

2 September 2016

The Coordinating Officer
Lotteries and Art Unions Act Review
Liquor & Gaming NSW

By email: lotteries.review@justice.nsw.gov.au

Submission to the *Lotteries and Art Unions Act 1901 (NSW) Discussion Paper*

Not-for-profit Law (**NFP Law**) welcomes the opportunity to respond to the Discussion Paper concerning the *Lotteries and Art Unions Act 1901 (NSW) (Act)*.

About Not-for-profit Law

Not-for-profit Law (**NFP Law**) is a program of Justice Connect, providing free and low cost legal assistance to not-for-profit community organisations. Justice Connect is a registered charity and an accredited community legal centre.

Not-for-profit Law 'helps the helpers' by providing practical legal information, advice and training to not-for-profit community organisations. By helping those involved in running not-for-profits to navigate the full range of legal issues that arise during the lifecycle of their organisation, we save their time and resources. This allows them to focus on achieving their mission, whether that is helping vulnerable people, environmental conservation, or working towards social cohesion.

Not-for-profit Law advocates for an improved legal and regulatory framework for the not-for-profit sector and for law reform that takes into account the impacts of regulation on not-for-profits. Effective and appropriate regulation of not-for-profits supports efficient and well-run not-for-profits and a thriving sector that benefits all Australians.

NFP Law's work focuses on assisting 'public interest' volunteer-run, small-to-medium community groups. We draw on our experience working with such organisations in this submission.

Please note: in this submission we use the term 'not-for-profit organisations', noting that some but not all not-for-profits meet the legal definition of a 'charity' (only about 10 percent). Whilst all charities must be not-for-profits, not all not-for-profits are charities – this is why we have used the broader term of 'not-for-profit' in this submission.

1.1. The need for a nationally-consistent regulatory regime

In our view, the most effective way to regulate community gaming, lotteries and trade promotions by not-for-profit organisations would be a nationally-consistent regulatory system. We applaud the NSW Government's review of the Act and commitment to principles-based regulation, and encourage it to extend this work by seeking cooperation of other state and territories governments to move to one national, principal based model.

Not-for-profit organisations contribute significantly to our civil society: they build our communities, support our most vulnerable, embody and celebrate our cultural traditions and work to keep us active and healthy. Many not-for-profits fundraise for their activities through community raffles, art unions and other activities regulated by the Act – and the revenue this generates is vital to their ability to pursue their not-for-profit missions and contribute to civic life.

We note the NSW Government acknowledges that community lotteries such as raffles, are a key source of income for many not-for-profit organisations, as stated by Deputy Premier Troy Grant in August 2016:

Raffles and art unions are a popular way to raise funds for charities, local sports clubs and small businesses, especially in regional NSW where community support keeps many of these organisations going.¹

The Fundraising Institute of Australia and Third Sector Management Services reiterated the key role of lotteries and art unions for charities' fundraising, in their joint submission to the Productivity Commission Inquiry into Australia's Gambling Industries in 2010:

In a survey conducted in 1995 of 148 charitable organisations in all states of Australia, 38 or 25.67% stated that they obtained income valued at \$14.5 million from lotteries/art unions/calcuttas. The median sum raised (net proceeds) were \$64,000 and the average sum raised was \$382,000.²

Given the importance of community gaming, lotteries and trade promotions to the financial viability and sustainability of many not-for-profits (as well as the need to protect consumers and participants in these activities), their appropriate and efficient regulation is important. Indeed the NSW Government's objectives of the Act include the ongoing viability of organisations that conduct charitable fundraising and lottery systems (along with the objectives of integrity, preventing practices that are unlawful, protecting those who have been misled or deceived about the proceeds of such activities and to penalise those who have acted unfairly).³

We note there are multiple and sometimes inconsistent laws governing community fundraising efforts via raffles and other lotteries and gaming activities both in NSW and across Australia. These create unnecessary compliance burdens on non-for-profit organisations, especially those that operate and/or run lottery-related fundraising activities across multiple jurisdictions, including, increasingly, online sales of raffle tickets (see image below for an example of the multiple permits required).

