

INDEX

What's in Store for Not for Profits.....	1
The Not for Profit Sector in Review.....	2
You Can't Take It With You.....	3
Fundraising for Bushfire Victims.....	4
Book Review – Strategic issues for the Not for Profit Sector.....	5
Amendments to the Victorian Associations Incorporation Act 1981.....	5
Saving the Planet with the Help of the Tax Office.....	7
The Added Benefits of Giving.....	8
When a "Director" becomes a "Director" – a case of mistaken identity.....	9
Dischord in the Opera Community.....	10
A New NSW Associations Incorporation Act 2009?.....	11

What's in Store for Not for Profits?

2009 is shaping up as another year of changes in the social and regulatory context for Not for Profits.

Moore's Not for Profit Briefing is one way in which the Moore's Not for Profit Group keeps you up-to-date with current NFP issues.

In our quarterly Briefing you can expect to find the following:

- editorial comment on trends in the sector;
- resources to give you a better understanding of the sector;
- latest cases and legislation;
- hints on becoming more effective as a Not for Profit organisation;
- extended articles updating you on legal and governance issues.

Significant developments in 2008 include the following:

- High Court sides with Not for Profits in [Commissioner of Taxation v Word Investments Ltd](#) concerning the conduct of business activities to support charitable work;
- Senate conducts an extensive enquiry into structures and reporting requirements for Not for Profits and recommends national uniformity. [See Senate Committee Report.](#)
- Henry Review on the future of Australia's tax system considers commercial activities of Not for Profits, tax deductibility and fringe benefits tax. [See Henry Review.](#)

In the ten years we have been publishing the Not for Profit Briefing we have observed a move in public opinion and tax administration from the assumption that the Not for Profit sector ought to be encouraged to flourish with minimal regulation to regarding the Not for Profit sector with suspicion and in need of substantial regulation.

Moore's Legal will continue to advocate for consistent, sensible and minimal regulation and to provide resources to allow Not for Profits to operate more effectively.

Of course a briefing of this nature needs to be general and should you have specific issues arising in your organisation please do not hesitate to contact our Not for Profit team at Moore's Legal.

Murray Baird
Principal
Leader - Not for Profit Group

The Not for Profit Sector in Review

2008 was a "Year of Reviews" for the Not for Profit sector. Two reports show which way the wind is blowing:

- Senate Committee Report: Disclosure Regimes for Charities and Not for Profit Organisations December 2008 [Click here for copy of report.](#)
- Australia's Future Tax System - Consultation Paper [Click here for Review home page.](#)

The Senate Committee Report looked at three matters:

- Current Disclosure Regimes for Not for Profits;
- Models of Regulation and Legal Forms to improve governance and management of Not for Profits;
- Measures that would assist the sector to improve governance, standards, accountability and transparency.

Before Democrat Senators Allison and Murray departed the Senate 30th June 2008 they initiated the Senate Committee Enquiry. The catalyst was an article in Choice on-line magazine entitled "How much of your donation is gobbled up by fundraising fees and expenses?" Ninety-seven percent of respondents to a Choice survey said it was important to be informed about the effectiveness of a supported charity. Ninety-four percent said it was important that they know about a charity's cost structure.

Choice was concerned about the variability and inconsistency of the way Not for Profits communicated key information to stakeholders.

In considering the motion to establish the Senate Committee Review, the Senate noted that most of the 27 recommendations from the Charities Definition Inquiry (CDI) commissioned by the Treasurer in June 2001 had not been adopted. [Click here for link to CDI Report.](#)

The Senate Report made 15 recommendations which we summarise as follows:

- Common terminology for describing organisations within the sector and referring to size of organisations.
- A unit in government for Not for Profit issues reporting to a Minister of the third sector.
- A single independent national regulator for Not for Profits.
- A national register for Not for Profits with compulsory sign up.
- A comprehensive study by the Australian Bureau of Statistics of the sector.
- A single mandatory legal structure for the sector.
- Including the examination of tax measures in the Henry Review to reduce confusion and cost of compliance.
- A national fundraising act.
- A tiered reporting system based on annual revenue.
- A standard chart of accounts for Not for Profits.
- Financial disclosure with narrative directed to whether the organisation is achieving its mission.
- Visibility of information through a national website portal.
- A national taskforce to implement the recommendations.

