropriate, in circumstances where the client is soliciting funds via a crowdfunding platform, that standard practice involve practitioners advising their clients about the consequences of disclosing information about the case.

As mentioned above, this issue has been addressed by the District of Columbia Bar in their ['Ethics Opinion 375: Ethical Consideration of Crowdfunding'](#), which notes:

A lawyer should consider counselling his or her client regarding disclosures to third parties. Crowdfunding typically entails some level of disclosure to third parties about the predicate need for counsel. Because of their financial support, crowdfunding contributors may be interested in the status of or information about the client's matter. Due to the risk of waiver of the attorney-client privilege, or simply for strategic reasons, a lawyer who knows that a client is crowdfunding should provide the appropriate level of guidance to the client regarding disclosures to third parties, whether such disclosures occur on a social media platform or privately in discussions with friends and family.⁹⁶

In line with such opinion the CFWG suggest that practitioners should provide in their initial consultation and/or meeting the client, advice concerning:

- privilege and waiver of privilege;⁹⁷

⁹² See [Barclays Bank Ltd v Quistclose Investments Ltd](#) [1968] UKHL 4; [1970] AC 567; [1968] 3 WLR 1097; [1968] 3 All ER 651; See [Australasian Conference Association Ltd v Mainline Constructions Pty Ltd \(in liquidation\)](#) (1978) 141 CLR 335 at 353.

⁹³ Rule 5 relates to dishonest and disreputable conduct, addressed in Chapter 2.

⁹⁴ see the "Risks- negligence" section of this paper on pages 36-37 below.

⁹⁵ See *Chan v Zacharia* (1984) CLR 154, 198 (HCA) and *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, 144-145 (HL).

⁹⁶ District of Columbia Bar, (n 83).

⁹⁷ For discussion of this issue in a third-party litigation funding context, see *Blue & Blue* [2007] FamCA 1444 (14 December 2007), where the Court determined that privileged was not waived when advice regarding the

- the law of confidential information;
- strategic reasons for not disclosing case information; and
- the need to check with one's lawyer before making any disclosures (whether on a crowdfunding platform or otherwise).

As is discussed in detail below, this advice should also address the nature of language used in the crowdfunding appeal- particularly with regard to the ramifications of making misrepresentations. As is also discussed below, such matters should also be addressed in the retainer or costs agreement (see page 38).

A further matter of concern is that clients are advised of their obligations not to disclose information provided by another party under compulsion: see *Harman v Secretary of State for the Home Department*.⁹⁸

Communications and misrepresentation

The risk of clients making misrepresentations is particularly high in the crowdfunding context. Even clients with the best intentions will not necessarily understand or accurately describe the information they attempt to convey or relay, let alone appreciate the implications of their communications. It is accordingly imperative that practitioners advise their clients on the issues arising from these communications, such as:

- The models and remedies triggered by different word choices (see Chapter 2);
- The disclosure of confidential information (see page 32);
- What constitutes a misrepresentation;
- Misrepresentations regarding the use of funds (in particular);
- The relevant law and penalties (depending on the model adopted), for example:
 - Sections 18 and 29 of the Australian Consumer Law;
 - S1041H of the Corporations Act;
 - ss12DA, 12CA- 12CC, 12DF of the ASIC Act; and
 - ASIC Regulatory Guide 248.

We have discussed the relevant regulation in some detail from in Chapter 2 of this Guidance Note.

Misrepresentations not only create a risk (to both the client and potentially the practitioner) of ancillary proceedings or sanction arising from the misrepresentation, but also have the potential to undermine the client's creditability.

It is also worth noting that any representations made on crowdfunding platforms, social media and the like will potentially be subject to subpoenas and discovery, should these representations ultimately be the subject of separate proceedings. Clients accordingly may benefit from advice around the recording of and/or collection of posts and any amendments to posts. By way of guidance, this issue has been the subject of another [District of Columbia](#)

prospects of success was provided to the funder. Unfortunately, at present there is a dearth of case law that directly deals with the crowdfunding of legal expenses.

⁹⁸ [1983] 1 AC 280.

[Bar Ethics Opinion](#), which addresses the relevant ethical consideration when using social media.⁹⁹

Models of crowdfunding and applicable regulation

As has been addressed in detail in Chapter 2, the model of crowdfunding adopted by the client is significant in terms of the applicable obligations and remedies.

