



New South Wales

# Charitable Fundraising Amendment Bill 2018

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

This Bill is cognate with the *Fair Trading Legislation Amendment (Reform) Bill 2018*.

## Overview of Bill

The object of this Bill is to amend the *Charitable Fundraising Act 1991* (the **Principal Act**) to give effect to certain recommendations contained in the *Report of the Inquiry under the Charitable Fundraising Act 1991* undertaken by Justice Patricia Bergin and published in January 2018.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

## Schedule 1      Amendment of Charitable Fundraising Act 1991 No 69

### Interpretative amendments

**Schedule 1 [2]** inserts certain definitions into section 4 (1) of the Principal Act, including the following:

- (a) **ACNC registered entity**, which is defined as a registered entity within the meaning of the *Australian Charities and Not-for-profits Commission Act 2012* of the Commonwealth,
- (b) **Department**, which is defined to mean the Department of Finance, Services and Innovation,

- (c) **Secretary**, which is defined to mean:
- (i) the Commissioner for Fair Trading, Department of Finance, Services and Innovation, or
  - (ii) if there is no person employed as Commissioner for Fair Trading—the Secretary of the Department of Finance, Services and Innovation.

**Schedule 1 [31]** is a consequential amendment.

### **Amendments relating to investigations and enforcement of Act**

**Schedule 1 [1], [3], [26]–[30], [32]–[37] and [40]–[42]** make amendments to revise and update provisions relating to investigations of contraventions of the Principal Act or the regulations and otherwise deal with the enforcement of that Act and the regulations.

**Schedule 1 [26]** inserts proposed Part 2A (proposed sections 25A–25ZA) into the Principal Act to revise and update provisions relating to investigations of contraventions of that Act or the regulations under that Act and other enforcement provisions.

**Division 1 of Part 2A** contains provisions dealing with investigation powers.

**Proposed section 25A** enables the Secretary to appoint authorised officers for the purposes of the Principal Act. The regulations are empowered to authorise police officers of or above a specified rank to exercise any or all of the functions of an authorised officer.

**Proposed section 25B** requires an authorised officer to be issued with an identity card in a form approved by the Secretary. The card must be returned to the Secretary if an authorised officer ceases to be an authorised officer or the Secretary requests the return of the card.

**Proposed section 25C** requires an authorised officer to carry his or her identity card at all times when exercising functions as an authorised officer and to produce the card when requested to do so by a person in respect of whom the authorised officer is exercising a power.

**Proposed section 25D** provides that the investigation powers may be used if the Secretary or an authorised officer reasonably believes that it is necessary to do so to determine whether there has been a contravention of the Principal Act, regulations made under the Principal Act or an authority issued under the Principal Act.

**Proposed section 25E** permits an authorised officer to enter premises (other than residential premises) without the occupier's consent and without a search warrant. An authorised officer may enter residential premises with the occupier's consent or if authorised by a search warrant.

**Proposed section 25F** limits entry to premises to reasonable times during the day, a time when a fundraising appeal is being conducted, a time when premises are open for entry and a time that is permitted by the occupier or a search warrant. The Secretary may certify other times when an authorised officer may enter premises.

**Proposed section 25G** sets out the powers of an authorised officer who enters premises, including to make inquiries of persons at the premises, to require documents to be produced, to take photos and make recordings and to seize documents.

**Proposed section 25H** enables an authorised officer to require accounts and statements to be produced and to make copies of and examine any accounts and statements that are produced.

**Proposed section 25I** enables an authorised officer to apply for a search warrant to inspect premises if the authorised officer has reasonable grounds for believing that a provision of the Principal Act or regulations under the Principal Act is being contravened on the premises.

**Proposed section 25J** requires an authorised officer to do as little damage as possible when exercising a function and allows reasonable compensation to be recovered from the Crown if damage is caused by a person exercising a power to enter premises.

**Proposed section 25K** enables the Minister administering the Principal Act (the *Minister*) to direct a person or body to pay the remuneration and expenses of an authorised officer for the exercise of investigation functions in relation to the person or body, if a person has been found guilty of an offence.

**Proposed section 25L** establishes offences relating to non-compliance with requirements of authorised officers, including hindering or obstructing an authorised officer exercising functions, failing to comply with requirements and failing to produce documents or things.

**Division 2 of Part 2A** contains provisions dealing with other general enforcement powers.

**Proposed section 25M** enables an authorised officer to issue a compliance notice to a person or organisation conducting or proposing to conduct a fundraising appeal. The notice may require the person or organisation to remedy or prevent a contravention of the Principal Act or the regulations under the Principal Act or a condition of an authority issued under the Principal Act or to remedy things or operations causing or likely to cause the contravention.

**Proposed section 25N** enables an authorised officer to extend the period for complying with a compliance notice given to a person or organisation.

**Proposed section 25O** enables an authorised officer to make minor changes to a compliance notice and confers power on the Secretary to revoke or vary a compliance notice. The proposed section also preserves the validity of a compliance notice in the case of certain errors in the notice.