Moore's Legal welcomes the move towards national recognition and regulation of Not for Profits. The current situation of national Not for Profits needing to comply with legislation in each State is onerous. However we are wary of the "one size fits all" set of solutions - particularly of one mandatory corporate structure. In our view the cost and controversy of such implementation is not warranted.

The report ought to be read by anyone seeking an overview of current issues and directions for the Not for Profit sector. However the recommendations will take time to be considered or implemented.

Meanwhile the **Henry Review** has released its consultation paper of Australia's future tax system. The key messages and submissions are summarised as follows:

- concern over business ventures suggesting that concessions for Not for Profits unfairly disadvantage taxable entities. Other submissions pointed out the commercial pursuits provide charities with funds for good works.

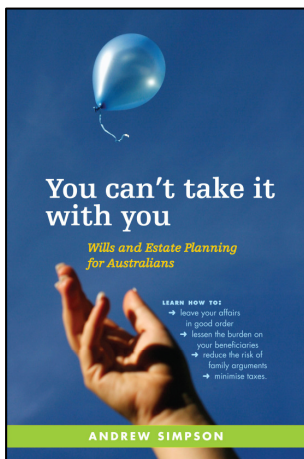
- consideration of extending the "mutuality principal" for complete tax exemption for member based organisations.
- need to look at FBT concessions to abolish, broaden or index.

The report highlights the "battle ground" over commercial activities of Not for Profits. On the one hand commercial organisations say that there is an unlevel playing field whilst Not for Profits point out that they apply the whole of their income to good works.

Moore's Legal continues to maintain that it is the "purpose" that should govern the treatment of activities and that taxable entities always have the choice to plough back profits into charitable works and have the same income tax treatment as Not for Profits.

Not for Profits and Charities by their nature are often poorly resourced and have poor sector co-ordination. This puts them at a disadvantage in making submissions. Well resourced peak bodies play a valuable role in making well researched and considered submissions to point out the value that the Not for Profit sector contributes to a civil society.

Murray Baird
Leader - Not for Profit Group



“You can’t take it with you” – New Moore's Publication

With Australia's aging population becoming larger, billions of dollars in assets will be passed on to the next generation over the coming decade, making estate planning an important consideration for baby boomers and their parents. This is especially true for those who have disabled dependents.

Written by Andrew Simpson, head of our Estate Planning, Superannuation and Structuring Work Group, **“You can't take it with you”** is a comprehensive and current guide to wills and estate planning for Australians, taking the angst out of an essential financial planning step. Written in plain-English and illustrated with case studies, this is a thorough, introductory guide to the estate planning process. Covering all the financial,

legal and human resource aspects of estate planning including wills and trusts, funeral planning, insurance and guardianship of children, readers learn how to:

- Leave affairs in good order and provide for beneficiaries
- Choose how assets will be distributed the way you want
- Reduce the risk of family squabbles about the estate
- Appoint guardians, executors, trustees
- Include business succession plans in your estate plans
- Use Powers of Attorney.

“You can't take it with you” provides readers with a clear idea of what the estate planning process should entail, minimising family difficulty during a trying time, and for making sure that hard earned assets are given to those they were intended for.

This publication is available for purchase online at [our website](#). With the recommended retail rate being \$34.95, Moore's Legal is offering the book at a discounted rate of \$25.00 for Not for Profit organisations wishing to purchase copies for interested members. Please contact Lee Newnham, our Marketing Manager on (03) 9843 2124, if you wish to take advantage of this offer.

