

Balancing Act

Issue 14

Legal and tax affairs for the non-profit industry

September 2009



In this issue...

Prescribed Private Funds – legislative changes	1
ATO areas of focus for the not-for-profit sector	4
When is a time limit not a time limit?.....	5
Is cause-related marketing a fundraising activity?.....	8

Out of time

Charity beneficiaries may be affected by late family provision claims

MAKINSON & d'APICE
— LAWYERS —

Prescribed Private Funds – legislative changes

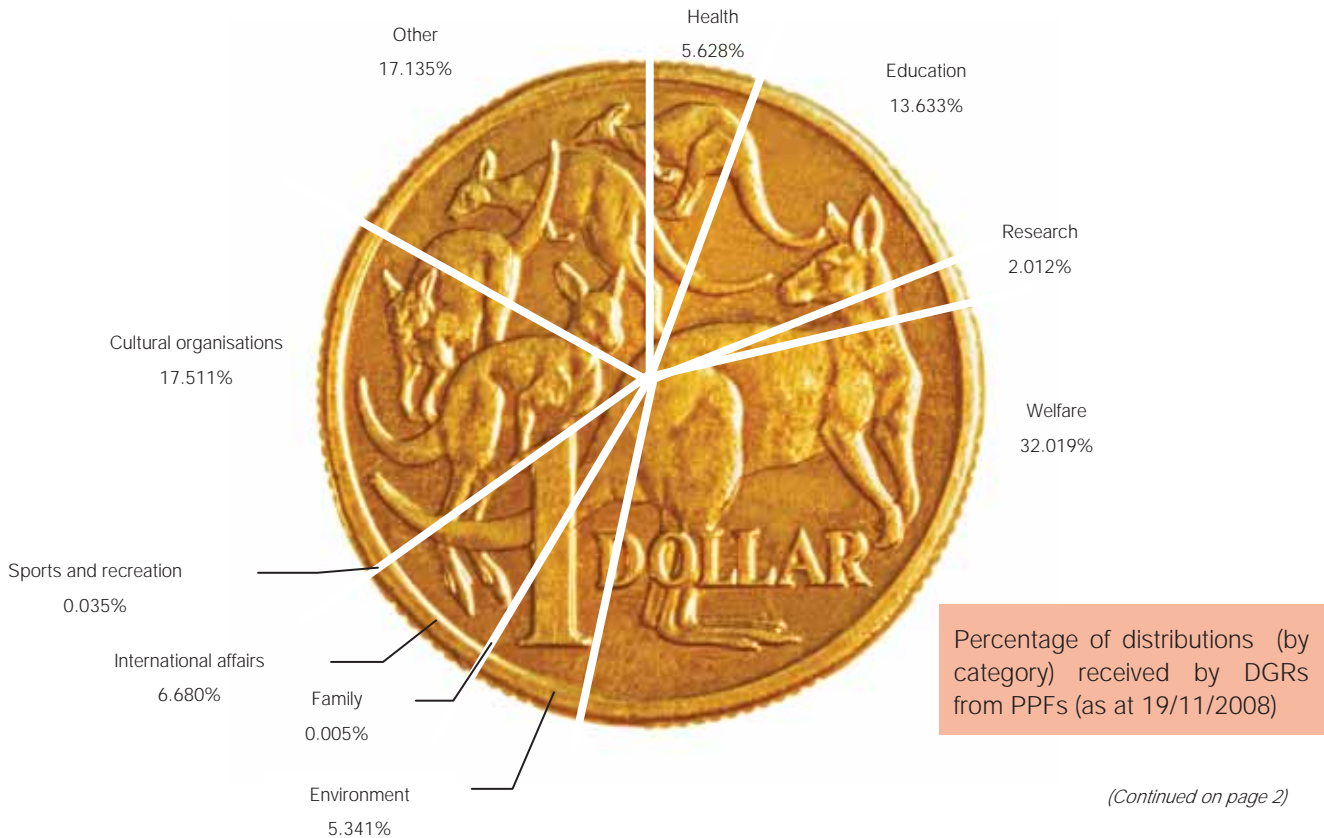
A Prescribed Private Fund (PPF) is a private charitable fund established by a trust deed to which businesses, families and individuals can make tax-deductible donations.

The sole purpose of a PPF must be to provide money, property or benefits to funds, authorities or institutions, which are deductible gift recipients (DGRs) (for example, public benevolent institutions, health promotion charities and overseas aid funds). A PPF cannot have other purposes.