Practitioners should accordingly advise their clients about:

- the different models of crowdfunding;
- the differing types and levels of regulation depending on the model adopted;
- the importance of the careful wording of crowdfunding appeals, noting that careless wording can trigger different obligations (see Chapter 2).

While clients may approach a lawyer after having engaged in the crowdfunding exercise, it is nevertheless important that practitioners discuss these issues with their clients. This is particularly so in a case where the client has chosen an equity-based model of crowdfunding and may not be aware of the consequent obligations, or that they continue to be subject to those obligations after the funds have been received.

Failure to provide such advice, particularly if the client fails to, for example, abide by the requirements of the ASIC Act, could in some circumstances amount to professional negligence. We discuss negligence in this context in more detail from page 38.

Use of funds and surpluses

Practitioners should address with clients:

- 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?
- The possibility of adverse costs orders and, in the absence of any agreements with litigation funders or the like,¹⁰⁰ 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.
- The potential impact of crowdfunding on costs orders.¹⁰¹

In consultations with the Grata Fund, it became clear that in many cases crowdfunding alone may not raise sufficient funds to fully fund the particular proceedings. Noting the potential personal exposure of clients, it is imperative that such issues are raised at the earliest possible opportunity.

The relevant regulations in respect of the use and management of crowd-raised funds should also be the subject of advice. This is complicated by a number of variables- the model of crowdfunding adopted, the language used in the crowdfunding appeal and the extent and timing of the involvement of the legal practitioner. As has been addressed in

⁹⁹ District of Columbia Bar, Ethics Opinion 371: Use of Social Media in Providing Legal Services, (November 2016) (online, <https://www.dcbbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm>)

¹⁰⁰ For example, the [Grata Fund](#) in some cases seeks indemnities for adverse costs orders on behalf of primary plaintiffs in public interest litigation.

¹⁰¹ For example, see *McVeigh v Retail Employees Superannuation Pty Ltd* [2019] FCA 14 and *Turner v Tesa Mining (NSW) Pty Limited* [2019] FCA 1644.

some detail in Chapter 2, different obligations are triggered in respect of the funds raised depending on the model of crowdfunding adopted. However, for example, in the case of donation-based crowdfunding there is little regulation around the use of funds.

For example, at present, if a client was to utilise donation-based crowdfunding and make no specific representations as to the use of funds, the following could occur without ramification:

- The client could settle the case before proceedings were commenced, thereby incurring limited legal costs, receive a sum as a result of the settlement and still keep all the funds raised for legal expenses.
- The client could raise relatively substantial funds for legal costs, but still fall short of the estimated required costs and accordingly discontinue (or never commence) proceedings. In that case the client could still keep the crowd-raised funds.
- The client could raise well in excess of the funds required for legal costs and keep the surplus at the conclusion of the trial as a windfall.
- The client could proceed with the matter through a trial, win at trial and seek a costs order, despite not actually having met the legal costs from their own private resources (i.e. to warrant reimbursement). In cases where there was already a surplus of funds, the client could keep the surplus and receive the costs order as a windfall, in addition to the judgment amount.¹⁰²

This is compounded by the fact that, even in cases where (by virtue of, for example, the model utilised or representations made) donors may have an avenue for refund or redress, there is unlikely to be much motivation to do so when the funds were raised via hundreds of small donations. It is unlikely that most people would go to the time and trouble of recovering \$5 or \$10, particularly when they then become exposed to cost orders or other pitfalls of litigation.

The degree to which the above-listed scenarios ought to be permissible is also subject to a wide variance of opinion. While these scenarios may not pass the ‘sniff test’ for some; others may argue that, so long as donations were not induced by some misrepresentation (as to the use of funds or otherwise), then it is not immoral, and even if it were, not practical, to return a surplus of funds.

Where amounts donated to a crowdfunding campaign exceed the professional fees and other costs incurred or awarded, the present ability of the client to retain those surplus funds can be seen as somewhat akin to profiting from the legal action. As a matter of public policy, it is questionable whether it is ethical for a litigant to be able to “profit” from litigation where crowd-funded donations are greater than the amount which the client is personally ‘out of pocket’- noting that present regulation of legal costs places limits on the extent to which a legal practitioner may ‘profit’ from a representation.

We note that as the crowdfunding of legal expenses is a relatively recent development, there are presently no published cases that address or provide assistance on these issues. As to whether or not the Courts will use their discretion in such cases, having regard to

¹⁰² This outcome is of course subject to the discretion of the courts, although the CFWG are not aware of such a discretion being applied in a case where crowdfunding has been used.

matters such as the indemnity principle,¹⁰³ there is no precedent of which the CFWG is aware.

