

EXPOSURE DRAFT

1 Inserts for

2 **Tax Laws Amendment (2009 Measures**
3 **No. 4) Bill 2009: Prescribed private funds**

4 **EXPOSURE DRAFT**

If you have any comments on this exposure draft, they should be emailed to ppfreview2008@treasury.gov.au, or sent to:

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Philanthropy and Exemptions Unit, Personal and Retirement Income Division,
The Treasury
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By Friday 29 May 2009.

5 **Commencement information**

| Column 1 | Column 2 | Column 3 |
|-----------------------|-----------------|----------------|
| Provision(s) | Commencement | Date/Details |
| 1. Schedule 4, Part 1 | 1 October 2009. | 1 October 2009 |
| 2. Schedule 4, Part 2 | 1 January 2010. | 1 January 2010 |
| 3. Schedule 4, Part 3 | 1 October 2009. | 1 October 2009 |

6 **Schedule 4—Private ancillary funds**

7 **Part 1—Amendments commencing on 1 October**
8 **2009**

9 *A New Tax System (Australian Business Number) Act 1999*

10 **3 Paragraph 26(3)(ga)**

11 After “section 426-65”, insert “or 426-110”.

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Income Tax Assessment Act 1936

5 Subsection 6(1)

Insert:

private ancillary fund has the meaning given by section 426-105 in Schedule 1 to the *Taxation Administration Act 1953*.

10 At the end of subsection 16(4)

Add:

; or (n) if the information relates to the non-compliance of a private ancillary fund or charity with a law of the Commonwealth, a State or a Territory—the Attorney-General of a State or Territory for the purposes of the administration of a law of the State or Territory governing trusts or charities.

Income Tax Assessment Act 1997

15 Section 30-15 (table item 2, column headed “Recipient”)

Omit “*prescribed private fund”, substitute “*private ancillary fund”.

20 Section 30-15 (paragraph (c) of the cell at table item 2, column headed “Special conditions”)

Omit “, unless the fund is a prescribed private fund”.

25 Paragraph 30-17(1)(b)

Repeal the paragraph.

30 At the end of subsection 30-125(1)

Add:

; and (d) in the case of a *private ancillary fund—complies with the *private ancillary fund guidelines.

35 At the end of subsection 30-125(2)

Add:

; and (f) in the case of a *private ancillary fund—complies with the *private ancillary fund guidelines.

40 Subparagraph 30-227(2)(a)(iii)

Repeal the subparagraph.

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45 After subsection 30-229(2)

Insert:

(2A) If the *deductible gift recipient:

(a) either:

(i) is a fund, authority or institution; or

(ii) is a deductible gift recipient only because it is endorsed under Subdivision 30-BA as a deductible gift recipient for the operation of a fund, authority or institution; and

(b) the fund, authority or institution is covered by item 1, 2 or 4 of the table in section 30-15;

the statement may specify that the fund, authority or institution is covered by that item.

50 Paragraph 31-10(1)(b)

Omit “*prescribed private fund”, substitute “*private ancillary fund”.

55 Paragraph 31-10(2)(b)

Omit “or be a *prescribed private fund”.

60 Subsection 995-1(1)

Insert:

engage in conduct means:

(a) do an act; or

(b) omit to perform an act.

65 Subsection 995-1(1) (definition of *prescribed private fund*)

Repeal the definition.

70 Subsection 995-1(1)

Insert:

private ancillary fund has the meaning given by section 426-105 in Schedule 1 to the *Taxation Administration Act 1953*.

75 Subsection 995-1(1)

Insert:

private ancillary fund guidelines has the meaning given by section 426-107 in Schedule 1 to the *Taxation Administration Act 1953*.

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Taxation Administration Act 1953

80 Subsection 2(1)

Insert:

private ancillary fund has the meaning given by section 426-105 in Schedule 1.

