



## Health Alert March 2009

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### High Court considers commercial operations of charitable institutions

#### Charities conducting commercial activities

We have previously commented on the Full Federal Court decision in *Commissioner of Taxation v Word Investments Limited* [2007] FCAFC 171, which held that a company operating a commercial business for profit could be a charitable institution, if its profits are wholly given over to charitable bodies, in accordance with its purposes and practices.

#### Appeal to the High Court

The Commissioner of Taxation appealed to the High Court. In *Commissioner of Taxation v Word Investments Limited* [2008] HCA 55, the High Court of Australia, by a majority of 4:1, affirmed the Full Federal Court decision, holding that a company undertaking commercial activities can be a charitable institution and exempt from tax. This is as long as all of the following conditions are met:

- > the company's main purposes and objectives are charitable
- > the company's profits are raised for charitable purposes and directed to charitable institutions
- > the charitable institutions (that the funds are directed to) are obligated to use the funds for charitable purposes

- > the company itself has a physical presence in Australia and it incurs its expenditure and pursues its objectives principally in Australia.

#### Implications

The decision leaves open the possibility that a support entity of a charitable group, which provides financial support to an entity that conducts the charitable activities, could be tax exempt.

#### Opportunities to restructure

It should now be possible for charities to separate their commercial/fundraising activities from their core charitable activities. This could have significant asset protection advantages (eg the commercial activities that carry business risk could be conducted by a separate company and that separate company could still be exempt from tax).

The Word Investments case means that it now may be an ideal time to review a charity's structure.

#### Other taxes

The Word Investments case did not consider exemptions from state taxes (eg payroll tax and land tax and rates). It also did not consider the issues about what is a deductible gift recipient (eg what is a public benevolent institution). So these taxes and issues still need to be taken into account in relation to any existing structure, or any restructure.



## Amendments to the Victorian Fundraising Act

Significant changes to the Victorian fundraising laws will commence in 2009 after the *Fundraising Appeals and Consumer Acts Amendment Act 2009* (Vic) received assent in February. The amending Act will amend the fundraising laws contained within the *Fundraising Act, 1998* (Vic) (formerly called the *Fundraising Appeals Act*).

The changes to Victoria's fundraising laws include:

- > The definition of 'fundraising appeal' now clarifies that it is not only a single event over a limited period of time but can also be an ongoing activity.
- > The default registration period as a fundraiser has been changed from 12 months to 3 years. Registration and renewal applications lodged after 11 February 2009 will have a default validity period of 3 years, while applications made before this date will have the previous default period of 12 months.
- > The new Act has introduced the following new disclosure requirements:
  - Fundraisers must, at the time of registration, disclose details of the total proceeds that have been, or are estimated to be, distributed to beneficiaries; and
  - When obtaining donations as part of a supply for goods and services, all businesses must disclose to donors the exact dollar or percentage amount of donated funds which will be passed on to beneficiaries.
- > The previous sections of the *Fundraising Appeals Act, 1998* dealing with clothing bins have been removed.

- > To avoid any confusion to donors, the Act now provides that the wording on any direct debit deduction forms (used in fundraising appeals) are clear and legible. The purpose of this is to ensure that donors are aware of what they are signing up for.
- > The Director of Consumer Affairs Victoria now has the power to reduce the period of registration of a fundraiser where there is a breach of a condition and complete deregistration is not an appropriate penalty.

Most of the changes under the *Fundraising Appeals and Consumer Acts Amendment Act, 2009* (Vic) came into effect on 10 February 2009. There are, however, a couple of changes (such as those relating to commercial fundraisers, new disclosure obligations and direct debit forms) which have an implementation date of May 2009 or if not then, at latest, 1 November 2009.

## Privacy Law case note: *S v Health Service Provider [2008]*

The recent case of *S v Health Service Provider [2008] PrivCmrA 19* examined the personal information security obligations under the National Privacy Principle (NPP) 4.1, which requires organisations to take 'reasonable steps' to protect individuals' personal information from misuse, loss, unauthorised access, modification or disclosure.

### The facts

A patient visited Health Care Provider 1 (HCP1) to obtain X-rays. The patient later requested those X-rays along with her medical records be sent to a different Health Care Provider (HCP2). HCP1 chose to send the original X-ray films and the

medical records to HCP2 by general post. HCP2 received the posted goods and reported no problems.

## Did HCP1 comply with NPP 4.1?

The Commissioner found that delivery by general post did not constitute 'reasonable steps' to protect the patient's personal information and so HCP1 was in breach of NPP4.1.