Example:⁴



29 Panama Crescent, Mountain Creek

LOTTERY NO.177

CLOSES: 17/10/16 | DRAWN: 21/10/16

Lottery 177 closes 12.00 Noon AEST 17/10/16 & drawn 12.00 Noon AEST 21/10/16. Draw conducted at 190 Montpelier Road, Bowen Hills QLD. Members of the public welcome. Winners advised by registered post. Results published 21/10/16 on Surf Life Saving Lottery website www.surflottery.com.au and on 26/10/2016 in "The Australian" newspaper. Tickets from \$2 each. The amount of tickets available will range from 2,500,000 (single ticket purchases) to 8,000,000 (if bundle purchases occur). Promoter: S Francia, 190 Montpelier Road, Bowen Hills QLD 4006. GPO Box 9950, Brisbane QLD 4001. QLD Licence No. 30064; VIC Permit No: 10452/16; NSW Permit No. GOCAU/1793; ACT Permit No. ACT R16/00096. Gold valued at purchase price on day. Market variations apply. Surf Life Saving Foundation to pay stamp duty and legal fees for prize home transfer. Prize home complies with council and

¹ Media Release: Cutting Red Tape for Community Fundraisers, Department of Justice, 2 August 2016, <http://www.justice.nsw.gov.au/Documents/Media%20Releases/2016/Cutting-Red-Tape-for-Community-Fundraisers.pdf> (accessed 24 August 2016).

² Submission to the Productivity Commission Inquiry into Australia's Gambling Industries, Fundraising Institute Australia Inc and Third Sector Management Services Pty Ltd (joint submission), (undated), <http://www.pc.gov.au/inquiries/completed/gambling/submissions/sub148/sub148.pdf> (accessed 24 August 2016).

³ New South Wales, Parliamentary Debates, Legislative Council, 26 June 2003, the Hon Michael Egan, 2260-2261.

⁴ Surf Live Saving, Lottery No 177, Terms and Conditions, at: https://www.surflottery.com.au/wp-content/uploads/2016/07/Terms-and-Conditions_Lottery-177.pdf?e1e3f7 (accessed on 1 September 2016).

The failure of regulation to address this complexity causes inefficiencies, costs and concerns for those involved in running not-for-profits, who are often volunteers and rarely have funds to spend on specialist legal advice to clarify the application of laws to their organisation or its activities.

The case study below seeks to illustrate this complexity, and its negative effects on small community organisations that are seeking to do the right thing.

HYPOTHETICAL CASE STUDY:⁵ YOUTH ASSOCIATION STRUGGLES TO COMPLY WITH RAFFLE LAWS

On Track is a charitable association that engages with disadvantaged youth. It received a framed and autographed photograph of Usain Bolt, valued at \$7,000. It decides to raffle the photograph to raise funds for the organisation.

The association is small, mostly volunteer-run with only two paid staff. On Track is based predominantly in NSW but with some members in Victoria. It decides to promote the raffle through members in both States.

What laws apply: Interplay of community lotteries laws with charitable fundraising laws

Ralph, On Track's administrator, is given the responsibility of organising the raffle. He has never organised a raffle and is unsure what laws apply. As On Track is based in NSW and the competition will be run from NSW, he only looks at NSW laws. After some research, Ralph thinks that either the *Lotteries and Art Unions Act* or the *Charitable Fundraising Act* in NSW applies. Surely it can't be both?

The legislation is difficult to understand

Ralph looks up the *Lotteries & Art Unions Act* but finds the language really old-fashioned and confusing. For example, the Act starts off by saying that raffles are prohibited [s 3(4) of the Act] but when he reads further (s 4 of the Act) it seems that some lotteries are permitted. (Are raffles a lottery, Ralph wonders? It's unclear to him, as 'lottery' is defined in the Act by what it's not, rather than by what it is.) Feeling frustrated and very confused, he decides to visit the Liquor & Gaming website to see if he can find out more information about what a raffle is and how to run it.

Compliance burden

When Ralph reads the Liquor & Gaming factsheet on raffles he is relieved to find out that because the prize value will be less than \$30,000, On Track does not need a permit. However, while he does not need a permit he still has to meet all these other rules in both the Act and Regulations. These include prescriptive rules about what information must be recorded on the tickets, the format of tickets, how the raffle can be promoted, record keeping obligations as well as many other rules. He is overwhelmed.

Ralph then finds out that On Track also has to comply with charitable fundraising laws, which set out a slightly different set of prescriptive rules. He begins to wonder whether it is worth it.

He puts all the information on the tickets that the NSW Acts say he has to and then puts in a sentence about the "The cost of this ticket is tax deductible" because On Track has deductible gift recipient (DGR) status. Ralph's manager tells Ralph that she does not think this is correct. He does some research and finds out that whilst the organisation is a DGR, raffle tickets do not meet requirements for tax deductibility. He prints all the tickets again. Poor Ralph.

Cross-jurisdictional complexity

All the tickets sell and Ralph is glad about that (although he is behind in all of his other work). Then he finds out that because some people in Victoria bought some tickets that On Track needed to also comply with the laws there. Ralph is anxious about On Track potentially being prosecuted for failing to abide by the laws in Victoria. He tried to be compliant, wanting to do the right thing and now feels he has let the organisation down.

Too much hassle

Given the time and effort involved in running the raffle On Track is reluctant to engage in any future raffle or other community gaming activity for the organisation. This creates difficulties for the organisation's fundraising.