As at 24 October 2008, there were 769 PPFs approved by the Federal Government. These PPFs have a corpus of some \$1.3 billion and have made grants of approximately \$301 million to DGRs across a variety of categories. Over \$120 million was distributed from PPFs to the community in the 2006/07 financial year alone.

These statistics alone clearly illustrate the impact that PPFs are currently having on charities and the potential impact that they could have in the future if their consistent growth to date is sustained. Consequently, the more a charity understands about the mechanics of operating a PPF, the easier it will be for a charity to target PPFs for donations. PPFs are, and should continue to be, a significant source of funds for charities which are endorsed as DGRs.

Most people working in the non profit sector would have heard in recent times about the proposed changes to the legislation surrounding PPFs. This article will discuss the more salient proposed changes and how they will impact on fundraising for charities.



(Continued on page 2)

Prescribed Private Funds – legislative changes



(Continued from page 1)

The introduction of the new legislation and Guidelines

In the 2008 Budget, Treasury announced its commitment to improving the integrity of PPFs. After releasing a discussion paper seeking input from the public in November 2008 and receiving 138 submissions in response to that paper, Treasury released draft legislation, again for public consultation. The draft legislation has now been introduced into Parliament after certain amendments were made as a result of submissions received from the non-profit sector. On 25 June 2009 Treasury also released, for public consultation, a draft version of the New Guidelines. The public were invited to make submissions on the draft New Guidelines, with the closing date for submissions being 23 July 2009. On 10 September 2009 the draft legislation was passed by the Senate. The Bill and New Guidelines will take effect from 1 October 2009.

A PPF was called a “prescribed” private fund because it was prescribed by law. However, the recent proposed changes to the law surrounding PPFs has resulted in

“This new procedure will make it easier for a PPF to be established by regular larger donors and endorsed as a DGR.”

such funds now being referred to as Private Ancillary Funds.¹

The *Tax Laws Amendment (Measures No 4) Bill 2009 (Bill)* brings the full administration of the PPF regime under the authority of the Commissioner of Taxation (ie the ATO). As at 1 October 2009, the Commissioner will be responsible for determining whether a trust fund is a PPF, and if that fund is entitled to be endorsed as a DGR. The Commissioner’s decision is reviewable by the Administrative Appeals Tribunal and by the Courts.

Many charities recommend to their regular larger donors to consider establishing a PPF. This new procedure will make it easier for a PPF to be established by such a donor and endorsed as a DGR.

The new requirements which will apply to PPFs

Distributions

An important change that the New Guidelines introduces involves the rules with regard to accumulation of gifts by PPFs.

Minimum distributions to DGRs

There are currently complex rules governing accumulation targets for PPFs. The New Guidelines replace

these rules with a simpler minimum annual distribution rate for funds.

The New Guidelines set out that during each financial year a PPF must distribute at least 5% of the market value of the PPF’s assets (as at the end of the previous financial year). The PPF must distribute at least \$11,000 (or the remainder of the PPF fund if that is worth less than \$11,000) during that financial year if the 5% is less than \$11,000 and the expenses of the PPF for that financial year are paid from the PPF’s assets or income. No distribution is required during the financial year during which the PPF is established.

From a DGR’s perspective which is attempting to obtain donations from PPFs, this is an important fact to understand. DGRs may face reluctance from PPFs to make donations once a PPF has reached its minimum threshold of 5%.

Distribution strategy

The New Guidelines set out that a trustee must prepare and maintain a current distribution strategy for the PPF. The strategy must set out the anticipated quantity of donations to be received, expected recipients of the distributions of those donations and size of the distribution the PPF estimates that it will make.

¹ In this article, we will continue to refer to these funds as PPFs, for the sake of consistency.

(Continued on page 3)

Prescribed Private Funds – legislative changes

(Continued from page 2)

“The trustee of a PPF must be a corporate trustee (it can not be an individual)”

This may make it more difficult for DGRs approaching PPFs to elicit donations out of them which do not conform with the distribution strategy once that strategy has been adopted by the trustee. It would be easier for DGRs if they could obtain copies of these distribution strategies so as to know which PPFs to target for donations. However, there is no indication at this stage that these distribution strategies will be publicly available.

Corporate trustee

Another significant change that the Bill introduces is the requirement that the trustee of a PPF must be a corporate trustee. Currently, trustees of PPFs can be either individuals or corporations.

This new requirement ensures that directors meet minimum standards of behaviour as the *Corporations Act 2001* (Cth) sets out circumstances under which an individual will be automatically disqualified from managing a corporation, where such standards are not met.