## Implications for the health sector

The decision in *S v Health Service Provider* highlights the need for health care providers to ensure they understand the privacy obligations owed by them when handling personal information. Health care providers must keep in mind that sensitive personal information must be treated with strict confidentiality and they must take reasonable steps to protect the information from potential loss or misuse.

Not all personal information sent by general post will fail the reasonable steps test and decisions about the how information is to be transmitted should be made on a case by case basis. Relevant factors to consider when making these decisions include:

- > the sensitivity of the personal information;
- > the cost of alternative methods of delivery (ie: sending the personal information must not unduly place a financial burden on a health provider); and
- > the risk and consequences of loss.

Original X-rays should not be sent by general post because not only are X-rays of a sensitive nature but any loss of X-rays



is permanent to the patient and accordingly the risk is too great to send by general post.

As an alternative to general post, health care providers might consider sending personal information by courier or registered post. These forms of delivery allow for tracking and ensure greater security.

The greater the sensitive nature of personal information and the risk of significant detriment from unauthorised access, the higher the security measures expected, especially if the records are originals.

### Information on the Aged Care Sector

#### Compliance information to be made available on website

The Commonwealth Government plans to expand its [Aged Care Australia website](#) (which is designed to assist families in choosing aged care homes). From 1 July 2009 the website will contain information relating to aged care homes' compliance with government safety and standard levels. This will compliment the information available at the [Department's website](#) about sanctions.

The decision to make this information easily accessible follows representations from consumer and advocate groups to improve transparency and accountability.

#### Grant Thornton Aged Care Survey

In 2008 Grant Thornton conducted a comprehensive survey on the aged care industry. Aged care providers were asked to submit information about their financial performance, major influences on their

operations and development and options for the future.

In October 2008 Grant Thornton released its first report, which examines the impact of policy models on service quality and consumer choice.

In February 2009 Grant Thornton released its second report on its aged care survey. This report focuses in detail on the financial performance of aged care providers and presents some of the key strategies employed by operators achieving top quartile results.

Copies of the [first report](#) and [second report](#) can be downloaded from the Grant Thornton website.

### Legislation Update

#### Associations Incorporation Bill 2009 (NSW)

The object of this Bill is to repeal and re-enact the *Associations Incorporation Act 1984* (NSW).

The reforms proposed under the Bill include:

- > Introducing large (Tier 1) and small (Tier 2) associations, so that larger incorporated associations can be made subject to stricter reporting and auditing requirements
- > Requiring an association's public officer, and at least 3 of its committee members, to be resident in Australia
- > Requiring an association's committee members to disclose their pecuniary interests in any matters to be discussed at a committee meeting,
- > Creating a number of offences with respect to fraudulent behaviour and

misuse of confidential information by an association's committee members,

- > Removing the requirement for an association's documents to be executed under seal, and
- > Enabling fees under the proposed Act to be waived, remitted or postponed in appropriate circumstances.

> We will keep you updated on the progress of the Bill through Parliament and provide a more detailed explanation of the amendments when the Bill becomes law.

#### Therapeutic Goods Amendment (Medical Devices and Other Measures) Bill 2008

The *Therapeutic Goods Amendment (Medical Devices and Other Measures) Bill 2008* proposes amendments to the *Therapeutic Goods Act 1989* (Cth). The main amendments proposed in the Bill are:

- > changing the 'fit and proper person' test for the purposes of manufacturing licences and conformity assessment certificates and linking it to the conditions on manufacturing licences.
- > adding the United States Pharmacopeia and European Pharmacopeia as default standards for therapeutic goods (currently the only default standard is the British Pharmacopeia)
- > including more information on the Australian Register of Therapeutic Goods and increasing access to information by the public and other regulatory agencies
- > clarifying the advertising regulations, such as where pre-approval is required for consumer advertising of therapeutic goods.

## Review of supply arrangements of PBS medicines in residential aged care facilities and private hospitals

The amount of money that the Commonwealth Government pays for the dispensing and supply of PBS medicines is determined under the Fourth Community Pharmacy Agreement, which the Government and the Pharmacy Guild of Australia entered into in 2005.

Under that agreement the parties are required to undertake a number of reviews. One of these reviews examines the existing arrangements for PBS medicines supplied to residents in residential aged care facilities and to patients in private hospitals.

The consultation process has been completed and the discussion paper was released in December 2008. Workshops are being held in each State and Territory in April to assess the feasibility of the options proposed in responses to the discussion paper.

More information about the review and the details of the workshops are available at the [Department of Health and Ageing Website](#).

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