



PHILANTHROPY
Australia

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Patron
Sir Gustav Nossal AC CB

Dear Sir

**PHILANTHROPY AUSTRALIA'S SUBMISSION:
EXPOSURE DRAFT – IMPROVING THE INTEGRITY OF PRESCRIBED PRIVATE FUNDS**

Thank you for the opportunity to comment on the abovementioned Draft Legislation.

Philanthropy Australia believes that it is in the interests of the entire community that a clearer regulatory framework be established for Prescribed Private Funds (PPFs). Philanthropy Australia commends the efforts of Treasury to clarify the rules under which PPFs operate and to increase efficient management and accountability of both existing PPFs and new Private Ancillary Funds (PAFs).

In particular we would like to commend Treasury on the very positive initiative to ensure that the ABR identifies under what provision an entity is entitled to endorsement as a DGR. This initiative will greatly simplify the process of grantmaking and aid grantmakers' efforts to fund only eligible entities. We also support the provision for the Commissioner to be able to share information with the state Attorneys General as a positive strengthening of the compliance infrastructure.

However, Philanthropy Australia finds it extremely difficult to respond to the Exposure Draft 'Improving the Integrity of Prescribed Private Funds' without having seen the Guidelines which are yet to be issued. While we support in principle the objectives of the legislation we reserve support for the detail until the Draft Guidelines are released and can be considered. The majority of issues raised by our Members will be covered in the Guidelines and we will take the opportunity to make further submissions on the legislation once the Draft Guidelines are released.

In the meantime, we see some key issues in the Exposure Draft which warrant comment.

Philanthropy Australia also offers comments on both technical issues and matters of principle, which are equally important when dealing with the voluntary irrevocable commitment of significant private funds for community benefit.



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Significant technical issues:

1. We suspect the issue of requiring PAFs to have a single corporate trustee is more complicated than has so far been considered and may cause complications for some existing PPFs. In particular, under Victorian trustee law it is not legally possible to appoint a single trustee (other than an authorised trustee company) as trustee of a trust unless there was only a single trustee when that trust was first established. Therefore the transition to the PAF framework and the provision for Commissioner to be able to appoint an Acting Trustee may come into direct conflict with existing Trustee law. We also note that there may be state tax impositions in the transfer of some assets to a new trustee (both under the transition to PAFs and in circumstances of an Acting Trustee being appointed) which should be addressed in consultation with the states.
2. The exposure draft states that the trustee of the PAF and the directors of the trustee are jointly and severally liable for any administrative penalty. This unlimited personal liability appears to go against the concept of limited liability and the stringent provisions of the current Corporations Act. The exposure draft also states that the administrative penalties will largely result from a private ancillary fund failing to comply with the guidelines and that the guidelines will determine the amount of the penalty – guidelines that have yet to be issued. It would be very disappointing if the imposition of potentially unlimited personal liability, which is a greater liability than that required of directors of public companies, discouraged experienced and well respected individuals from being trustees and directors of a trustee of a PAF. This matter should be clarified in the Guidelines.
3. The exposure draft contains no mention of any potential vehicle to allow a private ancillary fund to transfer capital to a public ancillary fund or vice versa where appropriate. Provision of such a capacity would introduce a degree of flexibility and provide a greater choice of providers in the market. It provides a means for more efficient foundation management and has no tax consequences.

Significant issues relating to the growth and efficiency of philanthropy:

1. We commend the attempt to give rigour and accountability to the PPF system by ensuring that the Treasurer's power to make binding guidelines about the establishment and maintenance of PAFs is subject to review by Parliament. However, this still leaves donors and trustees with an undesirable lack of certainty. The practical implication is that existing PPFs and future PAFs may be forced to comply with future material rules which are not currently defined and which may be compelled upon them without notice or warning.

This is a serious disincentive for future donors who will be unwilling to make an irrevocable commitment of a large sum to the community without more certainty about the rules to which they are committing. It will be a big deterrent both for donors to contribute more to their existing PPFs and for the establishment of new PAFs and will also diminish trust in the government's commitment to furthering philanthropy.

Philanthropy Australia believes that both existing and potential donors and Trustees of existing PPFs and new PAFs need stronger assurances that they can proceed with some confidence that the ground rules under which they operate will not be changed without agreement.



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2. Apart from the timeframe allowed for existing PPFs that do not have a single corporate trustee, which gives them until 1 July 2011 to alter their arrangement, no allowance is made for the grandfathering or phasing in of the new amendments. Instead, all existing PPFs will be taken to have agreed to comply with the guidelines from 1 October 2009. This is fraught with potential difficulty as some PPFs' existing Trust Deeds may legally prevent them from complying with the amendments under State-based trustee laws. We urge that consideration to grandfathering be given to provide certainty to those PPFs established in prior years. Grandfathering provisions may also be particularly important in the light of the new Guidelines, when they are issued.
3. We would be interested to learn of the rationale behind the proposed removal of the Courts power to grant relief to a director (Sec 426-120 (7)) as this appears contrary to the existing legal framework.

As a matter of principle we cannot see there is natural justice in the statement that existing PPFs are "deemed to have agreed" to transfer to the new guidelines. Philanthropy Australia considers that existing PPF deeds are legal instruments of trust and can only be changed within the provisions of those deeds or by the Court, if those with authority to change each deed do not sanction any change, the status quo should remain.

The real success of the PPF structure has been that it provided a structure which has facilitated additional giving to the community. Because those setting up a PPF have made a substantial financial commitment to the not-for-profit sector, they have become intellectually engaged with issues facing society, bringing their time, their skills, their voice and their influence. They have encouraged their families, their friends and their peers to become engaged with the community sector. In so doing, the PPF has been a significant catalyst in building a culture of philanthropy in Australia which is so important in building a socially cohesive society.

Ensuring that philanthropic sector remains vibrant, flexible and attractive to donors is not just in the best interests of the philanthropic sector but those of charitable organisations and the entire community which they serve. Philanthropy Australia believes that it is essential that the new law does not inadvertently cause further complications for existing PPFs and urges that the issues we have raised be fully addressed.

Philanthropy Australia would welcome the opportunity to meet with Treasury to clarify and expand on the points raised in our submission.

Yours sincerely,

Gina Anderson
Chief Executive Officer