From a charity’s perspective, this should give it more confidence that PPFs are being operated and managed legally and in a manner which ensures that the sole purpose of the PPF is being accomplished, that is, supporting charities which are DGRs.

Penalties

The Bill now gives the Commissioner the power to impose administrative penalties on trustees that fail to comply with the New Guidelines, as well as the power to remove trustees of non-complying funds (for matters of serious non compliance). This can be contrasted with the current guidelines which provide an ‘all or nothing’ penalty system.

Liability

The Bill sets out that the trustee and the directors are jointly and severally liable for any administrative penalty, and the penalty must not be reimbursed by the PPF. The rationale behind this is that corporate trustees of PPFs generally have very little capital and this liability on directors will ensure that PPFs comply with the New Guidelines.

Numerous submissions made by the public to the draft legislation raised concerns in relation to the joint and several liability of trustees. Consequently, although this provision was not removed from the Bill, the Bill has widened the scope of the defence available to PPF trustees and directors from being jointly and severally liable to administrative penalties.

Indemnity

The New Guidelines further set out that the governing rules of a PPF must not indemnify the trustee (or any employee, officer or agent of the trustee) for a loss or liability attributable to dishonesty or negligence of the trustee, employee, officer or agent, or a deliberate act known to be a breach of trust.



(Continued on page 14)

ATO areas of focus for the not-for-profit sector

According to the compliance program of the Australian Taxation Office (ATO) for the 2009-10 year, the ATO is aiming to encourage high levels of voluntary compliance through the provision of information, guidance and support to non-profit organisations in addition to their ongoing audit activity.

Education activity

Regular information updates

Non-profit organisations can subscribe to these updates via <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/34577.htm>.

Private ancillary funds (formerly prescribed private funds)

Legislation outlining new measures for these funds was passed by the Senate on 10 September 2009 and received Royal Assent on 18 September 2009. The ATO will work with these funds to increase awareness of the new legislation, and to assist with transitional issues.

Misclassifying supplies as GST free

The ATO has increased its guidance on the application of the non-commercial supplies concessions to assist not-for-profits in determining their eligibility to them.

Misclassifying grants

The ATO is working on the development of a revised ruling concerning grants and other financial assistance, which is intended to clarify the GST treatment of such payments.



“The ATO is aiming to encourage high levels of voluntary compliance through education activities, in addition to their ongoing audit activity”

Compliance activity

While the ATO acknowledges that non-profit organisations tend to be highly compliant and seek to abide by the requirements of their special taxation status, the ATO will focus on the following areas in response to a small number of organisations that ignore their tax responsibilities or deliberately attempt to abuse concessions:

- determination of continued eligibility for concessions, including Deductible Gift Recipient status, through a review of 200 non-profit entities;

- compliance with employer obligations, through a review of 95 non-profit employers;
- accuracy of Fringe Benefits Tax and mutuality exemptions;
- validity of applications for refunds of franking credits; and
- endorsement applications. ■

Allan Mortel is a director of, and James Robson is a manager of, Moore Stephens Sydney Pty Ltd.



When is a time limit not a time limit?

“Family provision claims may be brought successfully after the expiry of the limitation period”

Charities are increasingly relying on bequests from deceased estates to help fund their charitable works and activities. As a consequence of this, charities are more frequently becoming involved in disputes over deceased estates.

Family provision legislation

As many charities will be aware, there exists in New South Wales family provision legislation which enables the Court essentially to “rewrite” a Will. Under the *Family Provision Act 1982 (NSW) (FPA)* and its successor, the *Succession Act 2006 (NSW) (Succession Act)*, eligible persons are able to bring a claim against a deceased estate so that such provision be made as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education and advancement in life of the eligible person.¹

Eligible persons

Under the FPA, eligible persons were limited to:

- the married spouse of the deceased at the time of the deceased’s death;
- a person with whom the deceased was living in a domestic relationship at the time of the deceased’s death;
- a child of the deceased or if the deceased was, at the time of his or her death, a party to a domestic relationship, a child of that relationship;
- a former married spouse of the deceased; and
- a person who was, at any particular time, both wholly or partly dependent on the deceased, and who is a grandchild of the deceased or was, at that particular time or at any other time, a member of the household of which the deceased was a member.

¹ Other jurisdictions have similar family provision legislation.

(Continued on page 6)

When is a time limit not a time limit?

