We have previously commented on the High Court decision in *Commissioner of Taxation v Word Investments Limited* [2008] HCA 55. The High Court held that a company undertaking commercial activities can be a charitable institution and exempt from tax.

**Tax Office’s response**

The Australian Taxation Office issued a Decision Impact Statement on the Word Investments case, which outlines their response to the case.

The Tax Office advised that they will consider this High Court decision in determining the status of any entity claiming exemption as a charitable, religious, scientific or public educational institution. The outcome in each case will depend on the objects of each entity and how those objects are put into practice.

The Tax Office also reminded entities that charitable institutions must apply for exemption and be endorsed by the Tax Office to be exempt.

As the Tax Office accepted the principles in the High Court decision, now may be an ideal time to review a charity’s structure. It should now be possible for charities to separate their commercial and fundraising activities from their core charitable activities, and still be exempt from income tax.

**Government’s response in the Federal Budget**

The High Court also held that if charities merely pass funds within Australia to another charity that conducts its activities overseas, these charities are considered to be pursuing their objectives principally ‘in Australia’.

In the 2009-2010 Federal Budget, the government announced that it will amend the ‘in Australia’ requirements in the legislation that apply to tax exempt charities, so that the government retains the ability to scrutinise organisations that pass money to overseas charities. This will reverse the decision that charities and other income tax exempt entities can direct funds to overseas projects outside the current restrictions.

We will be monitoring this amendment of the legislation and keep you updated on any progress.

**“A healthier future for all Australians” Final report of NHHRC released**

The National Health & Hospitals Reform Commission has issued its final report – “A healthier future for all Australians”. The report includes 123 recommendations (many with sub items) which includes significant changes to health and aged care in Australia. Various industry bodies and individual companies have commented on the recommendations, and will continue to do so. As the Federal Government’s responses to the recommendations
In the meantime, pending the government’s response to the report and any actual legislative changes, care will be required in negotiating almost any longer term contract to ensure that the contract does not assume continuation of the current structure of the health sector.

Significant changes to the provisions of the Trade Practices Act 1974 (Cth) (Act) that deal with cartels came into force on 24 July 2009.

The ACCC advises that common forms of cartel conduct are:

> output restrictions
> allocating customers, suppliers and territories
> price fixing
> bid-rigging.

Like a number of other provisions of the Act, the cartel provisions capture ‘contracts, arrangements and understandings’ (CAUs), so conduct that cannot be evidenced by a written agreement between two competitors can still be caught.

The Act now provides for a civil cartel prohibition and a criminal cartel offence. ‘Making’ a CAU that contains a cartel provision, and ‘giving effect’ to a CAU that contains a cartel provision are both offences under the Act.

For individuals, the cartel offence is punishable by imprisonment of up to 10 years and/or fines of up to $220,000 per contravention. Under the civil prohibition, individuals may be liable to a pecuniary penalty of up to $500,000 per contravention.

For corporations, the maximum fine or pecuniary penalty for each contravention of the cartel offence or civil prohibition is the greater of:

> $10,000,000;
> three times the total value of the benefits obtained by one or more persons reasonably attributable to the commission of the offence/act or omission in contravention of the civil prohibition;
> where those benefits cannot be fully determined, 10 per cent of the corporate group’s annual turnover in the 12-month period when the offence/contravention occurred.

Other sanctions relating to the cartel offence and civil prohibition include orders disqualifying a person from managing corporations and community service orders. Injunctions can also be ordered to stop the offending conduct.

The Act includes a number of exemptions from the new cartel provisions. These exemptions relate to:

> conduct subject to a collective bargaining notice;
> conduct subject to authorisation;
> some joint ventures;
> agreements between related bodies corporate;
> collective acquisition of goods or services;
> anti-overlap provisions.

Compliance with the Trade Practices Act has always been an important issue in the health sector. The new tougher cartel laws mean that it is now more important than ever to ensure compliance. When dealing with competitors or entering into arrangements that may impact on competition in a particular market such as where the arrangements involve exclusivity, rostering or anything that could be seen as sharing a market (whether those arrangements are in the form of a formal written contract or not), it is imperative to consider the cartel provisions, and whether any exemptions may apply to the proposed conduct.

Cartels operate in secret. Therefore to encourage companies or individuals to come forward and disclose the cartel arrangements, the ACCC has an immunity policy which grants protection to the first person to come forward and disclose the cartel arrangements. The policy is sometimes called the “race to the confessional”. If an individual or a company has a concern, it is important to act quickly in order to gain the benefits of the immunity policy. If successful, it may keep you out of jail!

These new laws also make it imperative that organisations understand the laws and provide effective compliance training.

In April, Justice Gzell of the New South Wales’ Supreme Court found multiple breaches of duties of care by officers of James Hardie. The finding was made in relation to a February 2001 press release from the company that described James Hardie’s foundation for victims of asbestos exposure as ‘fully-funded’, and the revelation by the company two years later that the fund in fact had a shortfall of more than $800 million.