The laws regulating not-for-profit 'fundraisers' via raffles and other lotteries are part of an overall regulatory landscape for the not-for-profit sector that has been acknowledged as mired in red tape – characterised by the

⁵ This case study is not based on a real-life scenario but reflects the type of feedback we hear from NFPs through our work assisting hundreds of organisations per year. The scenario is based on existing laws.

Productivity Commission in 2010 as complex, lacking in coherence and sufficient transparency, and costly to not-for-profit organisations.⁶ Despite streamlining in some areas in recent years, there is still great complexity, inconsistency and duplication within the regulatory system. There have been numerous calls for uniform regulation across Australia,⁷ and earlier this year it was reported that ‘overwhelmingly, fundraising is the source of the greatest amount of regulatory burden for charitable organisations’ and that fundraising was the “top priority for reform and an area recognised as making the most difference for regulatory burden reduction”.⁸

In this regard, we applaud the NSW Government for its leadership in proposing the abolishment of the *Charitable Fundraising Act 1991* (NSW), as one way of cutting red tape for the sector. We encourage the NSW Government to continue this work by delivering a streamlined, principles-based regulatory approach to community gaming, lotteries and trade promotions which makes it easier for not-for-profit organisations to (compliantly) conduct such activities, wherever they occur in Australia.

In many ways, our recent submissions⁹ in relation to charitable fundraising reform are also applicable to this review of the Act. In these submissions, we have argued the existing state-based, permit-driven regulatory approach has produced an overly burdensome and inadequately-enforced system, which requires national reform to achieve a harmonised and principles-based framework. We refer to the following NFP Law submissions on reform of charitable fundraising which are of relevance to issues raised by this Discussion Paper:

- NSW Fair Trading, *Charitable Fundraising Review Discussion Paper 2016* (submitted 15 July 2016), where we broadly supported the repeal of the *Charitable Fundraising Act 1991* (NSW), and
- Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Issues Paper* (submitted 27 May 2016), where we proposed that the Australian Consumer Law (**ACL**) should be clarified to ensure its application to fundraising activities; it is our view that minor amendments to the ACL would enable the repeal of state and territory fundraising regimes, thereby effectively creating a nationally-consistent regulatory regime. **(This submission is included at Annexure A.)**

The reasons for changing to the one national law from a fragmented approach, as stated by the Hon Joe Ludwig, Special Minister for the State and Cabinet Secretary on the Second Reading of the Australian Consumer Law, apply equally to the community lotteries and trade promotion context:

While these laws may work well for many purposes, each of them differs—to the cost of consumers and business. Australian consumers deserve laws which make their rights clear and consistent, and which protect them equally wherever they are. At the same time, Australian businesses deserve simple, national consumer laws that make compliance easier. A single national consumer law is the best means of achieving these results.¹⁰

For the not-for-profit sector in NSW, there would be a significant reduction in red-tape if there was one nationally-consistent, principles-based regulatory regime for community gaming, lotteries and trade promotions across Australia. Given the New South Wales Government has acknowledged more broadly the ACL may apply to fundraising activities (pending the facts of each case),¹¹ further consideration could be given by the NSW Government to its use (through amendment, including through its voluntary codes of conduct) to regulate

⁶ *Productivity Commission Research Report: Contribution of the Not-for-Profit Sector*, Productivity Commission, January 2010, <http://www.pc.gov.au/inquiries/completed/not-for-profit/report/not-for-profit-report.pdf> (accessed 24 August 2016).

⁷ *Measuring and Reducing Red Tape in the NFP Sector*, ACNC Forum, 4 December 2013, page 4 and *Research in to the Commonwealth Regulatory and Reporting Burdens on the Charity Sector*, Ernst and Young prepared for the ACNC, 30 September 2014, page 46.

⁸ *Cutting Red Tape: Options to align State, Territory and Commonwealth charity regulation*, Deloitte Access Economics, 23 February 2016, page 2-4).

⁹ See <http://www.justiceconnect.org.au/fundraisingreform>.

¹⁰ Commonwealth, Parliamentary Debates, Senate, 24 June 2010, the Hon Senator Joe Ludwig, p 4283.

¹¹ *Charitable Fundraising Review, Discussion Paper – July 2016*, New South Government, Department of Fair Trading, page 9.

gaming, lotteries and trade promotions; see our views on charitable fundraising in the ACL Review Issues Paper submission (**Annexure A**).

RECOMMENDATION 1

The NSW Government establish a modern, principles-based regulatory approach to community lotteries and trade promotions in partnership with other State and Territory governments to deliver a nationally consistent model of regulation.