It is also difficult to regulate in the present context, by attempting to regulate otherwise legal conduct of a client through their connection to legal services. There is a possibility that if the profession opts to prohibit all or some of the above-listed scenarios, that it would drive the crowdfunding practice 'underground', such that clients will obscure the origins of funds and thereby not access vital advice of the nature discussed above.

Looking to guidance from overseas, we note that the District of Columbia Bar, in their [Ethics Opinion 375](#) have made the following recommendations:

- With the exception of (some jurisdiction-specific) exceptions that are not relevant to us, the crowdfunded fees ought to be placed in trust, and the client invoiced as expenses are incurred. Placing fees in trust also mitigates against the risk that the client will use the fees for another purpose, and/or that there will be an unexpected deficit, for example, if costs are sought or a donor seeks to dispute some aspect of their donation.
- Where the lawyer has been involved in the crowdfunding efforts (see below) there should be a plan in place to terminate fundraising efforts once sufficient funds have been raised, to mitigate against the issue of a surplus.
- In respect of surpluses, the opinion notes:¹⁰⁴

In the absence of an appropriate agreement, unearned crowdfunds are the property of the client and should be returned to the client upon the matter's conclusion or termination of the representation, unless the client directs the lawyer to do otherwise. A matter may conclude for any number of reasons, including a natural conclusion, the client's decision not to pursue the case, settlement or any other resolution, or because the attorney-client relationship terminates, and each has different implications for prepaid legal fees and expenses, including crowdfunds. Pursuant to Rule 1.5(b), this point should be addressed with clients in engagement agreements and may be included in disclosures to donors, subject to Rule 1.6.

A lawyer may suggest that the client donate excess crowdfunds to a charity of the client's choice. Ultimately, however, the lawyer must abide by the client's decision and/or an appropriate agreement regarding disposition of unearned crowdfunds.

This 'agreement-based approach' to the handling of funds could be usefully employed by Australian legal practices. For example, the retainers or costs agreement could require that:

- All crowd-raised funds, whether done solely by the client or with the assistance of the legal representative, be placed into trust.

¹⁰³ See, for example, *Wentworth v Rogers; Wentworth & Russo v Rogers* [2006] NSWCA 145 at [45]-[46] per Santow JA:

"The indemnity principle is long-established at general law. It is however not to be applied rigidly, or uninfluenced by statute or by practice recognised by statute, such as in relation to conditional fee agreements. I do not agree with the amicus' submissions that the principle has ceased to exist. Certainly there have been inroads to it brought about by the Act and by analogical reasoning from recognised exceptions. Where a party to an action has an agreement with their legal adviser that they do not have to pay any costs, then the general law principle states that that party cannot recover party and party costs against their adversary: *McCullum v Ifield* [1969] 2 NSW 329 at 330 per Taylor J citing *Gundry v Sainsbury* [1910] 1 KB 645."

¹⁰⁴ District of Columbia Bar, (n 83).

- As and when legal expenses are incurred, the legal practitioner is to invoice the client in the usual manner.

Retainers or costs agreements can also stipulate how surpluses ought to be managed.

Practitioners are reminded that the same cost regulations apply regardless of the source of funds, and that they must ensure that invoices issued are reasonable and proportionate to the matter, and otherwise comply with the applicable costs regime. Practitioners subject to complaints from clients about rendering excessive bills will be subject to the usual disciplinary processes if a complaint is upheld.

Practitioners should also advise their clients in respect of making representations about the use of funds and any surpluses of funds. For example, raising funds “*for legal expenses*” may not be interpreted by a donor to include an adverse costs order if the litigation is unsuccessful.

It is noted, in respect of Ethics Opinion 375, addressed above, that the Opinion did not need to consider the issue of costs, presumably because the traditional ‘American rule’ has been that each party pays their own legal costs regardless of outcome.¹⁰⁵ This has shifted over time to the discretion of the Court; however, it is also subject to situation-specific statutes that vary greatly between jurisdictions.¹⁰⁶

In the Australian context, it is noted that the amount a successful litigant is entitled to recover from the other party under an award of party-party costs is generally only a partial indemnity for the costs payable by the successful litigant to his or her lawyers. In addition, as mentioned above, legal profession legislation ensures that the total amount of costs payable by a client are “fair and reasonable in all the circumstances”, having regard to a range of considerations.¹⁰⁷

Risks- negligence

Practitioners must be mindful that, in cases where the crowdfunding of legal expenses is a factor, failure to consider and/or address the matters discussed could potentially amount to professional negligence.

