

NATIONAL SECRETARIAT

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**Trustee
Corporations
Association
of Australia**

28 November 2011

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

Dear Mr Legget

Ancillary Fund Guidelines

As you will be aware, statutory trustee corporations (ie: Public Trustees and licensed trustee companies) have had a long involvement in managing charitable trusts.

Our members currently act as trustee (or co-trustee) for over 2,100 charitable trusts with assets of over \$3.2 billion, including a number of private ancillary funds (PAFs) and public ancillary funds (PuAFs).

I am writing to seek confirmation that our members can continue to invest PAF and PuAF monies in their own common funds and in *Corporations Act* managed investment schemes (MIS), whether managed by a related party or an external manager, without offending the current PAF guidelines or the proposed PuAF guidelines.

The current / draft guidelines in question are:

34. *The fund's investments must be made and maintained on an arm's length basis.*
37. *The trustee must keep the assets of the fund separate from all other assets.*

ANZ Trustees

Australian Executor
Trustees

Equity Trustees

National Australia
Trustees

New South Wales
Trustee and Guardian

Perpetual

Public Trustee for the
Australian Capital
Territory

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

The Trust Company

As you will be aware, for many years trustee corporations have been permitted to operate common funds to enable the efficient pooling and investment of monies from different estates.

The relevant State and Territory laws governing the several Public Trustees and Part 5D.2 of the Corporations Act that now applies to licensed trustee companies specifically provide for the pooling of trust money with other money, or the pooling of money from two or more trusts through common funds.

This delivers for the trust and its beneficiaries diversification of risk of volatility, potential for capital gains to protect against inflation, availability of tax-advantaged income and access to wholesale funds management fees.

Under the legislation governing common funds, trustee corporations must keep, for each common fund, accounts showing at all times the current amount for the time being at credit in the fund on the account of each estate.

Further, estate money cannot be pooled into a common fund if it would be contrary to an express provision of the conditions under which the estate money is held.

Similarly, MIS provide another regulated pooling mechanism for investments, with the responsible entities required to maintain details of each investor's holding of units in the fund.

Where a statutory trustee corporation (or a related party) manages the MIS, the investment of PAF/PuAF monies in the MIS is able to be authorised under the applicable governing rules.

The applicable trustee duties of the State and Territory *Trustee Act* as to the investment of trust assets continue to apply.

We suggest that there is no sensible policy advantage to be gained by prohibiting statutory trustee corporations, which are professional, regulated trustee entities, from investing PAF / PuAF monies, along with other estate monies, in their own common funds or in MIS.

Indeed, charitable beneficiaries would be disadvantaged if the economies of utilising common funds / MIS were not available.

Trustee corporations would face significant administrative inefficiencies, including difficulties in complying with the prudent person investment requirements, if they were forced to invest the monies of multiple estates separately.

Also, there would be considerable cost involved in unwinding any current investments of PAF / PuAF monies in common funds / MIS.

Specifically, we recommend that:

- (a) PAF guideline 34 and draft PuAF guideline 34 be amended to make it clear that they do not prohibit a Public Trustee or licensed trustee company from investing PAF / PuAF monies:
 - (i) in a common fund governed by State or Territory legislation or by Chapter 5D of the *Corporations Act*,

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- or, where the governing rules so permit,
- (ii) in a *Corporations Act* MIS operated by a trustee corporation, or by a related party of such a corporation; and
- (b) PAF guideline 37 and draft PuAF guideline 37 be amended to make it clear that they do not prohibit investment of PAF or PuAF monies in statutory common funds or in *Corporations Act* MIS.

Yours faithfully

Ross Ellis
Executive Director