# Draft CAANZ Guidance

# The application of the Australian Consumer Law to fundraising

Consumer Affairs Australia and New Zealand (CAANZ) released this guide following interest from the charities, not-for-profit and fundraising sectors for more information about when the Australian Consumer Law (ACL) applies to fundraising activities.

**Fundraising and the ACL**

**Key Point**

If you engage in fundraising activities you may have obligations under the ACL.

The ACL is a single, national consumer protection law, which applies in the same way nationally and in each State and Territory. The ACL sets out rules that must be followed when dealing with consumers.

The ACL applies to certain activities of charities, not-for-profit entities and fundraisers. Whether the ACL applies to a particular fundraising activity depends on whether that activity occurs in ‘trade or commerce’. If it does, then you should expect the ACL to apply to that activity.

Your fundraising activities are also likely to be captured by other State, Territory and Commonwealth laws that govern charities, not-for-profit entities and fundraisers. These sector-specific laws and regulators typically deliver protections and obligations that are different to those in the ACL, which is a general law that applies across the economy.

**The application of the ACL**

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| **Key Points**  Generally, if you:   * engage in a fundraising activity involving a supply of goods or services * are a for-profit professional fundraiser or * are fundraising in an organised, continuous and repetitive way   then your fundraising activity is likely to be in trade or commerce and you are likely to have certain obligations under the ACL. |

Generally, the ACL only applies to activities that are in **trade or commerce**, including business or professional activities, whether or not carried on for profit.

The trade or commerce threshold is intended to separate business activities from other activities and only apply the ACL to the business activities. When considering whether your activities are in trade or commerce, you need to consider the *characteristics of the activity*; not merely your organisational structure or whether your operation is for profit or not. You may be acting in trade or commerce for some of your activities but not others.

SUPPLY OF GOODS OR SERVICES

If you are regularly supplying goods or services in return for payment or other consideration, **including a donation**, then that activity is likely to be in trade or commerce and the ACL is likely to apply to you when you engage in that activity.

PROFESSIONAL FUNDRAISERS

Some charities, not-for-profit entities and fundraisers pay professional third party fundraisers to conduct fundraising activities on their behalf. Professional fundraisers are in the business of soliciting donations and the solicitation of donations by them is likely to be in trade or commerce. If you engage a professional fundraiser to carry out fundraising activities on your behalf then you need to be confident that their conduct does not breach the ACL.

**EXAMPLE**

A third party marketing company is paid to conduct a campaign, collecting donations on behalf of a registered charity that supports disease research. When soliciting donations, the employees of the third party marketing company state that all of the donations received will go towards that research. However, in reality, the commission received by the marketing company accounts for 60% of the donated funds. The conduct of the marketing company, engaged in on behalf of the registered charity, is likely to be in trade or commerce and likely to amount to misleading or deceptive conduct under the ACL.

FUNDRAISING IN AN ORGANISED, CONTINUOUS AND REPETITIVE WAY

Regardless of whether you collect donations or payments for goods or services by volunteer, employee or professional fundraiser, if those donations or payments are solicited in a business-like way then that fundraising activity is likely to be in trade or commerce and subject to the ACL.

A fundraising activity is more likely to be undertaken in a business-like way and therefore in trade or commerce when one or more of the following applies:

* it is undertaken in an organised, continuous and repetitive way
* the entity fundraising is incorporated or otherwise established as a legal entity
* the entity fundraising keeps financial records of the fundraising activity
* the entity fundraising has assets and employees
* the entity fundraising has internal management processes, policies and procedures that relate to the fundraising activity
* the entity fundraising measures fundraising outputs and compares those to fundraising goals.

**EXAMPLE**

An incorporated association is established for the purpose of providing volunteer emergency services, being partly funded by donations from the public. The association develops a strategic plan, which includes its fundraising activities. The association keeps records of its fundraising revenue and expenses, measures its performance against goals and undertakes regular fundraising drives with a view to meeting those goals.

The ACL is likely to apply to the fundraising activities of the incorporated association, because these activities are undertaken in a business-like way and therefore the fundraising activities are likely to be undertaken in trade or commerce.

Collecting a non-enduring donation for a one-off cause is unlikely to be in trade or commerce. It is not likely to be conducted with the level of organisation, continuity and repetition of a business-like activity.

