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Health Alert

February 2012

Warning: Public ancillary funds – your trust deed may be out of date

The Assistant Treasurer recently released the *Public Ancillary Fund Guidelines 2011* (**Guidelines**). The Guidelines commenced on 1 January 2012, subject to the transitional provisions. The purpose of the Guidelines is to set minimum standards for the governance and conduct of a Public ancillary fund (**Public AF**) and its trustee.

The Australian Taxation Office (**ATO**) also recently released a number of important documents dealing with Public AFs:

- Public AF model trust deed;
- Public AF – schedule for Deductible Gift Recipient (**DGR**) applicants;
- agreement to comply with the Guidelines;
- revocation of agreement to comply with the Guidelines;
- notification of change to the governing rules of an endorsed Public AF; and
- Public AF fact sheet.

Key issues relating to Public AF trust deeds

Thomsons Lawyers has been reviewing and amending trust deeds of Public AFs and have been in discussions with the ATO in relation to its requirements.

If you are a trustee or a director of the trustee of a Public AF, Thomsons Lawyers recommends you have the fund's trust deed reviewed. It is likely it will not comply with current requirements and will need to be amended.

There are three important but separate issues which may mean a trust deed of a Public AF may need to be amended.

1. Trust deeds for Public AF must contain certain provisions required by the Guidelines.

These guidelines are:

- guideline 10.1 – the trust deed must include objects that clearly set out the purpose of the Public AF;
- guideline 10.2 – on winding up or ceasing to be a Public AF, the net assets of the Public AF must be provided to particular types of DGRs, ie **not any** DGR;
- guideline 11.1 – the trust deed must clearly set out and reflect that the Public AF is established and operated as a not-for-profit entity; and
- guideline 18 – the trust deed must prohibit the Public AF from indemnifying the trustee, or an employee, officer or agent of the trustee, for certain losses or liabilities (eg attributable to dishonesty or gross negligence).

It is likely that the trust deeds of most Public AFs do not contain all these provisions (particularly guideline 18). Any trust deed of a Public AF which does not contain these provisions should be amended.

2. Compliance with ATO Taxation Ruling TR 95/27

The ATO continues to insist that trust deeds of Public AFs comply with ATO Taxation Ruling TR 95/27. Some of the requirements in TR 95/27 are:

- the trust deed must require that receipts are issued in the name of the fund;
- the trust deed must reflect that the public have to be invited to contribute to the fund;
- the trust deed must reflect that the majority of the members of the management committee (usually directors of the trustee) have a degree of responsibility to the community; and
- the trust deed must provide that the ATO is to be notified of any changes to the trust deed.

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It is likely that trust deeds of Public AFs that were set up before TR 95/27 was issued (ie before 2 August 1995) do not comply with TR 95/27.

Public AFs must ensure the trust deed complies with TR 95/27 regardless of the date on which it was established.

3. Transfer of funds on revocation of DGR status or winding up to eligible DGR

The income tax legislation requires that trust deeds of Public AFs include provisions which compel the trustee to transfer surplus of the following categories to an eligible DGR, on the earliest of the winding-up of the fund **or** revocation of its DGR endorsement:

- gifts of money or property and certain deductible contributions made to the fund for its principal purpose; and
- any money received by the fund because of such gifts and contributions.

Thomsons Lawyers considers it is likely that the trust deeds of Public AFs that were set up before these provisions commenced (which were effective in an earlier version of the income tax legislation from 22 December 1999), will not have such provisions in their trust deeds. An 'ordinary' winding up clause does not comply with the law.

The Government has increased the integrity measures dealing with Public AFs and the ATO is strictly enforcing those measures. The ATO is scrutinising technical compliance of trust deeds of Public AFs with the various requirements. Accordingly, there could be various reasons for amending the trust deeds of Public AFs. These include:

- compliance with the Guidelines;
- compliance with the income tax legislation; and
- compliance with the ATO's TR 95/27, Public AF model trust deed, and Public AF fact sheet.

Amendments to a trust deed of a Public AF will necessitate the trustee completing, signing and sending to the ATO the notification of change to the governing rules of an endorsed Public AF, along with copies of all relevant executed deeds.

Timing

The transitional rule in the Guidelines generally requires the deed to be amended to comply with the Guidelines by 1 July 2015. However, this transitional rule does not apply to compliance with the requirements outside of the Guidelines eg requirements under TR 95/27 and the income tax legislation – refer to the issues discussed under points 2 and 3 above.