(Continued from page 5)

The Succession Act similarly limits the concept of eligible person to such categories of individuals (with very minor amendments), but has added a further category – namely, a person with whom the deceased was living in a close personal relationship at the time of the deceased’s death. A close personal relationship is taken to mean a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.

While charities are not explicitly excluded from the concept of eligible person, they clearly do not fall within the definition.

Claims made out of time

Charities (and anyone for that matter) might be misled into thinking that a family provision claim cannot be brought outside the relevant limitation periods (see table below). But they would be wrong. The Court has the discretion to allow – and, in fact, exercises its discretion quite often – family provision claims to be brought outside (and, sometimes, well outside) the relevant limitation period.

In *Phillips v Hunt* [2005] NSWSC 978, the deceased husband, in his Will, gave a right of occupancy in the matrimonial home to his wife, an 89 year old woman, for her life. The remainder of the interest in respect of the house was given to three charities – The Trustees of the Sisters of Mercy (North Sydney) for the purposes of Our Lady’s Home at Waitara, St Gabriel’s School for Deaf Boys at Castle Hill conducted by the Christian Brothers, and The Trustees of the Sisters of Charity for the purposes of the Sacred Heart Hospice at Darlinghurst. The residue of the estate was left to the deceased’s wife.

The deceased died on 13 July 1991. The 18 month limitation period under the FPA expired on 13 January 1993. In October 2003, the deceased’s wife had a fall at her home and was transferred firstly to hospital and then to a nursing home, where she had no option but to reside due to her need for constant care. On 23 February 2005, the deceased’s wife consulted a solicitor and learned of the rights she may have under the FPA and, on 21 April 2005, brought a family provision claim – some 12 plus years out of time.

The Court held that, because the deceased’s wife had no knowledge of her right to make a claim until consulting a solicitor in February 2005, there was a sufficient explanation for the deceased’s wife bringing her claim out of time. Once she learned of her rights under the FPA, the deceased’s wife took prompt action.

The Court thought it necessary to consider the situation of others having a claim on the deceased’s estate. In this case, it was the two remaining charities (one of them having gone out of existence). The Court saw no particular evidence of contact between the deceased and the charities, although they were, no doubt, known to the deceased and his wife through their contact with the local Roman Catholic Church, which they had attended every Sunday. The evidence was that St Gabriel’s School for the Deaf depended upon donations to the extent of between 16% to 25% of its income. The Court was not in doubt that its purposes were worthy, as were the well-known purposes of the Sisters of Charity at Darlinghurst. Notwithstanding, the Court felt it appropriate to make adequate provision for the deceased’s wife under the Will, and, by extending the limitation period up until 21 April 2005, made an order for an appropriate capital sum for the deceased’s wife, with the balance of the proceeds being distributed equally between the named charities. The Court aptly noted that the provision of an appropriate capital sum at that particular point in

	FPA	Succession Act
Legislation applies in relation to a deceased person who died on or after	1/9/1983 (and before 1/3/2008)	1/3/2008
An eligible person must bring their claim within <i>X months</i> from the date of the deceased’s death, unless the Court otherwise orders	18 months	12 months

(Continued on page 7)

When is a time limit not a time limit?

(Continued from page 6)

time would accelerate the receipt by the charities of some share in the estate (which, under the terms of the Will, they would not have received until after the death of the deceased's wife).

In another case involving a bequest to a charity, *Whalen v Byrnes* [2003] NSWSC 915, although the family provision claim was only made four months out of time, the Court noted in passing as relevant to the claim that a charity is not an eligible person under the family provision legislation. Interestingly, the Court commented on the deceased's attitude towards religious observances. There was no suggestion that, during his lifetime, the deceased had any contact with members of the religious community to which he had made a bequest under his Will, The Carmelite Order of Catholic Nuns at Sydney, or was, indeed, acquainted with them or their works and activities. The deceased had not attended Church in the last 30 years of his life, during which period he appeared to have become somewhat reclusive – indeed eccentric – in his lifestyle, and, even before that time, went to Church only occasionally. The Court commented that the religious community's

benefit under the terms of the Will "must be regarded as being in the nature of an unexpected piece of good fortune". Accordingly, the Court made an order for the deceased's younger brother (who fell within the fifth category of eligible person (see above)), who had brought the claim.

Lessons to be learned

Even though the relevant limitation period for making a family provision claim may have expired, charities should be aware that family provision claims may be brought successfully after, and sometimes long after, the expiry of the limitation period.

Furthermore, charities should be wary of relying solely on bequests to fund their charitable works and activities and would be advised to maintain reserve funds should a family provision claim be made some time down the track, which would dilute the charity's bequest. ■

Timothy Sargeant is a solicitor at Makinson & d'Apice.