**EXAMPLE**

A person sets up a one-time peer to peer fundraising appeal stating that the monies received will be used for seeking medical treatment for their ill child. They do not have a child and the money obtained was used for a holiday. The ACL is unlikely to apply to the misleading statements as the statement did not occur during a business like activity. However, this may be opportunistic fraud and the person soliciting donations may be liable under other laws, including criminal laws, for obtaining a financial advantage by deception. The conduct may also breach the rules of the online platform used to solicit donations.

**EXAMPLE**

A parent solicits donations from their extended family and work colleagues stating that the money will be used to fund their child attending a State athletics carnival. The funds are used for other purposes.

The ACL is unlikely to apply.

OTHER LAWS

If your fundraising activity is not in trade or commerce then the ACL obligations do not apply to that activity. The ACL may still apply to your other activities. Others laws may apply to your fundraising activities including State and Territory fundraising legislation, criminal and other laws. Your entity is also regulated by laws governing its incorporation, such as State and Territory associations legislation or the *Corporations Act 2001*.

The Australian Charities and Not-for-profits Commission (ACNC) is the national regulator of charities. Whilst the ACNC does not regulate fundraising *per se*, charities that are registered with the ACNC must conduct their operations in compliance with the *Australian Charities and Not-for-profits Commission Act 2012* and ACNC governance standards.

**Your obligations under the ACL**

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| **Key Point**  You should be open, truthful and fair when fundraising. If you are, then you are unlikely to raise concerns under the ACL. |

The extent to which a particular provision of the ACL may apply to your activities depends on the wording of the provision of the ACL, the character and nature of your organisation and the particular facts around how the activity is conducted.

If your fundraising activities are in trade or commerce then you have a number of obligations that you must meet that are designed to protect consumers. Broadly, this includes not:

* engaging in misleading or deceptive conduct
* making false or misleading representations
* engaging in unconscionable conduct

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| **Key Points**  Generally, if your conduct is in trade or commerce:   * you must not engage in misleading or deceptive conduct or unconscionable conduct; and * if your fundraising activities also involve supplying goods or services, you must not make false or misleading representations or engage in unconscionable conduct in relation to the supply of those goods or services. |

**The prohibition on misleading or deceptive conduct**

If your fundraising activities are in trade or commerce then you are required by law not to mislead or deceive. This obligation applies broadly, including if you are selling a good or service but also if you are soliciting donations of money only (i.e. without supplying a good or service).

Some examples of conduct that will mislead a donor include:

* making claims about where the money you collect will go, or what proportion is used to achieve the represented purpose, that are not true
* claiming to be a volunteer collecting money on behalf of a charity, not-for-profit or fundraiser when that is not the case, for example, where you receive a commission from donations secured
* claiming that a person is making a one-off donation when they are in fact making an enduring (i.e. ongoing) donation
* claiming that the good or service a person is purchasing has certain qualities or characteristics that it does not have.

You can find general information regarding the obligation to not engage in misleading or deceptive conduct in trade or commerce in [*Avoiding unfair business practices: A guide for businesses and legal practitioners*](https://www.accc.gov.au/publications/avoiding-unfair-business-practices-a-guide-for-businesses-legal-practitioners).

EXAMPLE

A charity is conducting its annual fundraising campaign to raise money for homeless support services. While soliciting donations, some of the charity’s volunteers and employees require donors to complete a credit card authorisation form to make, what the donor is told is, a single donation via credit card. The form is actually an agreement for an ongoing monthly donation.

The fundraising activities of the charity are likely to occur in trade or commerce due to the organised, continuous and repetitive nature of these activities. The ACL is likely to apply to the conduct of both the charity’s volunteers and employees in soliciting the donations.

**Unconscionable Conduct**

The prohibition against unconscionable conduct seeks to prevent trading practices that are unfair. Conduct may be unconscionable if it is particularly harsh or oppressive or where one party knowingly exploits the special disadvantage of another. The prohibition against unconscionable conduct reinforces the recognised societal value and expectation that consumers will be dealt with honestly, fairly and without deception and unfair pressure.