85 Subsection 3C(4)

Repeal the subsection, substitute:

(4) Nothing in subsection (2) prohibits the Commissioner, a Second Commissioner, a Deputy Commissioner or a person authorised by the Commissioner, a Second Commissioner or a Deputy Commissioner from communicating any information to:

(a) a person performing, as an officer, duties in relation to a taxation law, for the purpose of enabling the person to perform those duties; or

(b) if the information relates to the non-compliance of a private ancillary fund or charity with a law of the Commonwealth, a State or a Territory—the Attorney-General of a State or Territory for the purposes of the administration of a law of the State or Territory governing trusts and charities.

90 Subsection 250-10(2) in Schedule 1 (table item 140, column headed “Provision”)

Omit “Divisions 284, 286 and 288”, substitute “298-15”

95 Paragraph 298-5(c) in Schedule 1

Omit “or Division 16”, substitute “, Division 16 or section 426-120”.

100 At the end of Division 426 in Schedule 1

Add:

Subdivision 426-D—Private ancillary funds

Guide to Subdivision 426-D

426-100 What this Subdivision is about

This Subdivision outlines how to establish and maintain a type of private philanthropic trust fund known as a *private ancillary fund*.

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1 The Minister may make guidelines determining how private
2 ancillary funds are to be established and maintained. This
3 Subdivision also provides for:

- 4 (a) penalties for trustees who fail to comply with the
5 guidelines; and
6 (b) powers for the Commissioner to suspend or
7 remove trustees who breach their obligations.

8 Table of sections

9 Operative provisions

10 Private ancillary funds

- 11 426-105 Private ancillary funds
12 426-107 Private ancillary fund guidelines
13 426-110 Australian Business Register must show private ancillary fund status

14 Administrative penalties

- 15 426-120 Administrative penalties for trustees of private ancillary funds

16 Suspension and removal of trustees

- 17 426-125 Suspension or removal of trustee
18 426-130 Commissioner to appoint acting trustee in cases of suspension or removal
19 426-135 Terms and conditions of appointment of acting trustee
20 426-140 Termination of appointment of acting trustee
21 426-145 Resignation of acting trustee
22 426-150 Property vesting orders
23 426-160 Commissioner may give directions to acting trustee
24 426-165 Property vested in acting trustee—former trustee’s obligations relating to
25 books, identification of property and transfer of property

26 Operative provisions

27 Private ancillary funds

28 426-105 Private ancillary funds

29 A trust is a *private ancillary fund* if:

- 30 (a) the only trustee of the trust is a body corporate; and

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- 1 (b) the trustee has agreed, in writing in the *approved form given
2 to the Commissioner, to comply with the *private ancillary
3 fund guidelines, as in force from time to time; and
4 (c) the trustee has not, in writing in the approved form given to
5 the Commissioner, revoked that agreement.

6 **426-107 Private ancillary fund guidelines**

7 The Minister may, by legislative instrument, make guidelines
8 (*private ancillary fund guidelines*) about the establishment and
9 maintenance of *private ancillary funds.

10 **426-110 Australian Business Register must show private ancillary** 11 **fund status**

- 12 (1) If a *private ancillary fund has an *ABN, the *Australian Business
13 Registrar may enter in the *Australian Business Register in relation
14 to the fund a statement that it is a private ancillary fund.

15 Note 1: An entry (or lack of entry) of a statement required by this section does
16 not affect whether an entity is a private ancillary fund.

17 Note 2: The Australian Business Register will also show if a private ancillary
18 fund is endorsed as a deductible gift recipient: see section 30-229 of
19 the *Income Tax Assessment Act 1997*.

- 20 (2) The *Australian Business Registrar must take reasonable steps to
21 ensure that a statement appearing in the *Australian Business
22 Register under this section is true. For this purpose, the Registrar
23 may:
24 (a) change the statement; or
25 (b) remove the statement from the Register if the statement is not
26 true.

27 **Administrative penalties**

28 **426-120 Administrative penalties for trustees of private ancillary** 29 **funds**

30 *Administrative penalty*

- 31 (1) The trustee of a *private ancillary fund, and the directors of the
32 trustee, are jointly and severally liable to an administrative penalty
33 if the trustee or any of the directors falsely holds the fund out as
34 being endorsed, entitled to be endorsed, or entitled to remain
35 endorsed, as a *deductible gift recipient.