Fundraising for Bushfire Victims

The recent Victorian bushfire tragedy has seen an outpouring of grief and acts of kindness and compassion. Many individuals and organisations have dug deep to donate and raise funds for the victims.

With this proliferation of fundraising events, and the desire to raise funds as quickly as possible, comes the risk of contravening the *Fundraising Appeals Act 1998* (Vic). Under section 17A of the Act, a person must not conduct a fundraising appeal unless he or she is registered with Consumer Affairs Victoria ("CAV") as a fundraiser. Penalties are \$27,220.80 for a corporation and \$13,610.40 and/or 12 months imprisonment for an individual.

What is a fundraising appeal?

A fundraising appeal occurs if a person solicits or receives money or a benefit (hereafter referred to simply as "money" for short) other than for exclusively their own benefit or profit. It does not matter whether the person is soliciting the money on a volunteer or paid basis. It would therefore cover everything from a pub trivia night to a doorknock appeal, or a national "telethon".

Certain activities are not considered to be fundraising appeals:

- an organisation soliciting money from its members, former members, or relatives or acquaintances of members or former members;
- an organisation soliciting money from its employees;
- a raffle, lottery or other activity authorised or permitted under the *Gambling Regulation Act 2003* (Vic);
- soliciting money from a corporation, partnership or trust that is permitted to donate money for non-profit purposes by its constitution or other empowering document.

Who is exempt from the registration requirement?

Certain organisations are exempt from registration as a fundraiser:

- any person or organisation that receives less than \$10,000 gross in a financial year from fundraising, and uses only unpaid volunteers;
- a government school, school council or non-government school under the *Education and Training Reform Act 2006* (Vic);
- a university, TAFE or other tertiary educational institution;
- a kindergarten that employs a pre-school teacher;
- a registered funded agency within the meaning of the *Health Services Act 1988* (Vic);
- a religious organisation;
- a political party registered under section 50 of the *Electoral Act 2002* (Vic);
- a trade union registered under the *Trade Unions Act 1958* (Vic), or an organisation registered under the *Workplace Relations Act 1996* (Cth); or the *Industrial Relations Act 1988* (Cth).

While such organisations are exempt from registration requirements, they will nevertheless be required to comply with other provisions in relation to identification badges, use of secure collection receptacles and prohibitions against false statements.

Making an application

An application is made with CAV, using one of the forms available from its website (www.consumer.vic.gov.au).

An application for registration must be accompanied by the written consent of the intended beneficiary of the appeal, as its name will be associated with the appeal, and its reputation stands to suffer if the appeal attracts bad publicity.

March 2009

Urgent applications

Normally, an application must be lodged at least 28 days before the person intends to start fundraising. Exceptions exist in the case of special circumstances, and CAV has stated that it will be fast-tracking any bushfire-related applications.

Raising funds in your name?

On the flipside, if you are a charity for whose benefit somebody is raising funds, how can you hold that person accountable, to ensure that you do receive the raised funds? Keep in mind that only certain fundraisers need to seek your consent before raising funds on your behalf.

The *Fundraising Appeals Act* allows a court, on the application of the Director of Consumer Affairs Victoria or of the Minister, to order a person to stop a fundraising appeal, and also to make orders for the distribution of funds raised by an unregistered or wrongly conducted appeal. These enforcement provisions are not available to the intended beneficiaries, so that the best avenue for a charity in whose name a fundraising appeal is being conducted, and which has concerns about that appeal, is to raise those concerns with Consumer Affairs Victoria.

Nils Versemann
Senior Lawyer

Book Review – Strategic Issues for the Not for Profit Sector

People in the Not for Profit sector wanting an overview of the social and political context in which they are operating will find this book useful.

“Strategic Issues for the Not-for-Profit Sector” Jo Barraket, 2008, UNSW Press boasts an impressive line-up of contributors, most of whom are social policy academics. The book explores the landscape in which Not for Profits operate, how that is changing and how Not for Profits need to adapt. Issues covered in this book include:

- details of a survey of the nature of partnerships between Not for Profits and businesses;
- risks associated with “business venturing” by Not for Profits, in particular the potential conflict between mission and commercial activities;
- relationships between Not for Profits and government, highlighting the impact of funding agreements on the extent to which Not for Profits can play an advocacy role.