“Charities should be wary of relying solely on bequests to fund their charitable works and activities”



Bequest Officers' Workshop Sydney • 30 September 2009

This full day practical workshop is specifically tailored for bequest officers and fundraisers of charities and not-for-profit organisations.

Gain an understanding of the legal processes involved in estate administration, so you can ensure your organisation is not missing out on its bequest entitlements.

Receive practical tips from an experienced bequest officer, who is co-presenting this workshop with two of Makinson & d'Apice's partners who have extensive experience in estate law and charities law.

Secure your place now by completing the registration form available at www.makdap.com.au or call Angela Mak on 9233 9049 or email amak@makdap.com.au.

MAKINSON & d'APICE
LAWYERS



Is cause-related marketing a fundraising activity?

Signature cause-related marketing campaigns allow a business to offer consumers the opportunity to support an identified charity through the purchase of the business's products and services. Usually, a percentage of the proceeds of sale of a particular product or service over a given period is remitted to the charity. It is a form of fundraising that offers benefits to both the business and the charity: obviously, the charity receives much needed funds but the business also often receives increased brand awareness

and sales, and an improved corporate image. This is particularly important today with approximately 60% of consumers expecting companies to be involved with supporting charitable or community causes.

Developing a cause-related marketing program and entering into corporate partnerships is a lengthy and often difficult process that requires considerable time and effort in order to achieve success. Because of the time and effort each party invests in integrating such a

campaign into their corporate affairs and determining the objectives, measurables, evaluation methods and reporting requirements of the program, it raises the question as to why there is not a national principle for dealing with this form of 'fundraising'. As we will see from the overview of the state legislation below, the extent to which the various States address this strategy of fundraising ranges from detailed to completely non-existent.

(Continued on page 9)

Is cause-related marketing a fundraising activity?

(Continued from page 8)

New South Wales

In New South Wales the raising of money for a charitable purpose is governed by the *Charitable Fundraising Act 1991 (NSW Act)* and overseen by the NSW Office of Liquor, Gaming and Racing, Department of the Arts, Sport and Recreation.

The NSW Act provides that a "*fundraising appeal*" is the soliciting or receiving of any money, property or other benefit where the purpose of the soliciting or receiving, or of an activity or enterprise of which the soliciting or receiving is a part, is for a charitable purpose. It proceeds to state that if the benefit is solicited from the supply of goods or services or in connection with any other commercial undertaking, then the activity constitutes a "*fundraising appeal*" for the purposes of the Act.

Under the NSW Act, the party supporting the charity's cause is known as the trader. A trader is simply a business or some other entity that conducts a fundraising appeal in connection with the supply of goods or services in the course of any trade or business that the trader carries on. The penalty for conducting an unlawful fundraising event is up to 50 penalty units, so it is important to ensure that both parties lawfully undertake the appeal.

To conduct a fundraising appeal, the following conditions must be complied with:

- the appeal must be conducted jointly by the trader and the charity holding the authority to conduct the appeal;
- any advertisement, notice or information must identify the trader and the charity; and
- any advertisement, notice or information must give details of the intended distribution of funds raised in the appeal. This may be by way of a guaranteed minimum payment or a proportion of profits.

Although an authority may have been granted in respect of the conducting of a fundraising appeal, the *Charitable Fundraising Regulation 2008* also requires an agreement to be entered into by the trader and the charity which governs the return of the proceeds of the appeal to the charity. The agreement must, at a minimum, provide for the following:

- the amount of the return or the basis or method upon which the return is to be calculated;
- the manner in which payment to the charity will be effected;
- details of any commission, wages or fees paid to the trader from the gross income raised;

“Any advertisement, notice or information must give details of the intended distribution of funds raised in the appeal”



(Continued on page 10)

Is cause-related marketing a fundraising activity?

(Continued from page 9)

- the type, and any limitation on the amount, of expenses to be borne by each party as part of the appeal;
- the basic rights, duties and responsibilities of the parties;
- insurance risks to be covered by each party, for example, public liability insurance, workers compensation insurance and personal accident insurance for volunteers;
- details of any records and documentation to be maintained by the trader;
- the requirement that the trader keep all records at the registered office of the charity;
- internal controls and safeguards to ensure proper accountability for the gross income raised;
- dispute resolution processes for disputes arising between the parties, complaints from the public and grievances from employees of the parties;
- the trader's reporting requirements;
- an undertaking by the trader to comply with the NSW Act and Regulation and the conditions of the fundraising authority;
- mechanism for dealing with a variation, addition or deletion of a condition of the authority; and
- the circumstances under which the agreement may be terminated.

