
Trustee Corporations Association of Australia

IMPROVING THE INTEGRITY OF PUBLIC ANCILLARY FUNDS

Submission to Treasury

December 2010

Introduction

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 (see Attachment).

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

In 2008/09, members distributed about \$180m to charitable causes from those trusts or directly from deceased estates they administered.

Statutory trustee corporations bring considerable professional expertise and resources to the trust management role.

They are required to observe high standards of governance and accountability under common law and relevant legislation including *State/Territory Trustee Acts*, *Trustee Companies Acts* and *Public Trustee Acts*, and the *Federal Financial Services Modernisation Act*.

They must continually demonstrate the utmost capacity and diligence in carrying out their functions, and to always put the interests of clients first.

Like other trustees, they are subject to the 'Prudent Person' investment provisions of the applicable *Trustee Act*.

However, because trustee corporations are in the business of acting as a trustee or investing money on behalf of other persons, the legislation requires them to demonstrate a higher standard of care, diligence and skill in managing the affairs of others than 'non-professional' trustees.

Trustee corporations also offer the benefit of perpetuity.

We are pleased to have the opportunity to comment on the consultation paper *Improving the integrity of public ancillary funds*.

General comments

Public ancillary funds (PuAFs) are an ideal means of encouraging individuals to engage in a structured giving program as they are relatively simple and convenient.

Donors to PuAFs often do not have the immediate means to establish a private ancillary fund (PAF), but are attracted to the sense of immortality achieved

through a named sub-fund, with which their children and other family members can become engaged.

The proposed guidelines should be clear and avoid unnecessary complexity.

At the same time, the guidelines need to be flexible as not all PuAFs are the same – some are set up by charities as vehicles for relatively short term fundraising, while others are structured with a view to retaining a corpus of funds in perpetuity and making charitable grants from the income earned.

We see it as very important that the guidelines do not threaten the ability of PuAFs to operate in perpetuity, a key feature in attracting community support for these valuable philanthropic vehicles.

Responses to specific questions

The following sections address the specific questions raised in the consultation paper.

Distributions

What is an appropriate minimum distribution rate for a public ancillary fund and why?

We do not believe that PuAFs should be required to make a minimum distribution of their capital each year.

In fact, some existing PuAF trust deeds restrict distributions solely to income.

The proposed guidelines should not destroy the ability of PuAFs to operate in perpetuity by mandating an excessive level of distributions.

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

However, there needs to be flexibility in terms of enabling them to accumulate funds in certain circumstances, eg: to fund major capital works associated with a philanthropic project or to vary the timing of scholarships depending on the suitability of potential recipients from year to year.

The fact that PuAFs receive public donations does not in our view warrant a particular minimum distribution rate being imposed on them.

If it is felt that there needs to be any greater accountability by PuAFs, this should be reflected in their disclosure requirements (see below) rather than their distribution rate.

Valuation of assets

Are there any issues that the Government needs to consider in implementing the requirement to ensure public ancillary funds regularly value their assets at market rates?

Are the valuation rules that apply to private ancillary funds also appropriate for public ancillary funds? If not, why not?

We see no reason why the market value of a PuAF's assets, like those of a PAF, generally should not be valued at least annually.

Real property should only need to be valued every 3 years.

Appropriately qualified valuers should include registered real estate agents, who in many cases will be managing properties owned by PuAFs.

Increased accountability

Are there any issues with requiring public ancillary funds to lodge a return?

Are there any issues with imposing greater public disclosure requirements on public ancillary funds?

What information should remain confidential and what information should be disclosed and why?

We agree that PuAFs should be recorded on the Australian Business Register and be required to lodge an annual income tax return in a format agreed with the ATO.

The return should be based on a standard chart of accounts to ensure comparability in the data across funds.

If it is felt that the soliciting of funds from the public by PuAFs warrants a higher level of community accountability, we suggest that the ATO should publish statistics for each PuAF showing:

- the aggregate amount of donations received during the year (ie: not details of individual donors),
- expenses incurred by the PuAF,
- a breakdown of distributions classified by type of recipient DGR, and
- the value of fund assets at the end of the financial year.

Breaches by trustee

Is the administrative penalty regime (including magnitude of penalties) that applies to private ancillary funds suitable for public ancillary funds?

We support a system of administrative penalties for PuAFs similar to that which applies to PAFs.

As is the case with PAFs, the directors of statutory trustee corporations involved in the management of PuAFs should not be liable to the administrative penalties for failure to comply with the guidelines, on the basis that those entities are subject to an appropriate level of supervision to cover their liabilities.

Corporate trustees

Are there any difficulties in requiring public ancillary funds to have a corporate trustee?

Are the rules for suspension or removal of trustees of private ancillary funds suitable for public ancillary funds?

We agree that, for regulatory purposes, PuAFs generally should be required to have a corporate trustee.

However, grandfathering arrangements may be necessary, as in the case of the transition from Prescribed Private Funds to PPFs.

Our members are well placed, in terms of expertise and resources, to effectively carry out the role of corporate trustee for PuAFs, working closely with an appropriately structured management committee or board.

We see no difficulty in the rules for suspension or removal of trustees of PAFs also applying to PuAFs.

Fit and proper test for trustees

What fit and proper person requirements should be imposed on trustees of public ancillary funds?

We believe that similar fit and proper requirements as apply to trustees of PAFs should apply to PuAFs.

However, given their credentials and regulation as outlined above, we do not believe that statutory trustee corporations should be required to meet any additional 'fit and proper' test.

Transitional rules

What transitional arrangements are required for existing public ancillary funds to conform to the new arrangements?

We believe that a transition period of at least 2 years would be appropriate.

Should the term 'public fund' be codified in the guidelines in accordance with the principles set out in ATO Taxation Ruling TR 95/27?

We are unsure what this proposal means.

Investment rules

Can the investment and risk minimisation rules that apply to private ancillary funds be suitably applied to public ancillary funds?

We believe that the appropriately flexible investment and risk minimisation rules that apply to PAFs can be applied to PuAFs.

The 'Prudent Person' principles, mentioned in our introductory comments, require trustees, so far as they are appropriate to the circumstances of the trust, to have regard to various matters including:

- the desirability of diversifying investments.
- the risk of capital or income loss or depreciation.
- the potential for capital appreciation.
- the likely amount and timing of income return.
- the liquidity and marketability of proposed investments.
- the tax implications of investments.

Attachment

TCA Members

- ANZ Trustees Ltd
- Australian Executor Trustees Ltd
- Equity Trustees Ltd
- National Australia Trustees Ltd
- New South Wales Trustee and Guardian
- Perpetual Ltd
- Public Trustee for the ACT
- 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 Ltd
- State Trustees Ltd
- Tasmanian Perpetual Trustees Ltd
- The Trust Company Ltd