The book has an academic bent. While it is not a primer or a handbook, it addresses very real issues and provides a wide-ranging overview of the Not for Profit sector.

Strategic Issues for the Not-for-Profit Sector is available through Amazon.com

Libby Klein
Lawyer

Amendments to the Victorian Associations Incorporation Act 1981

An *Associations Incorporation Amendment Bill 2008* is currently before the Victorian Parliament. If passed, as is likely to occur, it will extensively amend the current *Associations Incorporation Act 1981*.

Many of these amendments will significantly impact upon incorporated associations. The amendments are likely to come into effect in two stages.

Under the first stage:

Registrar can send in a Manager

- The Registrar of Incorporated Associations may apply to the Magistrates' Court to have a statutory manager appointed to take over the management of the incorporated association, where this is in the interests of its members, its creditors or the public. The effect of this is that the committee members cease to hold office, and all power vests in the statutory manager. It is intended that the statutory manager will remain until such time as the affairs of the association have been put in order, at which time control will revert to a committee of management. The option of appointing a statutory manager should be a useful alternative tool for the Registrar of Incorporated Associations in dealing with a dysfunctional association, when currently the only real option is to seek the winding up of the association.

Insolvency Administrator

- The committee of management may appoint an external administrator under the provisions of Part 5.3A of the *Corporations Act 2001 (Cth)*, if the committee believes that the association is or will become insolvent. As with a company, an external administrator may also be appointed by a chargee (i.e. a person holding security over the assets of the association) or by a liquidator.

Distributing Assets on Winding Up

- New provisions dealing with the distribution of surplus assets on winding up make it clear that they must be distributed in accordance with the association's rules. Only if there is no applicable provision in the rules will distribution occur according to a special resolution of the association's members. This replaces the current provisions, where distribution will only occur in accordance with the rules if no special resolution as to the distribution of assets was passed. The amended legislation also prohibits the distribution of surplus assets to members or former members, except in limited circumstances (such as if the member is itself a body such as a charity that prohibits distribution of its assets to its members).

Cancelling Registration

- Where an association has assets of less than \$10,000 and no liabilities, it can apply to be voluntarily cancelled without needing to appoint a liquidator. Currently, an inactive association without assets often cannot afford to appoint a liquidator, and therefore cannot have its incorporation cancelled.

More Duties for Committee Members

- The public officer and members of the committee must not, by way of act or omission, directly or indirectly, be knowingly concerned in:
 - the exercise of any power that is prohibited to the association by its rules; or
 - any act that is outside the scope of the statement of purposes.

Such contraventions will now trigger the existing penalties provision in the Act, under which the public officer and committee members can be convicted of a criminal offence and fined.

Members can go to Court

- A member or former member may bring action in the Magistrates' Court in respect of any oppressive conduct. This is conduct that is unfairly prejudicial to, or unfairly discriminatory against, a member (including in the member's capacity as a member of the committee), or is contrary to the interests of the members as a whole. The Magistrates' Court may make wide-ranging orders, including reinstating a former member, terminating an existing member and amending the rules of the association.

March 2009

Give Back the Documents

- Where a person holds documents belonging to the association by virtue of that person's office, role or membership of an incorporated association, then within 28 days of ceasing to hold that office, role or membership that person must return such documents to the incorporated association. This would most commonly apply to a treasurer returning the association's books and financial records, but would equally apply to an archivist's official record of documents and photographs.

Sacking the Auditor

- Auditors can only be removed by members in general meeting, after 2 months notice is given to members, and a copy of the notice is provided to the auditor and the Registrar of Incorporated Associations.