**Proposed section 25P** enables the Secretary to give an order to a person or organisation conducting or proposing to conduct a fundraising appeal, prohibiting the conduct of the fundraising appeal, if the Secretary is satisfied that the Principal Act, regulations under the Principal Act or conditions of an authority have not been, or will not be, complied with or that it is against the public interest for the fundraising appeal to be conducted.

**Proposed section 25Q** enables the Secretary to make an order prohibiting a person or organisation from conducting any fundraising appeal for a period of up to 2 years if the Secretary is satisfied that the person or organisation has persistently failed to comply with the Principal Act, regulations under the Principal Act or conditions of an authority and is likely to continue to do so. An application for an administrative review of the Secretary's decision to make the order may be made to the Civil and Administrative Tribunal.

**Division 3 of Part 2A** contains provisions dealing with enforceable undertakings.

**Proposed section 25R** provides for the Secretary to accept written undertakings by a person in connection with a contravention or alleged contravention of the Principal Act or the regulations under that Act. The undertaking will be enforceable once the Secretary's decision is notified to the person giving the undertaking.

**Proposed section 25S** requires the Secretary to give notice of a decision about accepting or rejecting an enforceable undertaking and requires notice of a decision to accept an undertaking, and of the reasons for the decision, to be published.

**Proposed section 25T** makes it an offence for a person to contravene an enforceable undertaking that is in force.

**Proposed section 25U** confers jurisdiction on the Local Court, on application by the Secretary, to direct a person who contravenes an enforceable undertaking to comply with the undertaking or make an order discharging the undertaking. The person may also be ordered to pay the costs of the proceedings and the reasonable costs of the Secretary in monitoring future compliance with the undertaking.

**Proposed section 25V** enables a person who gives an enforceable undertaking to withdraw or vary the undertaking at any time with the consent of the Secretary.

**Proposed section 25W** prohibits proceedings for a contravention of the proposed Act from being brought against a person if an enforceable undertaking is in effect in relation to that contravention. An undertaking may be given before proceedings are finalised and, if that occurs, the Secretary is to take all reasonable steps to discontinue the proceedings.

**Division 4 of Part 2A** contains other provisions dealing with offences and brings together certain current sections of the Principal Act.

**Proposed section 25X** (which is substantially the same as current section 50 of the Principal Act) requires proceedings for offences under the Principal Act to be dealt with summarily by the Local Court. Proceedings for offences may be commenced within, but not later than, 3 years after the date on which the offence is alleged to have been committed.

**Proposed section 25Y** (which is substantially the same as current section 51 of the Principal Act) makes a director of a corporation, or other person concerned in the management of a corporation, liable for the same contravention of a provision of or under the Principal Act as the corporation if the director or other person knowingly authorised or permitted the contravention.

**Proposed section 25Z** confers on a court jurisdiction to make an order suspending, revoking or varying an authority granted under the regulations under the proposed Act. The action may be taken in addition or as an alternative to imposing a penalty for an offence.

**Proposed section 25ZA** enables penalty notices to be issued for offences against the proposed Act or regulations under the proposed Act.

**Schedule 1 [1], [3], [27]–[30], [32]–[37] and [40]–[42]** make consequential amendments.

**Schedule 1 [27] and [43]** relocate a provision of the Principal Act that provides for the Supreme Court to make an order for the disposition of assets in certain circumstances (including where there has been a cancellation of an authority).

### **Amendments relating to unlawful fundraising**

**Schedule 1 [4]** substitutes sections 9 and 10 of the Principal Act to clarify the central offence provisions of that Act.

Proposed section 9 (Conducting unlawful fundraising) carries an increased maximum penalty of 200 penalty units (rather than 50 penalty units). Also, the offence of conducting a fundraising appeal in contravention of any condition attached to an authority authorising the appeal is to be removed and dealt with in the provision relating to conditions generally (see proposed section 19 below).

Proposed section 10 clarifies the obligations of participants in fundraising appeals. The new offence provides that a person must not participate in a fundraising appeal which the person knows is being conducted unlawfully. For the purposes of this offence, a fundraising appeal is being conducted unlawfully if it is being conducted:

- (a) by a person in contravention of proposed section 9, or
- (b) contrary to a condition of an authority.

### **Amendments increasing offence penalties**

**Schedule 1 [5], [9], [10] and [19]** increase the maximum penalty that certain offences carry.

**Schedule 1 [45]** increases the maximum penalty that an offence created by regulation under the Principal Act may carry.

### **Miscellaneous amendments**

**Schedule 1 [6]** amends section 11 (2) of the Principal Act to make it clear that where an appeal is conducted by a trader (within the meaning of that section), the trader and the person or organisation that holds the authority to conduct the appeal must enter into a written agreement that complies with any requirements specified in the regulations regarding the conduct of the appeal.

**Schedule 1 [7]** inserts proposed section 11 (2A) into the Principal Act to enable regulations to be made for or with respect to the following matters:

- (a) written agreements between traders and persons or organisations that hold authorities to conduct appeals, including matters that must be included in such written agreements,
- (b) matters that must be publicly disclosed by a trader when conducting an appeal in accordance with section 11.