Finally, the charity must be administered in relation to its fundraising activities by a governing body, be it a board of directors or a committee, of no fewer than three

(3) persons and all business transacted by that governing body in relation to its fundraising activities must be recorded in the charity's minutes.

Victoria

Conducting a fundraising appeal in Victoria is governed by the *Fundraising Act 1998* and overseen by Consumer Affairs Victoria, Department of Justice.

“A fundraising appeal specifically includes the sale of goods where portions of the sale price are donated to a non-profit charity or cause”

In Victoria a fundraising appeal occurs if a person solicits or receives money or a benefit on the basis of a representation that it is not solely for the profit or commercial benefit of the person, cause or thing on whose behalf the appeal is being conducted. This specifically includes the sale of goods where portions of the sale price are donated to a non-profit charity or cause.

In making the representation that the solicitation or receipt of money or a benefit is not solely for a profit or commercial benefit, it does not matter if the person who solicits or receives the money does not make the representation or that the

representation was direct or indirect. If a representation is indirect, but such that a donor is caused to believe that they are providing a benefit or money for a non-commercial or non-profit person, cause or thing, then the money or benefit is obtained as a result of a fundraising appeal. Further, and interestingly, it also does not matter if the majority of the money or benefit is not applied for the benefit of the person, cause or thing on whose behalf it is solicited. Fundraising appeals can also be conducted as an ongoing activity or for a particular event and it does not matter whether the person conducting the appeal is a volunteer or that they receive a fee for services.

Where a fundraising appeal is a cause-related marketing appeal, whereby there is a supply of goods or services in the course of business and a representation that a portion of the money or benefit received in relation to that supply is to be applied towards a benevolent purpose, the party supplying the goods or services must disclose the dollar amount or percentage amount of the money or benefit to be applied to that benevolent purpose. The disclosure is to be made to the person to whom the goods or services are supplied (ie the consumer) in many cases, in writing. A condition may be imposed on the charity's fundraising registration that specifies how the disclosure is to be made.

Unlike in NSW, there is no requirement for an agreement to be

(Continued on page 11)

“In WA, Tasmania and SA, it is not at all clear as to whether the legislation in those States contemplates this method of raising funds”

Is cause-related marketing a fundraising activity?

(Continued from page 10)

entered into by the charity and the business involved in the fundraising appeal. There are, however, record keeping requirements which provide for accountability and transparency in respect of the funds raised.

Queensland

The Department of Justice and Attorney-General, Queensland regulates fundraising activities in Queensland pursuant to the Collections Act 1966. An appeal is referred to as an 'appeal for support'.

An appeal for support includes:

- any express or implied notification to the public that the proceeds of or any moneys from the sale of any articles or the supply of any service are intended or are to be appropriated for a specific purpose; and
■ the sale of any articles or the supply of any service where any moneys or proceeds from which are appropriated or intended to be used for the specified purpose.

The conditions and reporting requirements to be observed when conducting an appeal for support which involves a cause-related marketing campaign are those that apply to any other appeal for support, so long as the trader is authorised to assist in or make an appeal for support.

This authorisation will be in the form of a Certificate of Registration of a Charity or a Certificate of Sanction. Where a business or person offers to sell a good and makes a representation that the proceeds of the sale is to be applied to charities generally, a

particular charity or any community purpose, without an authority to do so, an offence is committed by that business or person.

Western Australia

The Department of Consumer and Employment Protection regulates the collections of money or goods from the public in Western Australia deemed to be for a charitable purpose. To conduct a collection for charitable purposes, a licence is required to be granted by the Minister. Charities that collect and receive money for non-charitable purposes do not require a licence (although there are permit requirements).

The Western Australian legislation does not specifically refer to arrangements between traders and charities in respect to fundraising appeals. Advice from the Department is that arrangements whereby a percentage of the proceeds from the sale of goods or provision of services is received by the charity are governed by the Act, and that the charity is required to hold a licence and must authorise the trader to make the collection of funds.

The authorisation can be in any form approved by the Minister, but is usually provided in the form of an agreement between the charity and the trader.

Tasmania

The Office of Consumer Affairs and Fair Trading administers the Collections for Charities Act 2001 in Tasmania. Similar to Western Australia, the legislation does not specifically mention the type of receipt of or solicitation of funds that we are focusing on in this article. Again, the advice from Consumer Affairs and Fair Trading is that this type of fundraising appeal falls under the Act. In fact, soliciting for donations,

(Continued on page 12)



Is cause-related marketing a fundraising activity?