Under the second stage:

Merging Secretary and Public Officer

- The role of the public officer will be merged into the role of the secretary. Once the amendments come into force, then the current public officer will take on the legislative obligations of the new secretary role, until the associations next annual general meeting. An association that wishes to continue splitting the role of legal compliance (currently done by the public officer) and administration (e.g. taking minutes, attending to official correspondence, currently done by the secretary) will need to rename this administrative role to ensure that this person does not incur the legal obligations of the secretary.

Rules must cover extra things

- The rules of the incorporated association will need to contain provisions dealing with:
 - the preparation and retention of accurate minutes of general meetings and committee meetings;
 - provision for members to have access to and be able to obtain copies of minutes of general meetings;
 - provision for members to have access (if any) to minutes of committee meetings.

The government has foreshadowed that once a date for the implementation of the second stage is announced, it will be necessary for all incorporated associations to amend their rules to address these 3 topics. In our experience, where any amendments to rules are made, the Registrar of Incorporated Associations will check to ensure that the rules meet all other requirements. It may therefore be necessary to check the rules for compliance with earlier amendments to the *Associations Incorporation Act*, to ensure that the amended rules are accepted as being compliant with the legislation.

Watch this Space

We anticipate advising on the final details of this Bill in a future edition of our Not for Profit Briefing, once it has been passed into law and a date has been announced for the amendments coming into effect.

Nils Versemann
Senior Lawyer

Saving the Planet with the Help of the Tax Office

A Registered Environment Organisation ("REO") can attract tax deductible donations to protect many aspects of the natural world affecting our lives. This article outlines critical steps to become a REO and explores what a REO may do in this time of climate change.

March 2009

To become a REO an organisation must apply to the Department of the Environment, Water, Heritage and the Arts (Cth) ("DEWHA"). Once it achieves registration, the organisation may then apply to the Australian Taxation Office for deductible gift recipient endorsement to enable it to receive tax deductible gifts.

Under the *Income Tax Assessment Act 1997* a REO must be an organisation established for the principle purpose of either "protecting and enhancing the natural environment" or "providing information or education, or the carrying out of research, about the natural environment".

The term "natural environment" for REO purposes includes not only protection of significant natural areas and wildlife but also protection of air, soil and water quality, minimisation of waste and promotion of ecological sustainable development. In other words a REO does not have to focus on aspects of the natural world unrelated to humans.

The term "natural environment" however excludes an environment that is essentially a "built", cultural or historic environment. In essence the "natural environment" is that environment not created by humans but which may well impact upon humans in their day to day lives.

The REO must establish a "public fund" which under tax law is the fund which may receive tax deductible gifts. This public fund must be managed by a majority of "Responsible Persons". A Responsible Person generally is a person with high standing within the Australian community or who is admitted to a profession with a code of conduct which is enforceable against members.

A REO must also ensure that its constituent documents include specific reporting and compliance requirements which are listed in the REO *Guidelines 2003* published by DEWHA. The REO *Guidelines 2003* may be accessed by following the link: <http://www.environment.gov.au/about/tax/reo/index.html>

REO's have been used to protect endangered species in countries other than Australia, provide low cost loans to Australian farmers to grow trees for carbon sequestration, fund landcare group activities, develop and promote community gardens, conserve marine life, protect wetlands and waterways and to promote environmental education. REO's vary in size from active community group type organisations such as the Merri Creek Management Committee Inc. and the Centre for Education and Research in Environmental Strategies ("CERES") to established foundations such as the Norman Wettenhall Foundation.

The existence of broad guidelines enabling such a diverse group of organisations to attain tax deductible status demonstrates the great potential for the Not for Profit Sector to benefit the environment.

Derek Mortimer
Lawyer

The Added Benefits of Giving - The Family Trust

The use of a family trust as a vehicle for charitable donations can maximise the effectiveness of the gift. The main benefit in using a trust to give, is in being able to make gifts from pre-tax income, rather than post-tax income.

