

Level 2  
95 Pitt Street Sydney, NSW 2000  
**Telephone** 02 8223 0000  
**Facsimile** 02 8223 0077  
**Email** [tia@taxinstitute.com.au](mailto:tia@taxinstitute.com.au)  
**Website** [www.taxinstitute.com.au](http://www.taxinstitute.com.au)  
**ABN** 45 008 392 372



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Manager  
Philanthropy and Exemptions Unit  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Email: [ppfreview2008@treasury.gov.au](mailto:ppfreview2008@treasury.gov.au)

Dear Manager

### **Improving the Integrity of Prescribed Private Funds Exposure Draft – Tax Laws Amendment (Prescribed Private Funds) Bill 2009**

The Taxation Institute of Australia (**'Taxation Institute'**) is pleased to provide its comments on the *Exposure Draft Tax Laws Amendment (Prescribed Private Funds) Bill 2009* (**'Draft Bill'**) and the related Explanatory Material (**'Draft EM'**) released for public comment on 14 May 2009 (together, **'Exposure Draft Material'**).

The Taxation Institute supports the Government's commitment to improving the integrity of prescribed private funds and appreciates the opportunities the Government has provided for wide community consultation on these issues, including the Discussion Paper (*Improving the integrity of Prescribed Private Funds*) released in November last year and the current Exposure Draft Material.

However, the Taxation Institute is concerned that the proposed legislative guidelines are not available as at the closing date for submissions on the Exposure Draft Material as they are the key to the new provisions. It is the guidelines that will specify matters such as:

- the role and purpose of private ancillary funds (**'PAFs'**) (formerly know as prescribed private funds);
- the class of entities that the funds may donate to;
- distribution requirements and permitted investment strategies; and
- eligibility requirements for the directors of the funds' trustees.

Without the guidelines, it is difficult to make any comprehensive comments in relation to the Exposure Draft Material. Accordingly, the Taxation Institute suggests that the consultation process in relation to the Draft Exposure Material should be extended until the proposed guidelines are released and the Exposure Draft Material can be considered in conjunction with those guidelines.

Despite the concerns outlined above, the Taxation Institute has provided some brief comments in relation to the Exposure Draft Material below. In doing so, the Taxation Institute's submission does not attempt to identify all possible issues but rather focuses on our two key areas of concern, which are:

- the role of the Commissioner of Taxation (**'Commissioner'**); and
- the operation of the transitional provisions.

### **Role and powers of the Commissioner**

While the Taxation Institute supports having a single national regulator, the Taxation Institute questions whether the Commissioner is the best choice. In this regard, the Taxation Institute notes that the Senate Standing Committee on Economics in its charities report (*Disclosure regimes for charities and not-for-profit organisations*, 4 December 2008) recommended that there be a single independent national regulator for Not for Profit Organisations. This recommendation would overcome conflict of interest issues that may arise if the Commissioner was to have this role.

The Taxation Institute considers that if the Commissioner is to be the single national regulator, the Commissioner's powers will need to be clarified more clearly to eliminate, as far as possible, conflicts that might otherwise arise with the Commissioner's revenue collection role.

It is proposed that the Commissioner's powers in relation to private ancillary funds will cover all administration aspects in relation to PAFs, including:

- responsibility for determining whether a fund meets the definition of a PAF and whether the fund is entitled to be endorsed as a deductible gift recipient; and
- the ability to suspend or remove trustees of PAFs that consistently breach the guidelines or other relevant Australian laws.

The Taxation Institute recommends that no discretion be available in relation to these administrative powers. Further, the Taxation Institute recommends amending the Draft EM to make it clear that no discretion is available. This could be achieved, for example, by amending the law comparison table following paragraph 1.21 and paragraphs 1.24, 1.30, 1.47 of the Draft EM.

If, contrary to the Taxation Institute's suggestion above, the Commissioner is to have discretion in relation to these areas, then the Taxation Institute recommends that there should be a right of judicial review. In this regard, the Taxation Institute notes that there is a right to apply to the Administrative Appeals Tribunal for review where the Commissioner suspends or removes a trustee (refer proposed s 426-125 of the Draft Bill). However, there does not appear to be a similar provision in relation to the other administrative powers mentioned above. Although, the Draft EM indicates that such a right is available (refer paragraph 1.31 of the Draft EM). The Taxation Institute recommends that a specific provision be included in the Draft Bill.

#### **Transitional rules for entities currently registered**

The Draft Bill provides for existing prescribed funds to be taken to be PAFs from the commencement time. However, the Draft Bill provides that a fund can only be a PAF if the trustee is a body corporate and the trustee has agreed to comply with the guidelines. There is a transitional provision for funds that do not have a corporate trustee so that they have until 1 July 2011 before becoming subject to the administrative penalties and the removal and suspension of trustee provisions.

However, the Taxation Institute considers that this timeframe is insufficient for funds which may need to amend their trust deed to comply with the guidelines. Amending trust deeds will give rise to technical legal and tax issues, including the prospect of a breach of trust and potentially resettlement issues. The Taxation Institute recommends that consideration be given to including an additional transitional provision to modify the guidelines as far as necessary to accommodate funds that are unable to, or need additional time to, amend their trust deeds in order to comply with the guidelines.

#### **Conclusion**

While the Taxation Institute supports the aim of improving the integrity of prescribed private funds it is concerned that key features of the proposed new law as summarised in the Exposure Draft Material may create an environment which discourages rather than promotes the growth of prescribed private funds especially given that the guidelines may be made and amended by the Minister of the day by legislative instrument.

The Taxation Institute is happy to make its representatives available to discuss our submission with you. In the meantime, if you would like to discuss any of the issues raised in our submission or require further assistance or information, please contact Joan Roberts on 03 9611 0178 or the Taxation Institute's Senior Tax Counsel, Dr Michael Dirkis, on 02 8223 0011.

Yours sincerely



Joan Roberts  
President