Legal practitioners must provide professional services with reasonable care and skill. Failing to provide legal services to a standard of competence and diligence that a member of the public is entitled to expect can, depending on the circumstances of the individual case, amount to either unsatisfactory professional conduct or professional misconduct and result in proceedings being brought by the relevant state or territory local regulator.¹⁰⁸

Examples of potential findings of professional negligence in the context of the crowdfunding of legal costs could include:

- 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;

¹⁰⁵ Kass Legal Group PLLC, Can I recover my legal fees in litigation? (Accessed October 2019), (online, <https://www.kasslegallgroup.com/Articles/04-08-10-Can-I-Recover-My-Legal-Fees-In-Litigation.shtml>).

¹⁰⁶ Kass Legal Group PLLC, (n 105).

¹⁰⁷ Legal Profession Uniform Law, section 172.

¹⁰⁸ Office of the Legal Services Commissioner, ‘Fact Sheet 9: Negligence’ (July 2015), (online, <http://www.olsc.nsw.gov.au/Documents/Fact%20Sheet%209%20Negligence%20July2015%20AC.pdf>).

- 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; or
- A lack of advice about the consequences of disclosing confidential information leads to a waiver of privilege that adversely impacts the client's proceedings.

As this is a modern phenomenon, there is little published case law that addresses crowdfunding and generally only in passing. There is none to date that addresses a legal practitioner's negligence in this context, however it is not only possible but, with the rise of crowdfunding, is to some extent inevitable.

It is also noteworthy that in circumstances where a crowdfunding campaign may give rise to a *Quistclose*¹⁰⁹ trust,¹¹⁰ practitioners who then manage those funds in a way contrary to the intended purpose may expose themselves to civil proceedings,¹¹¹ sanction from the regulator,¹¹² and/or be required by the regulator or the Courts to account for their management of trust funds.¹¹³

Practitioners are also reminded to ensure that their advice in relation to crowdfunding does not stray into financial advice (see page 30) and/or is of a nature covered by their professional indemnity insurance.

Retainers

The terms of the retainer and the costs agreement made with the client who is crowdfunding can give rise to ethical issues.

For example, the purposes to which crowdfunding can be put should be clearly described and agreed with the client, and accurately represented to potential donors. Questions which should be dealt with include the possible use of funds as security for costs if the court orders such security, and/or for payment of the other party's legal costs if the action is unsuccessful. Other issues include whether or not there is any obligation to return excess funds if the matter is settled at an early stage, or how any surplus funds are to be applied.

Practitioners should consider the extent to which the ethical issues arising from crowdfunding should be managed through the retainer. For example, retainers could include express termination clauses in the event that certain advice is not followed. This could cover express termination, for example:

- when clients, against advice, publish legal advice on the crowdfunding website; and/or

¹⁰⁹ [Barclays Bank Ltd v Quistclose Investments Ltd](#) [1968] UKHL 4; [1970] AC 567; [1968] 3 WLR 1097; [1968] 3 All ER 651

¹¹⁰ See [Australasian Conference Association Ltd v Mainline Constructions Pty Ltd \(in liquidation\)](#) (1978) 141 CLR 335 at 353.

¹¹¹ See *Barnes v Addy* (1874) LR 9 Ch App 244 at 251-252 per the Lord Chancellor:

“[S]trangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.”

¹¹² For example Chapter 4 of the Uniform Law or under Rule 5 ASCR.

¹¹³ For example, see s162 of the Uniform Law; also see Dal Pont, G E, 'I Want Information! Beneficiaries' Basic Right or Court Controlled Discretion?' [2013] UTasLawRw 3; (2013) 32(1) University of Tasmania Law Review 52 (online, <http://classic.austlii.edu.au/au/journals/UTasLawRw/2013/3.html>)

- when clients, against advice, publish and/or refuse to remove false statements and misrepresentations on the crowdfunding platform.

Retainers 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.