On 20 August 2009, Justice Gzell handed down the penalties to the former officers for the breaches. Chief Executive Officer Peter Macdonald was banned from managing a corporation for 15 years and
ordered to pay a $350,000 fine. General Counsel/Company Secretary Peter Shafron was banned for seven years and fined $75,000. CFO Philip Morley was banned for five years and fined $35,000. Each other director was banned from managing a corporation for five years and fined $30,000, and the company was fined $80,000.

This landmark decision provides a timely reminder to all directors and officers of their duties and raises important issues for consideration including:
> general board conduct and processes, director participation,
> abstention in board meetings, and
> directors’ ability to delegate and the role of general counsel.

Thomson Playford Cutlers hosted interactive panel discussions with the Australian Institute of Company Directors in Adelaide on 23 June 2009 (facilitated by Loretta Reynolds, Corporate Partner, Adelaide) and in Sydney on Tuesday 14 July 2009 (facilitated by Lucinda Smith, Corporate Partner, Sydney). The topic was “The James Hardie case – what does it mean for directors?”

The Adelaide panel comprised Kevin Osborne (Deputy Chairman of Bendigo and Adelaide Bank Ltd - he chairs the Credit committee and is a member of the Audit and Risk committees - and Non-Executive Director of ABB Grain Limited) and David Simmons (ex Managing Director of Hills Industries and currently director of Gunns Ltd, Koverst Ltd and Codan Ltd), and David Gaszner (Dispute Resolution Partner, Adelaide).

The Sydney panel comprised Trevor Bourne (Chairman of Hastie Holdings Limited and Non-Executive director of Origin Energy Limited and Caltex Limited), Anne McDonald GAICD (Non-Executive Director of a number of listed and unlisted companies including The GPT Group, Spark Infrastructure and Westpac’s Life and General Insurance business), and Craig Powell (Dispute Resolution Partner, Sydney).

In light of the James Hardie decision, The Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, has asked the Corporations and Markets Advisory Committee (CAMAC) to:

> examine the guidance or codes of conduct that are available overseas for corporate directors;
> examine whether there is sufficient guidance provided to executive directors and non-executive directors in Australia to ensure that they have a clear understanding of their roles and responsibilities;
> advise whether the performance of directors would be enhanced by the introduction of guidance for directors, for example through a code of conduct or best practice guidance by a relevant regulator – and, if so, what form that guidance should take.

CAMAC is due to report back to the government by 30 April 2010.

For more information on the James Hardie decision, see our briefing note, case study and our alert on the penalties handed down. We have prepared a 10 point checklist for directors to consider in light of the James Hardie decision, and our partners are currently providing high level intensive board training to our clients to ensure that directors are protected. Please contact Lucinda Smith if you would like a copy of the checklist or if you are interested in the training.

### Legislation update

**National Health Amendment (Pharmaceutical and Other Benefits - Cost Recovery) Act 2009 (Cth)**

The National Health Amendment (Pharmaceutical and Other Benefits - Cost Recovery) Act 2009 (NSW) was assented to on 22 July 2009. This Act amends the National Health Act 1953 (Cth) to authorise the making of regulations for:

> the recovery of costs associated with the provision of certain services by the Commonwealth related to the exercise of Ministerial powers under s. 9B (Provision of vaccines) and Part VII (Pharmaceutical benefits) of the National Health Act 1953 (Cth);

> matters related to the payment of fees, including the payment of penalties in respect of late fees, the time and manner of payment, and the grant of exemptions from prescribed fees.

The Act also requires the Minister to review the impact of cost-recovery measures and the new regulations, and table an annual report.

**Health Workforce Australia Act 2009 (Cth)**

The Health Workforce Australia Act 2009 (Cth) was assented to on 22 July 2009. This Act establishes Health Workforce Australia (HWA), which forms part of the health workforce package agreed to by the Council of Australian Governments (COAG) in November 2008. The Act specifies the functions, powers, governance and structure of HWA.
The Nursing and Midwifery Practice Regulations 2009 (SA) have been made under the authority of the Nursing and Midwifery Act 2008 (SA) and commenced on 4 August 2009.

The Regulations:
> prescribe representative bodies for the purposes of the Act and the powers and functions that may be delegated by the Nursing and Midwifery Board;
> prescribe ‘mental health nursing’ as an area of practice;
> impose an obligation on each employee responsible for the supervision of a person registered or enrolled under the Act to report medical unfitness or unprofessional conduct;
> prescribe the information that must be included where a person has claimed damages or other compensation in respect of alleged negligence by a person registered or enrolled under the Act; and
> authorise the Board to fix fees and charges and provide for an exemption from the requirement to pay fees for a nurse or midwife temporarily practicing in South Australia who is qualified and pays fees under the laws of another state.

The Private Health Insurance (National Joint Replacement Register Levy) Act 2009 (Cth) was assented to on 24 June 2009. The Act establishes a ‘national joint replacement register levy’ on each joint replacement prostheses sponsor to fund the National Joint Replacement Registry, and prescribes the procedure for calculation of the rate and payment of the levy.

The Private Health Insurance Legislation Amendment Act 2009 (Cth) was assented to on 1 July 2009. The Act amends the Private Health Insurance Act 2007 (Cth) consistent with the introduction of the levy.

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