

**IMPROVING THE INTEGRITY OF PRESCRIBED PRIVATE FUNDS
THE TREASURY – DISCUSSION PAPER, NOVEMBER 2008**

**SUBMISSION BY *MANNKAL ECONOMIC EDUCATION FOUNDATION* –
January, 2008**

From studying this Discussion Paper, I was drawn to the many chronicled instances of “The Law of Perverse Consequences” – i.e., cases where the unintended long-term consequences of a course of action, such as this proposed legislation, may be wholly at odds with the ‘good’ intentions that lay behind them.

One unintended consequence of this submission is that there will be one less Mannkal Scholarship granted. Unfortunately the cost of researching this submission robs one student of such opportunity, as is always the outcome of increasing any administrative burden.

- We saw the establishment of our PPF as a way for our family to significantly engage with the community which we do with active scholarship programs with Western Australia’s five universities:-
 - The University of Notre Dame
 - Murdoch University
 - The University of Western Australia
 - Curtin University of Technology
 - Edith Cowan University
- Plus the University of Adelaide, together with support to other DGRs.

Our contributions for the year ended June, ’08 was \$562,000.

Since the Foundation was incorporated in 2002, Mannkal’s total contributions to the above beneficiaries (to 30th June, 2008), is \$1,246,166.

- We would not have established a PPF under the rules suggested by this Discussion Paper, in particular if PPFs are compelled to:
 - distribute as much as 15% of the closing value of the fund each year, effectively eliminating perpetuity; and
 - make their contact details available publicly.
- The proposal to distribute 15% per annum is inconsistent with the original rules under which our Foundation was established. We would consider this a breach of faith by the Government.
- The rules suggested in Treasury’s Discussion Paper will likely:
 - close down the majority of existing PPFs within a 15 year period; and
 - result in very few new PPFs being established.

- One of the major reasons for establishing our PPF was for the family to engage with the community in a strategic way over a long period of time, hopefully including more than one generation. Depending on various assumptions, a distribution rate of 15% per annum will result in the Foundation having an immaterial corpus within approximately 10 years, resulting in the Foundation being closed.
- Philanthropy requires a long term approach to major issues facing the community. Lack of perpetuity will make this very difficult and certainly result in a short term focus.
- We agree that several of the current PPF Guidelines are ambiguous and we welcome abolishing accumulation plans. We further agree that for simplicity PPFs distribute a minimum amount each year based upon the market value of the PPF's net assets at the close of the previous financial year. We agree that this would provide greater certainty to PPF trustees and provide more consistency to giving by PPFs. We believe such clarity, at a distribution rate which allows perpetuity of the foundation, will also lead to an increase in the establishment of PPFs. Another prime benefit will be to assist our beneficiaries with their forward budgeting.
- We believe a reasonable distribution rate to be 5% per annum. This will ensure at least 5% of the corpus reaches the community each year and allow the Foundation to accumulate funds over a reasonable period of time so that the annual distribution can be meaningful in amount. This will maximise the long term benefit to the community. It is similar to the rate used in the USA.
- If PPFs are required to provide their contact details to the public we would be inundated with requests for funds. We understand that there are over 20,000 deductible gift recipients ('DGRs') in Australia. Notwithstanding that a proportion of these may be ineligible to receive gifts from a PPF, once a list of PPF addresses is made publicly available we would expect a vast number of these DGRs would likely write to each PPF seeking funding. To minimise costs our Foundation does not employ full-time staff, however, if the Foundation was to be inundated with funding requests it is likely that staff would need to be expanded to manage this process. This would have a material adverse impact on grants made by the Foundation each year.
- We foresee this resulting in a significant waste of resources for charities. We would imagine that we will receive requests for many projects which fall outside the mission and scope of the Foundation.
- With regard to regulation, we submit that trustees of PPFs are presently subject to a sufficient degree of regulation, as outlined in Part 2a, paragraph 25, of the Paper. In Parts 2a and 2d, and throughout the Paper, it appears the view is taken that the Guidelines published by the ATO bind and regulate the ongoing conduct of trustees of PPFs. That is in our view a misconception. On an ongoing basis, the principle source of rules governing the conduct of trustees is the Trust Deed by which the PPF is settled and where applicable the *Trustees Act* of the State or Territory of settlement. The ATO's Model Trust Deed is not of itself obligatory. Rather, use of it increases the prospects of a trust so settled being recommended for prescription as a PPF: see paragraph