There is some uncertainty about how critical the timing is in relation to amendments for compliance with some of the Guidelines. Thomsons Lawyers is of the view that each Public AF should make it a priority to consider the Guidelines and determine how they apply to it, and as soon as possible make any necessary changes to the way in which the Public AF is conducted and also make those amendments to the trust deeds which are required for compliance with the Guidelines.

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What's new in charitable fundraising

On 12 February 2012, the Australian Treasury issued a consultation paper on *Charitable Fundraising Regulation Reform* with the stated primary aim of reducing the compliance burden faced by charities.

The paper sets out the framework for a new nationally consistent approach to the regulation of charitable fundraising instead of the existing regime where every state and territory (except the Northern Territory) separately regulates fundraising by charities. While options are raised in some paragraphs of the paper, in general proposed action is stated on many key points.

The paper deals with:

- **Fundraising activities to be regulated** – the proposed definition is 'any activity involving soliciting or receipt of money or other property primarily for a charitable purpose', and 'charitable purpose' will be defined in accordance with the related work in progress on charity definition.
- **Possible exemptions from regulation** – these include corporate donations or donations from public and private ancillary funds, workplace appeals and donations to religious organisations from their own members. We expect that religious organisations, in particular, will want to consider the exemptions that they currently enjoy under some state legislation which are somewhat broader than the proposed exemption under the national proposal.
- **Where state regulation will continue** – it is contemplated that this could include lotteries and raffles, which would be exempt from the new fundraising regulation but remain subject to specific state laws.
- **Small charities** – it is proposed that annual fundraising up to $50,000 by a single or closely related group of organisations should be exempt from national

regulation. The implication is that those charities may still be regulated by state legislation.

- **A nationally consistent approach** – the paper recognises this cannot be achieved without both commonwealth and state laws. Even if there is not a fully applied application of the commonwealth law (or mirror state legislation), the paper notes that the states may decide to exempt charities that are covered by the national law from state fundraising law.
- **Registering for fundraising** – the paper speaks only of a 'potential' for authorisation for fundraising to be streamlined with the process of registering as a charity with the Australian Charities and Not-for-profits Commission (**ACNC**), whereas Thomsons Lawyers understood that was a definite aim as part of the one-stop shop approach for charities.
- **Regulating the conduct of fundraising** – the paper leans towards principles-based regulation relying on generic laws to achieve regulatory objectives instead of detailed provisions. For example, the paper notes that in matters such as misleading or unconscionable conduct or false or misleading representations, provisions of the Australian Consumer Law (that already operates Australia wide) could also be applied to charitable fundraising.
- **Information disclosed at the time of giving** – the paper notes this could include things such as whether the collector is being paid; whether donations are tax deductible; the charity's ABN and basic details about the charity; name badges and contact information; and a link to ACNC's public information portal on public documents issued by the charity. There is also a suggestion that ACNC might maintain a scams page on its public information portal and disclosure of whether gifts are tax deductable.
- **Information disclosure** – this would include record keeping and auditing to the extent already required under other legislation. It is proposed that reporting requirements to ACNC would replace existing reporting requirements in state fundraising legislation. Again, state legislative changes will presumably be required to achieve this.
- **Internet and electronic fundraising** – it is proposed that fundraising over the internet for charitable purposes be prohibited unless the charity is registered with ACNC.

Thomsons Lawyers will be monitoring progress with this proposed reform and including comment in future editions of our Health Alert. Responses to the Treasury paper are requested by 5 April 2012.

Click here to access copies of the discussion paper and a fact sheet issued by the Treasury.

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Victoria considers retirement village legislation reform

The Victorian Government is expected to release its response early in 2012 following consideration of submissions requested relating to its discussion paper *Retirement villages: contract information disclosure options* released in late 2011.

A variety of questions and issues were raised by Consumer Affairs Victoria in the discussion paper, with the hope that submitted responses would allow for potential development in the area leading to a reduction in complaints to the regulatory body.

The discussion paper called for submissions to be made on proposals to:

- improve the disclosure of information to prospective residents;
- set out matters that must and must not be included in contracts;
- specify a basic set of mandatory terms for contracts;
- prescribe a standard layout for contracts; and
- provide for a condition report on leased or licensed units.

The discussion paper draws heavily on the New South Wales legislation and is largely focused on whether concepts in the current New South Wales legislation could be adopted in Victoria.