Typically, a family trust or discretionary trust holds business or investment assets. The income generated is available to the trustee to distribute to the beneficiaries. Generally, under tax law, a trust is not taxed. Rather, it is the beneficiaries that receive distributions from the trust, that are taxed on the distributions made to them. The beneficiaries are taxed at their marginal income tax rate. Where the beneficiary in question is income tax exempt, a distribution made to it is effectively tax-free.

Many charitable organisations are income tax exempt and therefore giving to them via a family trust will result in no tax being paid - effectively pre-tax distributions. This would enable a donor to increase their contribution at no further cost to them.

The advantage is particularly significant when distributing to a charitable organisation which is income tax exempt but does not have deductible gift recipient (DGR) status - for example, a school or a religious organisation such as a church. If you were to give to a church from your salaried earnings, you would first have to pay income tax and then make a gift to the church from your net income. In contrast, if you were to distribute income from a family trust to the church, you would be giving from pre-tax dollars.

Let's consider an example below, assuming that your total income is \$150,000.

For the 2007/08 financial year:

If your annual taxable income, from salary and wages was \$150,000, the income tax payable on that figure, including the Medicare levy is \$49,350. If you wish to give \$20,000 of your income to a church, this would leave you with disposable income of \$80,650.

In contrast, if you had a family trust which generated \$20,000 of income which was distributed directly to your church, and your personal taxable income was \$130,000, the tax payable on your salary, including the Medicare levy, would be \$41,050. Therefore your disposable income would be \$88,950.

As you will see from this example, giving via a family trust increases your net position by \$8,300. You could choose to increase your giving by \$8,300 and suffer no loss in doing so.

It is important to be aware that the trust deed for a trust sets out who the applicable beneficiaries of the trust are. Ideally this should be drafted as broadly as possible and should include charitable organisations. Changing the beneficiary class once the trust has already been established can result in adverse tax consequences. Therefore it is best to get it right from the start.

The Moores Legal family trust deed has been drafted with a broad range of charitable beneficiaries. If you or your donors are interested in establishing a trust, please do not hesitate to contact us.

Suhanya Ponniah
Lawyer

When a “Director” Becomes a “*Director*”: a Case of Mistaken Identity

Senior staff in many Not for Profit organisations (especially those which operate in multiple states) are frequently entitled “Managing Director”, “Director of Mission/Ministry”, “State Director” etc. Such staff, however, may not hold a position on the Board or Committee of Management of the organisation in question and may not be aware that their description as “director” could result in unintended consequences for both themselves and the organisation they serve.

The definition of “director” contained in section 9 of *The Corporations Act, 2001* (Cth) specifically extends the status to persons who are not validly appointed as such, but who either:

- act in that capacity; or
- cause the validly appointed directors of the organisation to act in accordance with their instructions or wishes (other than in their capacity as a professional advisor or the like).

Such people are known as “de facto” directors – someone who is not formally appointed as a director, but who assumes that mantle based on the nature of duties he or she performs and *the perception of others*, including those external to the organisation.

March 2009

Clearly, a title which encompasses the word “director” has the potential to create the perception that the holder is, in fact, formally appointed. The mere perception that a person is authorised to act on behalf of an organisation can bring with it unintended obligations and potential liabilities.

We recommend that Not for Profit organisations which use position titles containing the description “director” be particularly careful when the title holder is not formally appointed to their Board or Committee of Management. Moores Legal would be pleased to provide detailed advice with regard to an organisation or individual’s potential exposure, and to suggest appropriate safe guards.

Fiona Thomas
Senior Lawyer

Dischord in the Opera Community

When Edith Thompson died in 2002 at Camberlea Nursing Home in Melbourne’s leafy eastern suburbs, one quarter of her \$8m estate was left for the benefit of Opera in Victoria. But who was the true beneficiary on behalf of opera lovers?

A number of opera companies spent what is estimated to be close to \$1m trying to work this out.