17, PPF Guidelines v3. The model trust deed has been designed as basis from which an intending settlor of a PPF may work in order to accommodate both the settlor's intentions and objectives in establishing a PPF, and the requirements of Item 2 of s30-15 of ITAA 1997, the ATO's views as set out in Taxation Ruling TR 95/27, and the integrity assurance measures: see para 15, PPF Guidelines v3.

- We submit that reducing the terms of the Model Trust Deed would reduce the obligations that are to be observed by the trustee in the ongoing administration of the PPF. Expanding the scope of the Guidelines by relocating provisions of the Model Trust Deed to it as proposed in Part 2c of the Paper would not achieve or ensure any greater degree of compliance by trustees with the objectives of the integrity assurance measures as discussed by the ATO in the Guidelines. It might reduce the ATO's administrative burden.
- Trustees are bound in the first instance to comply with the terms of the trust deed: *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 at [32]. The Guidelines comprise a general, rather than legally precise, statement by the ATO of its views and the approach that it will take to the process of recommendation for prescription of funds as PPFs. Accordingly, increasing the scope of the Guidelines and making compliance with its terms obligatory, on an ongoing basis, may result in a conflict arising between the terms of the Guidelines and the trust deed by which the trustee is bound, particularly in the case of existing PPFs. Any provision in the Guidelines to the effect that the Guidelines shall prevail in the event of any such consistency would go some way towards rendering the terms of the trust deed nugatory, if indeed that is what the ATO intends, but at the risk of confusion and at best attenuating trustees' varied obligations to the highly diverse circumstances of diverse excellent causes. The continued operation of existing PPFs in such a case would become impossible due to the imprecise terms in which the Guidelines are drafted. We submit that nothing would be gained by the proposals to amend the Guidelines or the Model Trust Deed.
- Amending the ITAA 1997 or otherwise legislating to make use of the Model Trust Deed obligatory would entirely remove the current degree of flexibility that exists for PPFs to be established for particular purposes suited to defined objectives, and consequently reduce the incentives for establishment of PPFs. Philanthropy of itself has a more limited meaning than the present uses to which payments from PPFs are now made.
- The question raised in Part 2b to introduce a "fit and proper person" test in respect of trustees appears to overlook the existing requirement that at least one individual trustee, or director of a corporate trustee, be a "responsible person" as that term is defined in the model trust deed. It is submitted that to impose a requirement such as that which applies to tax agents under reg 156 of the Income Tax Regulations 1936 or the superannuation legislation would introduce a further and unnecessary regulatory regime relating to the assessment and certification of trustees according to those requirements. The ATO already oversees the process of nomination of each PPF's "responsible person" at the point of application for prescription as a PPF. We submit that is of itself sufficient, and no change is required. As experience has shown, administration of the "fit and proper person" test in relation to tax agents has given rise to a number of contested cases in the Federal Court and in the

Administrative Appeals Tribunal. The legislative imposition of a similar test for the trustees of PPFs would give rise to more problems than it would solve.

In relation to tax agents it requires consideration of their knowledge and experience of tax law, preparation of tax returns and the like. Contrast that with the position of a trustee of such a fund – by what measure will you determine his skill, experience or wisdom? In the case of tax agents, compliance with tax law can be an issue. How would a board of trustees establish what the other trustees had done in relation to their own compliance obligations?

- In conclusion, could we suggest that Australia should be encouraging families to commence traditions of giving, not discouraging them, as the proposals in the Discussion Paper will do.

Yours faithfully,



Ronald B. Manners
Founder & Joint Trustee

8th January, 2009