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29 May 2009

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

Dear Sir / Madam.

**TAX LAWS AMENDMENT (PRESCRIBED PRIVATE FUNDS)
BILL 2009**

We appreciate having the opportunity to comment on the exposure draft of the above Bill.

TCA members have had a long term and significant involvement in supporting the philanthropic sector and promoting sound management practices for charitable trusts.

General comment

It is unfortunate that the proposed new guidelines, which will cover important matters such as the minimum distribution requirements and the permitted investment strategies of private ancillary funds (PAFs), were not released at the same time.

Those elements will have a crucial impact on the integrity and efficient long term operation of PAFs.

We look forward to being able to comment on those guidelines as soon as possible.

Main amendments

We note that the amendments included in the exposure draft implement the Government's 2008 Budget announcement to:

- give the Treasurer the power to make legislative guidelines about the establishment and maintenance of PAFs;
- give the ATO greater regulatory powers over PAFs;

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

- move the full administration of those funds under the authority of the Commissioner of Taxation; and
- give the Commissioner the power to impose administrative penalties on trustees that fail to comply with the guidelines and to remove or suspend trustees of non-complying funds.

We are generally supportive of the above proposals on the basis that they will assist in ensuring that PAFs operate in an acceptable and transparent manner.

However, as regards the ability of the Commissioner to remove or suspend trustees of non-complying funds, it is unclear how this would work in practice alongside the powers of the Courts in relation to trustees.

Corporate trustee

We also note that, in order to provide the Commissioner with appropriate regulatory powers to protect the charitable funds of PAFs, it is seen as necessary to require all PAFs to have a single corporate trustee.

We welcome that decision to the extent that it enables statutory trustee corporations, which are well resourced entities with a long history of charitable fund management, to fill that role.

The exposure draft indicates that the corporate trustee and its directors will be jointly and severally liable for any administrative penalty, on the basis that:

“As corporate trustees of PAFs usually have little capital, it is necessary to also impose the penalty on the directors to effectively ensure that a PAF complies with the guidelines.”

We suggest that joint and several liability should not be a requirement for statutory trustee corporations acting as PAF trustees given their solid capital positions.

We also note that allowing only a single corporate trustee could result in some PAFs having less professionalism in their governance. There may be situations where individuals, who currently are co-trustees with a statutory trustee corporation, would choose to establish their own corporate entity to act as sole trustee, so as to maintain their direct involvement in the control of the PAF.

We suggest that allowing individuals to act as co-trustees with statutory trustee corporations under the new PAF regulatory regime, notwithstanding the potentially different liability profiles, would not unduly compromise the ATO’s ability to exercise appropriate control over the sector.

However, if a ‘single corporate trustee’ model is confirmed as Government policy, we believe that there should be scope under the guidelines, and provision made in any model deed, for a PAF to have an Advisory Committee in which responsibility is reposed for determining:

- the recipients of fund distributions, and
- the proportion of the annual distribution each beneficiary is to receive.

Where such a provision is utilised, the duty of the trustee would be to ensure that the proposed distribution accords with the deed and the law (for example, ensuring that the recipient is a DGR, and where the deed nominates a particular head of charity to benefit, that the recipient operates within that charitable area).

The corporate trustee would remain wholly responsible for the trust administration (including asset investment and determining the total amount to be distributed each year). However, and of great significance in terms of the motivation for creating PAFs, founders and their families etc can retain, within the scope of the law, the control they desire over the allocation of distributions to eligible beneficiaries.

We would also note that existing PPFs seeking to move to a single corporate trustee structure may run into barriers in terms of current State and Territory trustee laws that prevent appointment of a single trustee (other than a statutory trustee corporation) except where only one trustee was originally appointed.

Transition arrangements

The exposure draft provides that existing PPFs will become PAFs on 1 October 2009 and the Commissioner will be taken to have endorsed them as DGRs on that date.

Further, in order to comply with the new definition of PAF, all existing PPFs will also be taken to have agreed to comply with the guidelines from 1 October 2009, although those PPFs that do not have a single corporate trustee will have until 1 July 2011 to alter their existing arrangements.


This is a much tighter timetable than was proposed in the November 2008 Discussion Paper, which suggested a transitional period of 2 years during which existing PPFs could continue to use the current guidelines.

We believe that the transition period proposed in the exposure draft should be extended to 2 years.

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We would, of course, be happy to discuss any of the above matters with you.

Yours faithfully,



Ross Ellis
Executive Director