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**Trustee  
Corporations  
Association  
of Australia**

30 August 2011

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

Dear Sir

**Public Ancillary Funds – Draft Guidelines**

The TCA is the peak representative body for the trustee corporations industry in Australia.

It represents 16 organisations, comprising all 8 regional Public Trustees and the great majority of the 11 private licensed trustee company groups.

Our members provide a wide range of financial services to individual, family and corporate clients, involving the management / administration of about \$500b in assets.

Member services include:

- traditional activities, such as estate planning, wills, powers of attorney, deceased estate administration, and management of various types of personal trusts.
- superannuation fund trustees / administrators.
- responsible entity for managed investment schemes.
- other corporate activities such as debenture trusteeships, securitisation facilities, and custodial services.

Within the personal trusts sector of their businesses, TCA members manage over 2,000 charitable trusts or foundations with assets of around \$3.3b.

We are pleased to provide comments on the draft guidelines for public ancillary funds (PuAFs).

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Public Trustee for the  
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Territory

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Northern Territory

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Queensland

Public Trustee  
South Australia

The Public Trustee  
Tasmania

Public Trustee  
Western Australia

Sandhurst Trustees

State Trustees  
Victoria

Tasmanian Perpetual  
Trustees

The Trust Company

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## Comments

As noted in our submission last December on the consultation paper *Improving the integrity of public ancillary funds*, we see it as very important that the guidelines do not threaten the ability of PuAFs to operate in perpetuity, as this is a key feature in attracting community support for these valuable philanthropic vehicles.

Further, the guidelines need to be flexible as not all PuAFs operate in the same way.

Many PuAFs are structured with a view to retaining a corpus of funds in perpetuity and making charitable grants only from the income earned.

In some circumstances, charities ask for distributions to be held over by the trustee for a forthcoming presentation function.

Similarly, intended scholarship grants are sometimes retained by the trustee pending identification of suitable recipients.

Some PuAFs are set up for limited periods to accumulate funds for specific capital works associated with philanthropic projects, with funds released at irregular intervals over the term of the particular project.

Having regard to those considerations, we offer the following comments on the draft guidelines.

### The trustee

Draft guideline 14 provides:

*At all times, a majority of the individuals involved in the decision-making of the fund must be individuals with a degree of responsibility to the Australian community as a whole.*

*14.1. An individual before whom a statutory declaration may be made is to be considered an individual with a degree of responsibility to the Australian community as a whole.*

*14.2. The individuals referred to in guideline 14 must be active directors of the trustee and a member of any other controlling body of the fund.*

*14.3. This guideline does not apply to the Public Trustee of a state or territory.*

We believe that 14.3 should also exclude licensed trustee companies from guideline 14 on the basis that they are subject to an appropriate level of regulation by ASIC, including in respect of the competence of their responsible managers.

A similar concession is proposed to be applied to both the Public Trustees and licensed trustee companies in respect of administrative penalties given the adequacy of the regulatory frameworks under which those entities operate.

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## Distributions

Draft guideline 19 provides:

*During each financial year, a public ancillary fund must distribute at least 4 per cent of the market value of the fund's net assets (as at the end of the previous financial year).*

While the 4% figure is lower than the minimum distribution rate applicable to private ancillary funds, we remain of the view that PuAFs should not be required to make a minimum distribution of their capital each year.

Rather, as a general rule, they should be expected to distribute most of their income annually.

Indeed, many PuAFs have been created under wills which contained clauses requiring capital to be retained and income earned to be distributed to charitable causes.

Those clauses cannot be amended because the testator has died.

Many other wills containing similar clauses also cannot be amended because the testators, although still alive, have lost the legal capacity to do so.

If a guideline specifying a minimum distribution of capital is retained in the final guidelines, we recommend that:

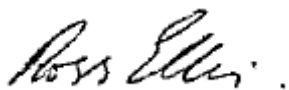
1. PuAFs in existence at 31/12/11 with clauses specifying that only income is to be distributed each year be exempt from that guideline.
2. A similar exemption apply to PuAFs that come into existence after that date as a result of wills containing, at that date, an 'income only' clause that could not be amended because of the testator's loss of capacity.
3. Other PuAFs be required to distribute an average of 2.5% of their capital each year, calculated as a moving 5 year average.

## Sub-funds

Some PuAFs operate sub-funds, whereby donors can establish their own named fund to serve specific purposes that they identify, even though donations to all sub-funds are pooled for efficient investment.

Clarification is sought as to whether the guidelines will apply to each sub-fund individually or on an aggregate basis to the 'parent' PuAF.

Yours faithfully



Ross Ellis  
Executive Director