(Continued from page 11)

according to the Australian Taxation Office, means any request for donation however communicated and a donation may be anything of value, not just money. The Act does not, however, apply to soliciting "for the sale of goods or services". An example might be chocolate bar fundraisers where chocolate bars are sold and the proceeds remitted back to the charity. It is unclear whether "sale of goods or services" encompasses an appeal involving the sale of goods or provision of services by a trader who remits only a portion of the proceeds back to the charity and Consumer Affairs and Fair Trading were not able to provide any clarity in this respect.

South Australia

The Office of the Liquor and

Gambling Commissioner regulates community fundraising activities in South Australia under the *Charitable Purposes Act 1939*. Again, the legislation does not specifically refer to fundraising by traders in association with a charity or not-for-profit charity. It does, however, encompass the obtaining or attempted obtaining of money by the sale of a disc, token, badge, etc, or "other device". "Device" is not a term that is defined in the Act and, again, there is no clear guidance as to whether engaging a trader in a cause-related marketing campaign would, in fact, constitute the sale of a "device", rather than a "good" or "service".

Australian Capital Territory

Charitable collections in the ACT are regulated by the *Charitable*

Collections Act 2003 which is overseen by the Office of Regulatory Services, ACT Department of Justice and Community Safety. All types of collections for charitable purposes are regulated, including money or goods donated or sold.

A collection under the Act involves the soliciting or receiving of money or a benefit if, before or during the soliciting or receiving, the person represents that the purpose of the soliciting or receiving, or the purpose of an activity or enterprise of which the soliciting or receiving is part, is or includes a charitable purpose. It is, notably, immaterial whether the money or benefit is received as a donation or otherwise.

A collection is conducted by anyone who organises, manages or

(Continued on page 13)

Is cause-related marketing a fundraising activity?

State/Territory	Government Authority	Legislation
New South Wales	NSW Office of Liquor, Gaming and Racing, Department of the Arts, Sport and Recreation	<i>Charitable Fundraising Act 1991</i>
Victoria	Consumer Affairs Victoria, Department of Justice	<i>Fundraising Act 1998</i>
Queensland	Department of Justice and Attorney-General, Queensland	<i>Collections Act 1966</i>
Western Australia	Department of Consumer and Employment Protection	
Tasmania	Consumer Affairs and Fair Trading	<i>Collections for Charities Act 2001</i>
South Australia	Office of the Liquor and Gambling Commissioner	<i>Charitable Purposes Act 1939</i>
Australian Capital Territory	Office of Regulatory Services, ACT Department of Justice and Community Safety	<i>Charitable Collections Act 2003</i>
Northern Territory	Not applicable	Not applicable

(Continued from page 12)

assists in organising or managing the collection (other than as an employee) and it is immaterial whether the person is being paid or is a volunteer. The proceeds of a collection include any moneys or benefits derived, whether completely or partly or directly or indirectly, from money or benefits because of the carrying out of, or for the purposes, of the collection.

There are no requirements under the Act for there to exist agreements between the charity and the trader, although this may form part of the licence conditions.

Northern Territory

Donations in the Northern Territory are not regulated at all.

Conclusion

It is clear from this overview of the State legislation that a standard, national fundraising principle dealing with this

increasingly popular method of fundraising is required. It is another example of why Australia requires a third sector that is regulated consistently across State boundaries. In some of the States, it is unequivocally an activity that falls within the State's fundraising legislation, however, in Western Australia, Tasmania and South Australia, it is not at all clear as to whether the legislation in those States contemplates this method of raising funds at all. With approximately 42% of Australian businesses and major charities involved in cause-related marketing, it is time for it to be recognised as a genuine and successful fundraising mechanism and for consistent legislation to be drafted which will relieve much of the legal fog and administrative workload that surrounds its implementation. ■

Claire Russell is a solicitor at Makinson & d'Apice.

Prescribed Private Funds – legislative changes

(Continued from page 3)

Gifts

Under the current regime, whilst a PPF may solicit and receive gifts from the public, gifts from the public cannot be the primary source of gifts to it. However, the New Guidelines prescribe that a PPF **must not** solicit donations from the public and in any financial year, the PPF must not accept donations totalling more than 10% (in total) of the market value of its assets from entities (other than a founder of the PPF, associates of the founder or employees of the founder).