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Note: Division 298 in this Schedule contains machinery provisions for administrative penalties.

- (2) The *private ancillary fund guidelines must specify the amount of the penalty. The guidelines may specify different penalties for different circumstances.
- (3) The penalty must not be reimbursed from the fund.

Defences for directors

- (4) It is a defence in proceedings to recover the penalty from a director if it is proved that:
- (a) the director did not take part in the management of the trustee at the time the conduct mentioned in subsection (1) occurred; and
 - (b) because of illness or for some other good reason, it would have been unreasonable to expect the director to take part in the management of the trustee at that time.
- (5) It is a defence in proceedings to recover the penalty from a director if it is proved that:
- (a) the director took all reasonable steps to ensure that the conduct mentioned in subsection (1) did not occur; or
 - (b) there were no such steps the director could have taken.
- (6) In determining what are reasonable steps for the purposes of subsection (5), have regard to all relevant circumstances.

Power of courts to grant relief

- (7) Section 1318 of the *Corporations Act 2001* (power of Court to grant relief in case of breach of director's duty) does not apply to a liability of a director under this section.

Suspension and removal of trustees

426-125 Suspension or removal of trustee

Suspension

- (1) The Commissioner may suspend the trustee of a *private ancillary fund if the Commissioner is satisfied that the trustee has breached:
- (a) the *private ancillary fund guidelines; or
 - (b) any other *Australian law.

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- 1 (2) The suspension is for the period determined by the Commissioner.
2 (3) The Commissioner may extend the suspension for a further period
3 or periods.

4 *Removal*

- 5 (4) The Commissioner may remove the trustee of a *private ancillary
6 fund if the Commissioner is satisfied that the trustee has breached:
7 (a) the *private ancillary fund guidelines; or
8 (b) any other *Australian law.

9 *Reasons for decision and AAT review*

- 10 (5) If the Commissioner decides to suspend or to remove a trustee
11 under this section, the Commissioner must give to the trustee a
12 written notice:
13 (a) setting out the decision; and
14 (b) giving the reasons for the decision.
- 15 (6) The trustee may apply to the *AAT for review of the decision of
16 the Commissioner to suspend or to remove the trustee under this
17 section.

18 **426-130 Commissioner to appoint acting trustee in cases of**
19 **suspension or removal**

- 20 (1) If the Commissioner suspends the trustee of a *private ancillary
21 fund, the Commissioner must appoint an entity to act as the trustee
22 (the *acting trustee*) during the period of the suspension.
- 23 (2) If the Commissioner removes the trustee of a *private ancillary
24 fund, the Commissioner must appoint an entity to act as the trustee
25 (the *acting trustee*) until the vacancy in the position of trustee is
26 filled.
- 27 (3) Despite paragraph 426-105(a), an acting trustee:
28 (a) need not be a body corporate; and
29 (b) may be the Commissioner.

30 **426-135 Terms and conditions of appointment of acting trustee**

- 31 (1) The Commissioner may determine the terms and conditions of the
32 appointment of the acting trustee, including fees.

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- 1 (2) Without limiting subsection (1), the Commissioner may make a
2 determination under that subsection to the effect that the acting
3 trustee's fees are to be paid out of the corpus of the fund.

4 **426-140 Termination of appointment of acting trustee**

5 The Commissioner may terminate the appointment of the acting
6 trustee at any time.

7 **426-145 Resignation of acting trustee**

- 8 (1) The acting trustee may resign by writing delivered to the
9 Commissioner.
- 10 (2) The resignation does not take effect until the end of the seventh
11 day after the day on which it was delivered to the Commissioner.

