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## Federal Budget and Not for Profits

As part of the Federal Budget process, the Government has made several announcements that may affect the taxation treatment of not for profit organisations. The announcements are:

- Government's interim response to High Court's decision in the *Word Investments Case*;
- Review of the "In Australia test";
- Review of the Deductible Gift Recipient registers, and
- Changes to Prescribed Private Fund regime.

## Media Releases

Media releases from the Assistant Treasurer relevant to these announcements may be accessed by following the links below:

[Media Release: Government's Interim Response to High Court's Decision in \*the Word Investments Case\*](#)

[Media Release: Review of the Deductible Gift Recipient Registers](#)

## Government Response to *Word Investments Case*

The Assistant Treasurer's media release on the decision of the High Court in *Federal Commissioner of Taxation v Word Investments* ("the *Word Case*")\_handed down on 3 December 2008 states that the Government intends to await the outcome of the Henry Review into Australia's future tax system and the Productivity Commission enquiry into the contribution of the not for profit sector before responding, unless government become aware of any "adverse implications" in the not for profit sector. We take this to mean that if there were to be a significant increase in the commercial activities of not for profits, the government may legislate sooner. The final report of the Henry Review is due to be given to Government in late 2009.

## Moores Comments

An issue in *the Word case* was whether an entity that undertook certain commercial activities for the purpose of providing part of the surplus from that activity to a charitable entity would itself be entitled to endorsement as a charitable institution. The High Court held that the entity was entitled to endorsement as a charitable institution. In this regard the High Court decision expands on and provides greater certainty to ATO Tax Ruling 2005/21 regarding how a

charitable entity may undertake commercial activities. The Assistant Treasurer has characterised the decision as being contrary to long standing tax rulings. We query whether it is contrary to TR2005/21 and 2005/22 or merely clarifies them. We also query whether rulings issued in 2005 can be regarded as "long standing". Charitable institutions may conduct commercial activities if they are incidental to, or pursued solely in furtherance of its charitable purpose.

We are also disappointed that the media release suggests the High Court decision was in relation to "commercial businesses with charitable objects". The Assistant Treasurer's media release begs the question by calling fundraising activities "commercial". In our view, a commercial business is pursued for the purpose of profit and by definition would not be entitled to charitable tax concessions.

## The "In Australia test" and distributions to charities overseas

Charitable funds and institutions are currently subject to the "in Australia test". The "in Australia test" under the *Income Tax Assessment Act* 1997 and an associated tax ruling collectively ensure that no less than 50% of income accrued by a charitable fund or institution is distributed to beneficiaries in Australia.

However these charities are entitled under the *Income Tax Assessment Act* 1997 to disregard certain distributions to beneficiaries without failing the "in Australia test". These "disregarded amounts" may be distributed overseas by the Australian charity.

The effect is that rather than "restricting" distributions by Australian charities to charities overseas (as the Assistant Treasurer's media release suggests), the tax laws presently expressly *permit* some of these distributions.

We await proposed changes to the "in Australia test" and in particular what the Assistant Treasurer means in the media release as being the ability of Parliament to "fully scrutinise" entities that distribute money to overseas charities. We will keep you updated when any proposed changes are released for public consultation.

## Review of Deductible Gift Recipient Registers

The Assistant Treasurer has indicated in his media release that the Government will commence reviews of certain deductible gift recipient ("DGR") registers on a three yearly basis. These registers are the:

- Register of Cultural Organisations;
- Register of Environmental Organisations;
- Register of Harm Prevention Charities; and
- Register of Approved Organisations Admitted to the Overseas Aid Gift Deduction Scheme.

Admission of an organisation to a DGR Register is a difficult process and requires the applicant to satisfy not only the relevant government department but also the Australian Tax Office. Organisations admitted to a DGR Register must also provide the Government with an annual statistical return to show donations received and disbursed over the previous financial year. The organisations are also required to undertake a "self-review" each year to ensure that their activities, processes and decisions remain consistent with the stated charitable purpose.

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It appears from the media release that the Government is wishing to introduce some form of cost benefit analysis of organisations admitted to DGR Registers for the purpose of ensuring Australian tax payers continue to receive "value for money" for the tax concessions granted to those organisations. This goal reflects the position of Treasury in its recent review of Prescribed Private Funds.

We will keep you informed as we monitor how the Government proposes to undertake its reviews of organisations on the DGR Registers. For the moment we recommend that organisations listed on the DGR Registers continue to undertake their annual self review.

## Release of Exposure Draft of Prescribed Private Funds Bill 2009

Prescribed Private Funds ("PPFs") are a form of private tax deductible fund developed by the Howard Government to encourage giving in Australia.

The Rudd Government encouraged submissions to a review of PPFs ("the PPF Review") which closed on 14 January 2009. Moores Legal was involved in providing a submission through the Law Institute of Victoria. You may access this submission by following the link below:

[LIV Submission: Improving the Integrity of Prescribed Private Funds \(PPFs\)](#)

The Government has now released an exposure draft of proposed amendments to tax laws. The draft legislation includes provisions to:

- Rename PPFs as "Private Ancillary Funds";
- Move administration of PPFs away from Treasury to the Commissioner of Taxation;
- Give the Treasurer power (by way of legislative instrument) to make mandatory guidelines about the establishment and maintenance of PPFs, including minimum distribution amounts; and
- Provide a range of penalties that the Commissioner of Taxation may impose on PPF Trustees.

We welcome acknowledgement in the exposure draft that a PPF is a form of "ancillary fund". There was uncertainty whether an existing body of law and tax rulings in relation to ancillary funds also applied to PPFs. We also welcome the move to give the Commissioner of Taxation responsibility for administration of PPFs. This is a sensible approach given the Commissioner's current role endorsing other Deductible Gift Recipients ("DGRs"). If the proposals in various circles to move the regulatory function for charities to a dedicated charity commission came about, the administration of PPFs should move accordingly.

We also welcome the move to amend the Australian Business Register to show the tax law under which an entity is entitled to DGR endorsement. This will help PPFs to distribute to the correct DGR beneficiaries.

Under the exposure draft, PPFs will be required to have a single corporate Trustee rather than individuals as Trustees. This will give the Commissioner and ASIC greater regulatory power over administration of a PPF. In our opinion the company trustee structure will add some complexity for those involved with a PPF. On the other hand a corporate structure may assist PPF founders in terms of planning for succession.

Arguably, the most contentious aspect of the PPF Review was to suggest a minimum distribution amount that PPF Trustees would need to make to eligible beneficiaries each year. The

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exposure draft legislation does not address this issue. We understand the Government may incorporate a minimum distribution amount in the yet to be released mandatory "PPF Guidelines".

In our opinion the Guidelines being mandatory, may be better described as being "Ministerial Rules". Organisations on the DGR Registers (discussed above) are required to abide by "Ministerial Rules". We await with interest release of the mandatory PPF Guidelines. We anticipate that the Guidelines may be more controversial than the proposed legislation.

## SEMINAR: The New Associations Act – What Your Association Needs to Know

Changes to the *Associations Incorporation Act 1981* came into effect on 8 April 2009. If you are an association executive or a committee member you need to be aware of these changes.

In this seminar which is supported by Professional Association Management Services Pty Ltd and endorsed by Australian Society of Association Executives Ltd, members of the Not for Profit team at Moores Legal will outline the changes and explain what you need to do.

Key topics will include:

- New members' rights;
- Changes to the role of public officer;
- Personal liability for committee members who condone activities outside the Association's statement of purposes; and
- Changes to Associations' rules.

For further details and to register click [HERE](#)

### 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

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