



Goldman Sachs JBWere  
Pty Ltd

ABN 21 006 797 897

101 Collins Street  
Melbourne Victoria 3000  
GPO Box 2050S  
Melbourne Victoria 3001

Telephone 03 9679 1111

[www.gsjobw.com](http://www.gsjobw.com)

29 May 2009

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

Email: [ppfreview2008@treasury.gov.au](mailto:ppfreview2008@treasury.gov.au)

Dear Sir/Madam

## **EXPOSURE DRAFT; TAX LAWS AMENDMENT (PRESCRIBED PRIVATE FUNDS) BILL 2009**

Thank you for the opportunity to comment on the recently released draft legislation relating to the oversight and regulation of Prescribed Private Funds.

Goldman Sachs JBWere supports the ongoing initiative by the Australian Government to further develop a clearer regulatory framework for the administration of Prescribed Private Funds (PPF's). As detailed in our response to the Treasury Discussion paper of November 2008, submitted on 14 January 2009, we believe any changes that improve the integrity of Prescribed Private Funds (PPF's) and create certainty around their ongoing oversight and administration will lead to greater levels of philanthropic support for the Australian community.

We specifically welcome proposals outlined in the Draft legislation to improve regulatory oversight by giving the Australian Tax Office (ATO) regulatory control of PPF's and the proposed new Private Ancillary Funds (PAFs).

We also acknowledge the proposals to ensure that the Australian Business Register (ABR) identifies the item under which an entity qualifies as a Deductible Gift Recipient (DGR). We agree that this initiative should reduce the difficulties of distinguishing DGRs by the ABR type, ensuring that ancillary funds can determine which DGRs they are able to distribute to.

There are some other specific comments we can make on the proposed legislation that has been circulated for comment:

- 1) We support in principle the requirement for PAFs to have a single corporate Trustee, however, given the complexity of trust law in Australia, we believe the legal consequences of this proposal need to be thoroughly investigated and considered before the proposal is implemented.
- 2) We are concerned that the impact of the amendment that gives the Treasurer the power to make or change guidelines, combined with the lack of any grandfathering of existing guidelines, creates significant uncertainty as to how future changes may impact existing PPFs or potential PAFs. We believe this may act as a significant impediment to those considering making a gift to an existing fund or those establishing a PAF into the future.

- 3) There appears to be no provision in the draft legislation to allow a PAF to transfer capital to a public ancillary fund and vice versa or to allow a transfer of capital from one Public Ancillary Fund to another Public Ancillary Fund. Such a facility would not only support the objective of increasing consumer choice in regard to the providers of Public Ancillary Funds (consistent with Government policy in other areas such as Superannuation) but would also provide a solution if the trustees of a PAF no longer felt the PAF was the most efficient available structure if the size of funds or the level of involvement of the donor was to change. Such an outcome would have no tax consequences and would ensure the most efficient foundation solution was available ensuring the community benefit is maximised.
- 4) In the absence of grandfathering provisions for existing PPFs, the time frame for existing PPFs without a Corporate Trustee to comply with the new rules is problematic, as some existing deeds may prevent them from ever complying. Pushing ahead on this proposal without grandfathering existing PPFs may result in unintended consequences, including the potential risk of litigation or quicker than expected spending down of PPFs that were voluntarily established under rules that have now been changed.
- 5) We don't believe the deeming of PPFs to "have agreed to comply with the guidelines from 1 October 2009" adequately recognises that existing PPF deeds are legal instruments of trust which can only be amended in accordance with the provisions of those deeds or by the Court. We believe that if those with authority to change each deed do not sanction any change, the status quo should remain.

Further to these specific points, we note that the issues not covered in this draft legislation, but foreshadowed to be addressed in the next version of the draft legislation, are the most significant and likely to have the greatest impact on whether a PAF is established going forward. At this time, it is therefore difficult to provide an overall comment on the draft legislation, and in particular to comment constructively on the impact of the changes in the light of the Government's stated position of wanting to encourage greater Private Philanthropy.

Based upon the information released to date, uncertainty will therefore remain until at least the release of the next version of Draft legislation and related guidelines. This creates a significant disincentive to any donor considering making either a further donation to an existing PPF or considering establishing a new PPF this tax year. If the matters above are not addressed we believe they will also act as a significant issue for those considering establishing new PAFs into the future which would have significant ramifications for the funding of the charitable sector in Australia.

We would be pleased discuss or provide more information on any of the matters raised at your request and look forward to receiving the final draft of the proposed legislation.

Yours sincerely



Christopher Thorn  
Executive Director  
Philanthropic Services  
Goldman Sachs JBWere