Investments by PPFs

The New Guidelines set out that a PPF must prepare and maintain a current investment strategy for the fund. The strategy should have regard to risk, composition and liquidity of the PPF's investments. The trustee must then implement the strategy and ensure that all

investments are made in accordance with it.

Conclusion

Every DGR should have a strategy in place in relation to requesting donations from PPFs, as the sole purpose for PPFs existing is to funnel funds through to DGRs. The question that then arises is, how do we find the PPFs?

Herein lies the challenge. There was a submission earlier on in the consultations concerning PPFs, that the contact details of PPFs be made publicly available so as to make it easier for charities to approach them with a view to soliciting donations from them. Many PPFs which made a submission to the Federal Government rejected this suggestion, their arguments being that:

- as they are in fact "Private" Prescribed Funds, they should

not be required to reveal their contact details; and

- the administrative costs that would come with the potential inundation of requests for donations from DGRs would be too great for some Funds to bear.

As a consequence, this suggestion did not make its way into the Bill or New Guidelines.

One benefit however from the new laws concerning PPFs is the requirement that they have a corporate trustee. The effect of this is that charities will be able to carry out a company search of the trustee company and, in so doing, obtain the address of the registered office of the trustee company. Approaches can then be made to the trustee company for donations. ■

Breanne Stratford is a solicitor at Makinson & d'Apice.

Having trouble finding what you're searching for?

Makinson & d'Apice have made it easier for charities and not-for-profit organisations to navigate through the complex maze of regulatory and compliance issues governing this sector.

We've created the Charity & Not-For-Profit Resources Centre, a website which provides free access to a wide range of resources, ideas and contacts that are relevant to those managing not-for-profits.

We have also included a section with responses to frequently asked questions, along with articles and workshops that you may find useful. Visit us any time at ...

www.makdap.com.au/charity_home.cfm



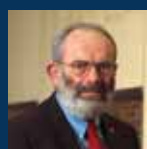
Balancing Act

Issue 14

Legal and tax affairs for the non-profit industry

September 2009

Makinson & d'Apice provides professional legal services for Australian and International clients including corporations, financial institutions, small businesses, non-profit bodies and personal clients. We provide prompt, authoritative, appropriate and cost-effective legal services and have done since 1859. An unrivalled reputation of integrity and experience, combined with the latest technology and research facilities is why Makinson & d'Apice is Sydney's member firm of the LAWorld International Legal Network.



Richard d'Apice AM
+61 2 9233 9011
rdapice@makdap.com.au



Bill d'Apice
+61 2 9233 9013
wdapice@makdap.com.au



Vera Visevic
+61 2 9233 9083
visevic@makdap.com.au



John Baxter
+61 2 9233 9037
jbaxter@makdap.com.au

Moore Stephens Sydney is an accounting and business advisory firm, part of a global network of 621 offices in 95 countries. We provide highly personalised, expert and commercially astute audit, accounting, tax and advisory services to our clients, delivering personal attention and local market knowledge, backed by a leading national and international network of expertise and advice that you need to succeed. Our clients include large and small businesses and non-profit organisations, as well as individuals.



Joe Shannon
+61 2 8236 7700
jshannon@moorestephens.com.au



Allan Mortel
+61 2 8236 7700
amortel@moorestephens.com.au

Back issues

All issues of *Balancing Act* are available online at www.makdap.com.au. Articles in the last two issues include:

Issue 13, June 2009

- The urge to merge
- *Legislaction*—Federal
- Actions speak louder than *Word(s)*
- Legislative changes to the law governing associations

Issue 12, March 2009


- When is a gift no longer a gift?
- *Legislaction* — Federal
- Fundraising at a time of crisis — opportunity or risks?
- *Legislaction* — States & Territories

Please feel free to circulate this newsletter to others who may be interested. If you would like to receive future issues of *Balancing Act* via email, please register at http://www.makdap.com.au/resources_registration.cfm.

Disclaimer: This publication is a non-comprehensive general outline of the law as at 25 September 2009. You should not act upon or rely on any information contained in this newsletter without obtaining specific legal advice.

© 2009 Makinson & d'Apice

MAKINSON & d'APICE
LAWYERS

 Liability is limited by the Solicitors Scheme under the *Professional Standards Act 1994*

Level 12 135 King Street Sydney NSW 2000 • GPO Box 495 Sydney 2001 • DX 296 Sydney
Telephone 02 9233 7788 • Facsimile 02 9233 1550 • Email mail@makdap.com.au • www.makdap.com.au