Gifts given under a Will for charitable purposes sometimes fail. This can mean expensive legal proceedings to determine the intentions of the now deceased donor, or “lapse” of the gift so that the gift is not available to any charitable beneficiary at all. Donors and charitable beneficiaries may be able to avoid these disappointments by taking professional advice before the gift is given.

In the case of a trust providing for a gift under a will, the trust may still succeed with the assistance of the court in providing for charitable beneficiaries despite the intended purpose of that trust being impossible to carry out. In such situations a court may allow the original purposes of that charitable gift to be altered to enable the charitable gift to be distributed “as near as possible” to the donor’s original intention.

The starting point for a court’s enquiry in such matters is firstly to determine whether it is impossible for trustees to carry out the wishes of the will maker. If this is found to be the case then the court must then determine whether the intention of the will maker to make the gift was “charitable”.

In the Edith Thompson case, as the Victorian State Opera no longer existed, the first point was straightforward. Note however that a court may refuse to alter the purpose of a charitable gift because fulfilment of the will maker’s wishes may simply be “difficult” for trustees to achieve or because the trustees deem that an amendment would be expedient.

Establishment of a “charitable intention” depends in part upon the common law doctrine of “cy-pres” and relevant statute such as the *Charities Act 1978* (Vic). Where it is impossible for trustees of a charitable trust to provide for beneficiaries (including if the beneficiary has ceased to exist) the court will examine whether the donor had a “general charitable intention” to give some of their assets to charitable purposes.

This general charitable intention gives the court some leeway to order a scheme for trustees to apply the gift for charitable purposes generally, without unduly conflicting with the wishes of the will maker.

Whether a donor has a charitable intention or some other “intention” depends on all the circumstances.

A key question to ask is whether the gift is being given outright to a particular organisation, or whether the gift is being given for a charitable purpose of which a particular organisation that may be named in the Will is merely a means to the charitable end.

Thus there is merit in ensuring that the gift is expressed to be for a general charitable purpose rather than being for a specific organisation. Fortunately in the matter of Edith Thompson’s Will, the parties accepted that her gift was for general charitable purposes, rather than being made specifically for the benefit of the Victorian State Opera. Had the latter been found by the court it is likely the gift would have “lapsed”, essentially creating an intestacy.

March 2009

The court was then able to agree to a scheme proposed by interested parties to distribute Ms Thompson's gift to benefit opera in Victoria, with the gift divided amongst several organisations with an interest in developing opera in Victoria.

Note that generally legal costs involved in a court application may be taken from the trust estate of the will maker. There is merit then for trustees and other interested parties to reach agreement on matters, including a proposed "scheme" to amend the will, before they head off to court. Sadly in the case of Thompson the court was advised that from her approximately \$2,600,000 gift, parties were seeking payment of approximately \$883,000 in costs.

Note that under the *Charities Act 1978* (Vic) the cy-pres doctrine can also apply to gifts made by donors during the course of fundraising events involving cash collections (from which it is impossible to establish one gift from another), and circumstances other than the "impossibility" of fulfilling the will makers intention.

To avoid protracted legal proceedings and the potential failure of a charitable bequest, we recommend that will makers and charitable beneficiaries discuss their plans and seek advice on documents with professional advisers.

Derek Mortimer
Lawyer

A New NSW Associations Incorporation Act 2009?

An *Associations Incorporation Bill 2009* is currently before the New South Wales Parliament. If passed, it will rewrite and extensively amend the current *Associations Incorporation Act 1984*.

No Consistency

Unfortunately, this Bill is quite different to the *Associations Incorporation Amendment Bill 2008* currently before the Victorian Parliament. In some areas, the laws in NSW and Victoria will diverge further, making it more difficult for national movements that seek to implement standardised constitutions for its member associations in different states. In NSW, the association's "rules" will be renamed its "constitution", while Victoria retains the term "rules". In Victoria, the association's "public officer" will be renamed its "secretary", while NSW retains the term "public officer".