The District of Columbia [Ethics Opinion 375](#) addresses this issue of retainers in crowd-funded matters and notes:

Even when a lawyer has regularly represented a client such that a written engagement agreement may not be required, crowdfunding can trigger areas of confusion that may not be present in a traditional client-self pay situation, such as ownership of excess crowdfunds raised and responsibility for payment if crowdfunds fall short of legal fees and expenses incurred. Accordingly, the Committee strongly encourages lawyers to have a written fee agreement for every representation involving crowdfunding by the lawyer.

The Philadelphia Bar Association Opinion 2915-6 similarly addresses such considerations:

First, the fee arrangement should include terms which describe the lawyer's obligations including the lawyer's obligation to remain in the case, assuming the client wishes him to do so, until its conclusion or until some other point at which retention of the total fees paid would not constitute an excessive fee. For example, the fee arrangement with the client could state that the inquirer is obligated to remain in the representation until the time expended reaches a total figure such that the total fee paid is reasonable in light of that time expended.

Second, the arrangement should require that the amount raised be placed in a trust account established under Rule 1.15 until those amounts are earned in accordance with the terms of the final fee agreement. Until such time that it is determined that the fee is actually earned, the monies raised constitute Rule 1.15 funds and should be held separate from the lawyer's own property.

In this way it is open to legal practitioners to risk-manage this issue to some degree through their retainers.

It is notable that a matter raised in consultation was whether practitioners could exclude all crowdfunding advice through their retainer. While it is open to practitioners to attempt to limit their duty of care to their client via the scope of their retainer,¹¹⁴ not all matters can be excluded. A practitioner has an obligation to alert his or her clients to all relevant legal risks that would have a negative impact on the client, regardless of the retainer, and to address all matters that reasonably arise in the course of carrying out a client's instructions.¹¹⁵

This is linked to the duty of competence, noting that some Courts have held that practitioners must take reasonable steps to keep up to date with developments in their field of practice, as part of achieving the duty of competence to their client.¹¹⁶ Should the lawyer deem their knowledge in this area to be insufficient to properly advise the client, it is open to the practitioner to either decline the case¹¹⁷ or to seek further specialist advice on the subject such as through a limited brief to Counsel.

¹¹⁴ *Hawkins v Clayton* (1988) 164 CLR 539 at 582; Dal Pont GE, (n 66),154.

¹¹⁵ See: *Hawkins v Clayton* (1988) 164 CLR 539 at 579; *Boyce v Rendells* [1983] 2 EGLR 146 at 149; *Credit Lyonnais SA v Russell Jones & Walker (a firm)* [2003] Lloyd's Rep PN 7 at [28]; *Cadoks Pty Ltd v Wallace Westley & Vigar Pty Ltd* (2000) 2 VR 569 at [120]; *Gilbert v Shanahan* [1998] 3 NZLR 528 at 537; Dal Pont GE, (n 63),156, 158.

¹¹⁶ See *Law Society of New South Wales v Moulten* [1981] 2 NSWLR 736 at 751; and *Council of the Law Society of New South Wales v Sandroussi* [2012] NSWADT 40 at [39]; Dal Pont GE, (n 63),116-117.

¹¹⁷ Dal Pont GE, (n 63),116.

The key issue is whether advice in respect of crowdfunding is considered something that is a relevant matter that reasonably arises in the course of a case, or the subject for specialist advice. This is a matter that, at the time of writing this Guidance Note, has not to the knowledge of the CFWG been considered by the Courts. However, it is noted that the regulatory and related issues arising from the crowdfunding of legal costs are relevant matters that involve risks to the client, and therefore practitioners should be cautious about relying on any retainers seeking to wholly exclude such advice.

At a minimum, one could argue that a client ought to be notified of these relevant issues and advised to seek out specialist advice (whether facilitated by the practitioner or otherwise). This would nevertheless still require a practitioner to sufficiently educate him or herself so to be able to identify the relevant issues. Failure to do so, and continuing to act in a matter where crowdfunding is a factor without providing the relevant advice, potentially exposes the practitioner to possible professional negligence proceedings and sanction from the designated local regulator.

Future considerations

Crowdfunding is recognised as being a complex and developing topic which the Law Council of Australia intends to monitor.

The Law Council may in the future consider recommendations for the introduction of specific regulatory measures or ethical rules in response to this issue, although there are no recommendations of that nature at this stage.

Further information

Practitioners seeking further information on this issue are encouraged to contact their local law society or bar association.

Comments on this Guidance Note may be sent to the Law Council of Australia at:

Email: mail@lawcouncil.asn.au