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**Trustee
Corporations
Association
of Australia**

14 January 2009

The Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir / Madam

Improving the Integrity of Prescribed Private Funds (PPFs)

The Trustee Corporations Association is the peak representative body for the statutory trustee corporations industry in Australia.

Our 17 member organisations comprise all 8 regional Public Trustees and most of the 10 private trustee corporations.

We are pleased to provide comments in relation to the matters raised in the PPF discussion paper.

Background

Statutory trustee corporations, established and regulated under specific legislation, have been prudently managing Australians' financial and personal affairs since the late 1800s.

TCA members provide a comprehensive range of services to millions of individual, family, and corporate clients, involving the administration / management of about \$520b of assets.

As part of their long history, TCA members have had a significant involvement in the philanthropic sector.

They currently act as trustee (or co-trustee) for over 2,000 charitable trusts and foundations, including a number of PPFs, with aggregate assets of \$3.9b.

In 2006/07, members distributed about \$280m to charitable causes from those trusts and foundations or directly from deceased estates they administered.

ANZ Trustees

Australian Executor
Trustees

Elders Trustees

Equity Trustees

National Australia
Trustees

Perpetual

Public Trustee for the
Australian Capital
Territory

Public Trustee
New South Wales

Public Trustee for the
Northern Territory

The Public Trustee of
Queensland

Public Trustee
South Australia

The Public Trustee
Tasmania

Public Trustee
Western Australia

Sandhurst Trustees

State Trustees
Victoria

Tasmanian Perpetual
Trustees

Trust

TCA members also manage more than 50,000 other personal trusts and financial management orders worth about \$9b, and manage \$7b under powers of attorney and other agency arrangements for a further 8,000 clients.

Statutory trustee corporations bring considerable professional expertise and resources to the trust management role.

In addition to their governance and accountability obligations under common law and the relevant *Trustee Act*, trustee corporations are also subject to the respective *Trustee Companies Act*¹ / *Public Trustee Act*.

They are required to continually demonstrate the utmost capacity and diligence in carrying out their functions, and to always put the interests of clients first.

Like other trustees, they are subject to the 'Prudent Person' investment provisions of the applicable *Trustee Act*.

However, because trustee corporations are in the business of acting as a trustee or investing money on behalf of other persons, the legislation requires them to demonstrate a higher standard of care, diligence and skill in managing the affairs of others than 'non-professional' trustees.

Trustee corporations also offer perpetuity.

Comments

The introduction of PPFs was a useful initiative to encourage increased private investment in philanthropic endeavours.

The TCA agrees that integrity measures should seek to ensure that there are legal and administrative frameworks in place to safeguard money and property donated to PPFs and, as far as possible, ensure that donations enjoying tax concessions are used for appropriate philanthropic purposes.

At the same time, the legislative and regulatory framework should aim to facilitate the efficient long term operation of PPFs.

Administration of PPFs

We support the proposal in the discussion paper that the full administration of the PPF regime be brought under the authority of the ATO, including in respect of endorsing and dis-endorsing PPFs.

If a name change is seen as necessary, we suggest 'Endorsed Private Funds' (EPFs) or 'Endorsed Ancillary Funds' (EAFs) rather than 'Private Ancillary Funds', so as to avoid the possible confusion of having two 'PAFs' – ie: Public Ancillary Funds and Private Ancillary Funds.

¹ As you would be aware, in March the Council of Australian Governments (COAG) agreed that the Commonwealth would assume responsibility for regulating private trustee corporations. This is likely to occur in July next year. We would not expect that the duties imposed on trustee corporations and the level of expertise that they are required to demonstrate will be any less than under the present legislative arrangements.

Guidelines

We agree that the present 'guidelines' approach to setting out the requirements for PPFs should be replaced by a more formal approach, such as legislation or ATO Rulings.

Accumulation plans

We support the proposal to discontinue the present accumulation plan requirements as we feel that they are not useful, in that they focus the trustee's attention on capital rather than on income distribution.

We believe that such a change would simplify arrangements without adversely affecting the integrity of PPFs.

Distributions

Reflecting the Government's commitment to increase the size of compulsory distributions by PPFs, the paper proposes that PPFs be required to distribute, over the following year, a minimum proportion of the value of their assets at each year end.

The paper notes that the distribution rate should be at a level that demonstrates a PPF's philanthropic character, and refers to ATO data indicating a long-term PPF distribution rate of approximately 15% pa.

However, we wonder whether such an approach is consistent with the policy intent that PPFs generally be perpetual in nature.