1.2. The proposed NSW model

We support the simplification and modernisation of the existing regime in NSW and the adoption of a principles-based approach to regulation of community gaming, lotteries and trade promotions, as the first step towards a uniform Australia-wide regulatory regime (see Recommendation 1 and discussion above). The modernisation of existing NSW law should also adopt a plain-language approach to legislation to make the obligations easier for volunteers and staff within small community organisations to understand and comply with.

We also support a model that imposes most regulatory burden on high risk activities, relieving low-risk activities of a requirement to obtain a permit. However, we query whether a permit-based system is the most effective regulatory approach for activities covered by the Act.

While the Discussion Paper states that between 1 July 2015 and 31 July 2016 Liquor & Gaming received 99 complaints regarding the conduct of certain community lotteries and trade promotions (page 5 of Discussion Paper), no evidence is provided of how many of those complaints were prosecuted. It is therefore difficult to comment on the rate or substance of enforcement action taken under the current Act. As Liquor & Gaming NSW's enforcement and compliance results are not available to the public other than through a freedom of information request, we have not been able to make that request in the short time-frame given for the consultation process. We do note, however, in relation to its *Charitable Fundraising Act 1991* (NSW), the NSW Government stated it does not undertake any specific compliance and enforcement, and of 29 complaints investigated they did not involvement detriment to the public. Further, investigation over a different period found the majority of complaints were found to be minor and unintentional mistakes and the cases of noncompliance had mostly been found to result from complex and statutory requirements.¹²

Drawing on our submission to the ACL, we consider there may be scope to implement a more efficient 'light touch' regulatory approach which would require organisations to comply with a set of overarching principles in the Act (eg, based on fairness, impartiality and transparency of process and outcomes), which are then policed through proportionate enforcement strategies such as education and guidance, 'spot checks' and issuing of compliance substantiation notices, targeted investigations and (where necessary) more serious enforcement action.

¹² Ibid, page 11.

RECOMMENDATION 2

That, in parallel with our Recommendation 1 above, the NSW Government moves towards a principles-based approach to regulation of community gaming, lotteries and trade promotions that is in plain-language and accessible by small volunteer-run not-for-profit organisations.

RECOMMENDATION 3

That the NSW Government considers, as part of its review of the Act:

- (a) whether a permit regime is the most effective regulatory approach for activities covered by the Act; and**
- (b) potential alternatives to a permit regime, including introducing a requirement for not-for-profit organisations to comply with a set of overarching principles (based on fairness, impartiality and transparency of process and outcomes), which are enforced via ‘light touch’ strategies such as education and guidance, spot checks, issuing of compliance substantiation notices, through to targeted investigations and (where necessary) serious enforcement action.**

The following are our brief comments in relation to the proposed model in the Discussion Paper (noting that the proposal is outlined at a relatively ‘high level’, with the result that we are unable at this stage to comment on the detail or any proposed legislative drafting):

- While the proposed NSW model would create a simplified ‘category’ system for the classification of gaming activities that do and do not require a permit, all activities conducted would still need to meet the requirements of the Act, Regulations and relevant rules. Unless the requirements under current legislative framework are significantly reduced, simplified and modernised, the proposed model would still create confusion and significant barriers for organisations conducting community gaming, lotteries and trade promotions. (Please see also our comments above regarding a potential alternative to the permit-driven approach.)
- Detailed factsheets have been prepared by the Liquor & Gaming NSW to assist organisations to adhere to the requirements of the Act, Regulations and permits. While the factsheets are helpful in setting out the requirements to be met, they rarely link to the relevant sections of the Act or Regulations and are very complex. If the proposed model is going to move to a less prescriptive approach, the creation of a best practice guide that applies to all community gaming, lotteries and trade promotions (with links to relevant legislation) would help organisations get an overall snapshot of the requirements for those activities.
- We support the introduction of a civil penalty regime for breaches under the Act. While we encourage Liquor & Gaming NSW as a ‘light touch’ regulator (using methods such as education and guidance as a first intervention to ensuring organisations’ and individuals’ compliance with the Act, as outlined above) we also encourage it to use other enforcement tools available in appropriate circumstances, including penalty notices.

2. Conclusion

In conclusion, the current review of the Act provides both the opportunity to simplify the existing regime in NSW, and then work towards the delivery of a modern, principles-based regulatory approach to community lotteries and trade promotions in partnership with other State and Territory governments to deliver a nationally consistent model of regulation.

We welcome any opportunity to discuss this submission or contribute to further stages of the reform process.

Yours faithfully



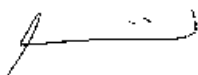
Juanita Pope, Director

Not-for-profit Law

Justice Connect

juanita.pope@justiceconnect.org.au

03 8636 4423



Savi Manii, Manager of Advice (NSW)

Not-for-profit Law

Justice Connect

savi.manii@justiceconnect.org.au

02 8599 2115