Whilst significant legislative action and moves towards reform have not yet been undertaken by the Victorian Government, retirement village operators should be prepared for potential changes to the Victorian legislation, which are likely to be centred on the above issues.

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Update on eHealth Records

The Government's eHealth records initiative has been reported in previous editions of our Health Alert in 2011. Notable developments have occurred on this front and are outlined below.

A Senate Community Affairs Legislation Committee has been established to report on two Bills, namely the *Personally Controlled Electronic Health Records (Consequential Amendments) Bill 2011* (PCEHR Consequential Amendments Bill) and the *Personally Controlled Electronic Health Records Bill 2011* (PCEHR Bill).

Once enacted, the PCEHR Bill will establish the regulatory structure the eHealth records initiative will operate under and the privacy governance of the system, whilst the PCEHR Consequential Amendments will make changes to a variety of legislative instruments (*Healthcare Identifiers Act 2010, National Health Act 1953* and the *Personally Controlled Electronic Health Records Bill 2011* itself).

The list below reflects the issues for consideration by the Committee:

- privacy issues/ privacy breaches/ penalties for breaches;
- security of information on the PCEHR;
- questions about the design, functionality, and capability of the personally controlled electronic health records (PCEHR) system;
- questions regarding the use of consultants, contractors, and tenders let or hired by the National E–Health Transition authority (NEHTA) in regard to the development of the PCEHR;
- the level of functionality of the PCEHR at 1 July 2012;
- questions around the continuation of NEHTA after 1 July 2012;
- the products that NEHTA designed, made, tested, certified for use in the PCEHR; and
- any other issues the Committee considers appropriate.

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IHPA Draft Pricing Framework initiates movement on National Health Reform

The December 2011 edition of our Health Alert reported on the passing of the Federal Government's *National Health Reform Amendment (Independent Hospital Pricing Authority) Act 2011* (Cth) (**the Act**), which amended the *National Health Reform Act 2011* and established the Independent Hospital Pricing Authority (IHPA) as a statutory body.

Following this announcement, the IHPA, acting with its new regulatory powers delegated under the Act, has released the Draft Pricing Framework which will form the basis of its functions within the National Health Reform agenda.

The release of the Draft Pricing Framework seeks submissions from concerned stakeholders, with feedback required on a variety of matters that will be vital in developing the Commonwealth Government health reforms. Reform issues requiring feedback include questions relating to:

- classifications of the types of hospital services that should be included in the proposed funding arrangements;
- the establishment of criteria to assess when these services should be granted block funding as opposed to the new activity based funding scheme, including research, teaching, training and small rural hospitals;
- the national efficient price and how this should be set, including whether any adjustments should be made, along with how to decide this for private patients in public hospitals; and
- general issues relating to the phasing in of the new system to ensure a smooth and effective transition.

It is advisable that stakeholders significantly affected by the new reforms, including public hospitals and other parties that are influenced by Government funding and pricing decisions, make a detailed submission to ensure that their interests are considered as the IHPA embarks on the move towards activity based hospital funding from the Commonwealth Government. Submissions close on February 21 2012 and are to be emailed to submissions.ihpa@ihpa.gov.au

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Palliative Care Senate Inquiry plea for submissions

Announced on 1 December 2011, the Senate Inquiry into palliative care is in urgent need of submissions from interested stakeholders to ensure that the 'once-in-a-lifetime' inquiry can deliver a coordinated response to the growing challenges faced in this sector, which is particularly relevant to Australia's ageing population.

The inquiry has been established to investigate a broad range of palliative care issues, addressing all aspects of the system from interactions with the aged care sector to funding issues and the various influences on choice and access to palliative care. Eight specific factors have been identified in the terms of reference. They include:

- the factors influencing access to and choice of appropriate palliative care;
- the funding arrangements for palliative care provision;
- the efficient use of palliative, health and aged care resources;
- the effectiveness of a range of palliative care arrangements;
- the composition of the palliative care workforce;
- the adequacy of standards that apply to the provision of palliative care;
- advance care planning, including national consistency in law and policy; and
- the availability and funding of research, information and data about palliative care needs in Australia.

A low submission rate has been reported, which jeopardises the potential for the Senate Inquiry to adequately address concerns raised in palliative care. It is strongly recommended that a submission is made by relevant stakeholders including hospitals, aged care facilities, retirement villages and other parties involved in providing or interacting with palliative care, to ensure a thorough inquiry occurs that addresses all issues to ensure the future applicability and relevance of palliative care within the national aged care and health systems.