**Schedule 1 [8] and [11]** make amendments to various provisions of the Principal Act to transfer the responsibility for granting authorities and administering the authority regime from the Minister to the Secretary. Other provisions substituted by the proposed Act make changes consistent with these amendments.

**Schedule 1 [12]** provides that the Secretary may grant an authority to conduct a fundraising appeal only if:

- (a) the Secretary is satisfied that all of the persons proposing to conduct the appeal, and all persons associated with the proposed appeal, are fit and proper persons to administer, or to be associated with, a fundraising appeal for charitable purposes, or
- (b) the applicant is an ACNC registered entity.

**Schedule 1 [13]** makes a consequential amendment.

**Schedule 1 [14]** provides that the regulations may prescribe other matters which may be grounds for the Secretary to refuse an application to conduct a fundraising appeal.

**Schedule 1 [15]** simplifies the application process and provides that the regulations may specify circumstances in which a person is not a fit and proper person.

**Schedule 1 [16]** inserts proposed section 18 into the Principal Act to provide that an authority has effect for the term specified in the authority (not exceeding 5 years).

**Schedule 1 [16]** also inserts proposed section 18A into the Principal Act to provide that an authority may be renewed by the Secretary.

**Schedule 1 [17]** substitutes section 19 of the Principal Act to make it clear that an authority may be granted unconditionally or subject to conditions and is subject to any conditions imposed by the regulations. The Secretary may, by notice in writing given to the holder of an authority, impose a condition on the authority or amend or revoke a condition of the authority (other than a condition imposed by the regulations). The regulations may provide that a contravention of a specified condition is an offence punishable by a penalty not exceeding 50 penalty units.

**Schedule 1 [17]** also inserts proposed section 19A into the Principal Act to deal with the suspension and cancellation of authorities.

**Schedule 1 [18]** substitutes section 20 (6) of the Principal Act to require that money received in the course of a fundraising appeal, before the deduction of any expenses, is to be paid immediately into an account held by the holder of the authority concerned at an authorised deposit-taking institution.

**Schedule 1 [20]** inserts a new provision to enable regulations to be made to make provision for or with respect to the following:

- (a) the identification of payments into and out of those fundraising appeal accounts and the fundraising appeals that the payments relate to,
- (b) controls on expenditure, including expenditure on administration costs and the engagement of agents, employees or collectors,
- (c) the giving of receipts,
- (d) other matters relating to dealing with money or benefits received in the course of a fundraising appeal.

**Schedule 1 [21]** substitutes section 22 (2) of the Principal Act to remove certain prescriptive record-keeping requirements from that Act and instead provide that records relating to fundraising appeals must be kept and maintained in the manner, and for the period, specified in the regulations.

**Schedule 1 [21]** also provides that the regulations may make provision for or with respect to the auditing of those records.

**Schedule 1 [22]** makes an amendment to section 22 (3) of the Principal Act that provides that if an unincorporated organisation contravenes that section, each trustee or other person who, at the time of the contravention, was a member of the governing body of the organisation is guilty of an offence. The amendment provides that such trustees or persons are guilty of the offence only if the trustee or person knowingly authorised or permitted the contravention. All new offences elsewhere in the proposed Act contain the same formulation.

**Schedule 1 [23]** substitutes section 23 of the Principal Act to simplify and clarify provisions relating to the lodgment of annual returns relating to authorities to conduct fundraising appeals.

**Schedule 1 [24]** amends section 24 of the Principal Act to provide that the accounts of any person or organisation that for the time being holds an authority to conduct a fundraising appeal, in so far as those accounts relate to receipts and expenditure in connection with any such appeals, are to be audited annually in accordance with the regulations.

**Schedule 1 [25]** inserts proposed sections 24A and 24B into the Principal Act. Proposed section 24A requires the holder of an authority to notify the Secretary of a change in certain specified circumstances. Failure to comply is an offence carrying a maximum penalty of 200 penalty units. Proposed section 24B requires the holder of an authority to give a written statement after the end of each financial year that the holder has, during that financial year, taken reasonable steps to ensure that the holder has complied with the Principal Act, the regulations and the conditions of the authority.

**Schedule 1 [38]** makes a consequential amendment.

**Schedule 1 [39]** substitutes section 48 of the Principal Act to provide that a person must not accept and keep any remuneration, payment or other benefit from an organisation that holds an authority if the person holds any office, or acts as a member of the governing body, of the organisation. The proposed section provides for exceptions and exemptions from this prohibition.

**Schedule 1 [44]** inserts proposed section 53 (2) into the Principal Act to provide that the Secretary may delegate the exercise of any function of the Secretary under that Act (other than the power of delegation) to:

- (a) any person employed in the Department, or
- (b) any person, or any class of persons, authorised for the purposes of that section by the regulations.

**Schedule 1 [46]** is a savings and transitional provision that enables savings and transitional regulations to amend the savings and transitional schedule to the Principal Act to provide for additional or different savings and transitional provisions instead of including the provisions in separate regulations.