Requiring 15% of a PPF's assets to be distributed each year, irrespective of the level of new donations or trust earnings, could defeat the objective of maintaining a corpus of assets which can generate distributable income in perpetuity, and discourage philanthropy.

Also, the requirement that PPFs must distribute capital gains greater than the CPI should be scrapped, as this is a disincentive to their establishment.

We suggest that PPFs should be brought more in line with perpetual testamentary charitable trusts, which must distribute 'income' annually and retain 'capital'.

If, for administrative ease, a minimum distribution rate is to be imposed on PPFs, we suggest that a figure of 5% rather than 15% would be more likely to allow the perpetual nature of those entities to be preserved.

Regular valuations

We agree that PPFs should value their assets at market rates at 30 June each year.

The recent market downturn, of course, highlights the risk in basing distributions on a snapshot of market value that includes unrealised capital gains.

Minimum PPF Size

We do not see the need to restrict PPFs to a certain minimum size. As with Self Managed Superannuation Funds, the decision to establish such a fund

should be left to the judgment of the prospective donors, having regard to costs etc.

Public Accountability

The paper notes that, because PPFs receive significant tax concessions akin to public funds, the public should be able to identify the PPFs and be satisfied that they are operating in an acceptable and transparent manner.

PPFs are required to provide an annual information return to the ATO, and this obligation should continue so that the regulator can monitor a PPF's compliance with its obligations.

Further, the ATO has released aggregate annual data on PPF donations received, distributions (broken up into several categories of recipients) and closing value of those funds.

However, because PPFs are not obliged to seek donations from the general public, it is debatable what, if any, information on individual PPFs should be made available to the general public.

We would oppose the suggestion that the contact details of PPFs should be provided publicly as this could result in a time-consuming deluge of approaches by entities seeking funding. Many PPFs have long term recipients of grants in place and / or specific areas of interest. It would seem preferable that it be left to individual PPFs as to whether they wish to 'advertise' their existence in order to distribute their gifts.

ATO scrutiny

We agree that the ATO should apply greater scrutiny to PPF activities to ensure that personal benefits from the trusts are not going to the donor or related parties and be given greater power to act in such a situation.

Transition Period

Two years seems a reasonable period for existing PPFs to comply with the proposed new guidelines.

Corporate Trustee

We note the paper's suggestion that, for Constitutional reasons, all PPFs might be required to have a 'corporate trustee' in order to enhance the ATO's ability to take action against PPFs that mismanage their funds.

It is unclear whether a 'sole corporate trustee only' approach is being proposed. However, we would not wish to see current arrangements, whereby individuals act as co-trustees with a statutory trustee corporation, ruled out.

At the same time, given their statutory standing, we believe that the new regime should allow the option of a trustee corporation being appointed sole trustee for a PPF without the need for at least one of its directors to meet the current definition of a 'Responsible Person'.

This current requirement entails an unnecessary administrative burden if that person ceases to qualify as a Responsible Person and needs to be replaced.

Penalties

We agree that penalties should be scaled to the nature of breaches by PPFs of their obligations.

This approach could include ATO warnings to funds about non-compliance that is minor or technical.

'Fit and proper person' test

While enhanced financial management skills for the controllers of PPFs are to be encouraged, it is unclear whether a formal 'fit and proper person' test, applying to all trustees, needs to be imposed.

As noted, trustees of PPFs are already subject to State and Territory trust laws, including the 'Prudent Person' principles.

One option might be to introduce a 'propriety' requirement for individual trustees along the lines of that applying to Registrable Superannuation Entity Licensees – ie: rule out 'disqualified persons'.

However, given their credentials / regulation as outlined above, we do not believe that statutory trustee corporations should be required to meet any additional 'fit and proper' test.

Model Deed

Our members do not find any difficulty working with the model PPF deed.

Number of donors

We believe that limiting the number of donors to a PPF (eg: 20 over the life of the fund) would be an unnecessary restriction, which could hamper intergenerational involvement with such funds.

This again would conflict with the perpetual nature of PPFs.

Winding up a PPF

If a PPF's circumstances change, it should be able to distribute its assets to a Public Ancillary Fund or convert to PAF status.

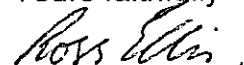
Similarly, if a PAF wishes to close, it should be able to distribute its assets to a PPF.

Liquid Assets

We do not believe that it would be desirable to restrict PPF investments to only liquid assets as this could limit a fund's ability to generate greater income and hence the amount of money available for charitable recipients.

Such a restriction would also conflict with traditional trustee discretion in respect of investments.

Yours faithfully



Ross Ellis
Executive Director