To make a submission please click here.

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Legislation Update

National standard of criminal liability for corporate officer fault proposed by Gillard Government

Parliamentary Secretary to the Treasurer David Bradbury MP released, for public comment, an exposure draft of the Personal Liability for Corporate Fault Reform Bill 2012 on 27 January 2012. This Draft Bill is part of the Coalition of Australian Government's (COAG) proposed 27 wide-scale reforms in response to its "National Partnership Agreement to Deliver a Seamless National Economy" report released in February 2011.

With productivity primarily the focus, COAG seek to establish a consistent framework of director liability reform across all Australian jurisdictions, with director's liability one of the 27 proposed COAG reforms. The release of this Draft Bill is the first tranche of proposed amendments to the *Corporations Act 2001* (Cth) (the Act) in pursuit of the uniform changes.

The Draft Bill is open for public comment. To access please click here.

A proposed change to the Act involves the repeated insertion of notes to a variety of sections attracting criminal liability to emphasise the potential sanctions involved when breaching these sections and where to locate the details of liability.

Changes have also been made to the liability of company secretaries. Responsibilities of company secretaries (s188 of the Act) such as disclosure of information to ASIC including the location of the registered office and the lodgement of financial reports have been changed from offences to civil penalty provisions. Section 1302 (location of registers) has been introduced to include actions of officers and employees of the company involved in any contravention. Section 1317G(1BA) has been inserted and clarifies that s188 contraventions are now civil penalty provisions, however the regular civil penalty ($200,000) is not applicable, with a pecuniary penalty of up to $3000 payable.

Another notable change is that the Bill proposes to increase penalties for a variety of dishonest actions by directors, secretaries and officers of companies. These increases mean that penalties for such things as failing to have a registered office or failing to lodge a notice of change of registered office or failing to lodge an annual report with ASIC or failing to notify ASIC of a change of holding company, to list a few, can carry penalties of between 5 and 60 penalty units. Currently in the jurisdiction of the Commonwealth, one penalty unit = $110.

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The Draft Bill also proposes changes to some other Commonwealth legislative instruments as outlined below:

Legislation	Proposed Change
Pooled Development Funds Act 1992	Section 50, a section with a variety of offences that officers and managers are personally liable for, will be repealed.
Insurance Contracts Act 1984	Section 11DA will replace section 76A, changing liability of directors, employees or agents from 'recklessly or intentionally' to 'authorise or permit' contraventions of this Act.
Foreign Acquisitions and Takeovers Act 1975	Authorise or permit will also be inserted here to clarify the level of involvement required for liability to be imposed on an officer. Notes will also be inserted to emphasise where this involvement is applicable.

Overall, no significant changes have been made to personal liability of director's as desired by COAG. It is anticipated that the second tranche of changes may address personal liability in more detail. In the meantime, submissions on the current proposed changes to Treasury close on 30 March 2012. Click here for details on how to lodge submissions.

New health councils regulated in NSW legislative amendment

The *Health Practitioner Regulation (New South Wales) Amendment Regulation* 2012 and the *Health Practitioner Regulation National Law (NSW) Amendment (Health Professions) Order* 2012 have amended the *Health Practitioner Regulation National Law (NSW)* to offer greater recognition to new councils for four health professions. These four councils are:

- Aboriginal and Torres Strait Islander Health Practice Council of New South Wales;
- Chinese Medicine Council of New South Wales;
- Medical Radiation Practice Council of New South Wales; and
- Occupational Therapy Council of New South Wales.

Previously, the *Health Practitioner Regulation National Law (NSW)* did not apply consistently to these councils. The primary purpose of the legislation was to rectify this.

The *Health Practitioner Regulation National Law (NSW) Amendment (Health Professions) Order* 2012 amends sections 41B and 165 of the *Health Practitioner Regulation National Law (NSW)* allowing for the Councils and their respective tribunals to be recognised.

The *Health Practitioner Regulation (New South Wales) Amendment Regulation* 2012 further recognises these Councils by inserting section 3A, and also outlines the membership requirements of these bodies. A new clause 26 also outlines that the Director-General may, before 1 July 2012 decide the amount of the complaints element for registration fees payable by health professionals that are members of the new bodies established in the *Health Practitioner Regulation National Law (NSW) Amendment (Health Professions) Order* 2012.

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