You can find further information regarding your obligations in [*Avoiding unfair business practices: A guide for businesses and legal practitioners*](https://www.accc.gov.au/publications/avoiding-unfair-business-practices-a-guide-for-businesses-legal-practitioners).

**EXAMPLE**

A charity that routinely raises money to support overseas aid pays a third-party marketing company and uses volunteers to solicit donations from elderly people in shopping centres. When a potential donor refuses to make a donation, the marketing company’s staff and the charity’s volunteers follow them around the shopping centre, pressuring them into completing direct debit forms and yelling at them in front of fellow shoppers. The potential donors are told that the direct debit form is only kept on file in case the potential donor changes their mind and chooses to donate in the future. Completed direct debit forms are in fact used to authorise ongoing monthly donations from the date they are processed.

The fundraising activities of the charity and the third-party marketing company are both likely to occur in trade or commerce. The conduct of the marketing company’s staff and the charity’s volunteers in soliciting donations may amount to misleading or deceptive conduct. The tactics used in soliciting the donations from a vulnerable consumer group may also amount to unconscionable conduct under the ACL.

**Obligations that only apply if fundraising activities are in connection to the supply of a good or service**

The obligation not to mislead or deceive or engage in unconscionable conduct in trade or commerce applies irrespective of whether you are seeking a donation of money only or are fundraising in connection with the supply of a good or a service, such as supplying badges or raffle tickets in exchange for donations of money.

If your fundraising activities involve supplying a good or a service then you have additional obligations under the ACL – not to make false or misleading representations about the good or service and not to harass or coerce donors into accepting or paying for the good or service. Obligations in relation to consumer guarantees, unsolicited consumer agreements and product safety also apply.[[1]](#footnote-1)

EXAMPLE

A not-for-profit organisation provides subsidised cleaning services to people who are disabled. The not-for-profit is able to subsidise the price of the services as it receives a range of philanthropic grants and engages in regular fundraising. The not-for-profit is likely to be engaging in conduct in trade or commerce because it is supplying a service to the consumer in exchange for payment, even though the price is subsidised.

*False or misleading representations*

It is unlawful to make false or misleading representations about goods or services when supplying, offering to supply, or promoting those goods or services. For example, you must not make false or misleading representations about:

* the quality or characteristics of the goods or services
* whether the goods are new
* where the goods were made
* testimonials relating to the goods or services
* the price or any guarantees or warranties.

*Harassment or coercion*

It is also unlawful to harass or coerce someone about the supply of, or payment for, goods or services. For example, you cannot engage in unnecessary or excessive solicitation, or use actual or threatened force, in attempting to sell goods or services for the purposes of fundraising.

**EXAMPLE**

A not-for-profit protest group uses volunteers to travel door-to-door selling books which fund the group’s protest activities. One of the volunteers pressures a person with a brain injury into purchasing the books, telling the person that if they do not buy the books, the volunteer will report them to the local council for having an overgrown garden.

The conduct of the volunteer may raise unconscionable conduct and harassment and coercion concerns under the ACL because the book was supplied to the person using coercive tactics that appear to target them as a vulnerable consumer.

You can find further information regarding your obligations in [*Avoiding unfair business practices: A guide for businesses and legal practitioners*](https://www.accc.gov.au/publications/avoiding-unfair-business-practices-a-guide-for-businesses-legal-practitioners).

**Enforcing the law**

ACL regulators investigate complaints about potential breaches of the ACL and take enforcement action where necessary and where this falls within current priorities. In some cases enforcement action can include issuing an infringement notice where the relevant regulator has reasonable grounds to believe that an entity has breached the ACL. ACL regulators can also take court action against an entity, in some cases seeking pecuniary penalties. The maximum penalty for some ACL provisions is $1.1m for corporations and $220 000 for individuals, with lesser civil penalties applying to other contraventions. Other remedies including Court enforceable undertakings and corrective advertising are also available. ACL regulators also utilise a range of compliance tools to prevent breaches of the ACL including business and consumer education, and working closely with stakeholders and other agencies.

1. You can find further information on consumer guarantees in [*Consumer guarantees – a guide for businesses and legal practitioners*](https://www.accc.gov.au/publications/consumer-guarantees-a-guide-for-businesses-and-legal-practitioners)*. You can find further information about product safety at productsafety.gov.au*. [↑](#footnote-ref-1)