Big and Small

One of the most significant features of the new Bill is the distinction between large (Tier 1) and small (Tier 2) associations, as determined by their annual revenue and assets. Tier 1 associations will face auditing requirements not faced by Tier 2 associations, as occurs in Victoria with prescribed (i.e. large) associations. While no revenue or asset thresholds have currently been announced, it will hopefully allow the avoidance of a situation recently encountered by our firm when seeking to incorporate an association in NSW. Incorporation was refused, on the grounds that the prospective association had more than \$500,000 in assets. This entity was instead forced to incorporate as a public company limited by guarantee. The \$500,000 asset level is easily reached by a small Not for Profit body holding even a modest block of land in suburban Sydney (such as a church owning its own land). Given that the NSW Minister for Fair Trading, the Hon Virginia Judge stated in parliament in introducing this Bill that such Not for Profit groups are "usually volunteer-run community groups", it would be very welcome that such bodies will not need to comply with the onerous legal requirements governing public companies.

Handover of Documents

As with the current Victorian Bill, the NSW Bill seeks to introduce a requirement for outgoing committee members to hand over documents in their possession which relate to the association's affairs.

The NSW Bill also mirrors the current Victorian Act in requiring committee members to disclose any direct or indirect interest in a matter being considered by the committee, where that interest appears to raise a conflict of interest. The Bill will require the association to keep a separate book of all such declared interests, open to inspection by members. The member may also not be present when the matter is considered by the committee (unlike in Victoria where the member is simply prohibited from voting). As in the current Victorian Act, the NSW Act will also prohibit a committee member from dishonestly using information or their position to benefit themselves or cause detriment to the association.

New Features

Some of the new features to be introduced by the NSW Bill will make the administration of associations easier:

- The association's committee may appoint an external administrator under Part 5.3A of the *Corporations Act 2001* (Cth), if it thinks that it is or will become insolvent.
- The Director-General (a role held by the Commissioner of Fair Trading, Department of Commerce) may appoint an administrator if the association has persistently failed to comply with the Act, and the appointment is in the interests of the members or creditors of the association. Upon the appointment, committee members will cease to hold office, and proceedings against the association will be stayed (i.e. put on hold) and may only be continued with the leave of the Supreme Court.
- General meetings can be held in more than one place, using technological devices to link the locations and allowing members to participate.
- The association's constitution may allow postal voting for certain kinds of resolutions.
- The new Act clarifies that an association will no longer need to execute documents under its common seal, but may do so under the signature of two committee members.

Watch this Space

With the Bill having only been introduced in the NSW Parliament on 4 March 2009, it may take some months for it to progress through the legislative process and become law. This will be the subject of a future article, which will also highlight any amendments made to the Bill during the legislative process.

Nils Versemann
Senior Lawyer

The Moores Legal Not for Profit Team

We have a range of practitioners who are able to assist with any minor queries or major issues you may have. If you require further information, please contact a member of our Team

Murray Baird
Corporate Governance
Head of our Not for Profit Team

Fiona Thomas
Not for Profits

Derek Mortimer
Not for Profits

Libby Klein
Not for Profits

Andrew Sudholz
Property Transactions

Tim Adam
Compensation & Schools

Peter Andrew
Employment & Schools Law

Andrew Simpson
Bequests & Estates
Aged Care Facilities

Nils Versemann
Intellectual Property

Cecelia Irvine-So
Volunteer Law

Allan Swan
Estate Planning, Superannuation & Structuring

Philip Curtis
Estate Planning, Superannuation & Structuring

Page 12 of 12
DISCLAIMER: This Not for Profit Briefing is of a general nature only. Specific legal advice should be sought rather than relying on this Briefing.

MOORESLEGAL

9 Prospect St, Box Hill Vic 3128 Lev 10, 350 Queen Street Melbourne Vic 3000
12/1140 Nepean Highway Mornington Vic 3931
Telephone: (03) 9898 0000 Facsimile: (03) 9898 0333
info@mooreslegal.com.au www.mooreslegal.com.au