12 **426-150 Property vesting orders**

- 13 (1) If the Commissioner appoints an acting trustee, the Commissioner
14 must make a written order vesting the property of the *private
15 ancillary fund in the acting trustee.
- 16 (2) If the appointment ends, the Commissioner must make a written
17 order vesting the property of the fund in the new acting trustee, the
18 previously suspended trustee or the new actual trustee (whichever
19 is applicable).
- 20 (3) If the Commissioner makes an order under this section vesting
21 property of a *private ancillary fund in an entity, then, subject to
22 subsection (4), the property immediately vests in the entity in law
23 by force of this Act.
- 24 (4) If:
- 25 (a) the property is of a kind whose transfer or transmission may
26 be registered under an *Australian law; and
- 27 (b) that law enables the registration of such an order, or enables
28 the entity to be registered as the owner of that property;
- 29 the property does not vest in the entity in law until the
30 requirements of the law referred to in paragraph (a) have been
31 complied with.

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1 426-160 Commissioner may give directions to acting trustee

- 2 (1) The Commissioner may give the acting trustee a written notice
3 directing the acting trustee to do, or not to do, one or more
4 specified acts or things in relation to the *private ancillary fund.
- 5 (2) The acting trustee commits an offence if:
6 (a) the acting trustee *engages in conduct; and
7 (b) the conduct contravenes a notice given to the acting trustee
8 under subsection (1).
- 9 Penalty: 100 penalty units.
- 10 (3) This section does not affect the validity of a transaction entered
11 into in contravention of a notice.

12 426-165 Property vested in acting trustee—former trustee’s 13 obligations relating to books, identification of property 14 and transfer of property

15 *Books*

- 16 (1) An entity (the *former trustee*) commits an offence if:
17 (a) the property of a *private ancillary fund is vested in the
18 former trustee; and
19 (b) the Commissioner makes an order under subsection
20 426-150(1) or (2) vesting the property in an acting trustee;
21 and
22 (c) the former trustee does not, within 14 days of the order being
23 made, give the acting trustee all books relating to the fund’s
24 affairs that are in the former trustee’s possession, custody or
25 control.

26 Penalty: 50 penalty units.

27 *Identification of property and transfer of property*

- 28 (2) Subsections (3) to (5) apply if:
29 (a) the property of a *private ancillary fund is vested in an entity
30 (the *former trustee*); and
31 (b) the Commissioner makes an order under subsection
32 426-150(1) or (2) vesting the property in an acting trustee.
- 33 (3) The acting trustee may, by notice in writing to the former trustee,
34 require the former trustee, so far as the former trustee can do so:

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- 1 (a) to identify property of the fund; and
2 (b) to explain how the former trustee has kept account of that
3 property.
- 4 (4) The acting trustee may, by notice in writing to the former trustee,
5 require the former trustee to take specified action that is necessary
6 to bring about a transfer of specified property of the fund to the
7 acting trustee.
- 8 (5) The former trustee commits an offence if:
9 (a) the acting trustee gives the former trustee a notice under
10 subsection (3) or (4); and
11 (b) the former trustee does not, within 28 days of the notice
12 being given, comply with the requirement in the notice.
- 13 Penalty: 50 penalty units.
- 14 *Strict liability*
- 15 (6) Subsections (1) and (5) are offences of strict liability.
16 Note: For strict liability, see section 6.1 of the *Criminal Code*.
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EXPOSURE DRAFT

1 **Part 2—Amendments commencing on 1 January**
2 **2010**

3 *Income Tax Assessment Act 1997*

4 **102 Subsection 30-229(2A)**

5 Omit “may”, substitute “must”.

6 *Taxation Administration Act 1953*

7 **103 Subsection 426-110(1) in Schedule 1**

8 Omit “may”, substitute “must”.
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EXPOSURE DRAFT

1 Part 3—Transitional provisions

2 105 Definitions

3 In this Part:

4 *commencement time* means the time at which this item commences.

5 *prescribed private fund* has the meaning given by the *Income Tax*
6 *Assessment Act 1997* (as in force just before the commencement time).

7 *private ancillary fund* has the meaning given by section 426-105 in
8 Schedule 1 to the *Taxation Administration Act 1953*.

9 115 Transitional—prescribed private fund determinations

10 (1) The Minister may, by legislative instrument, declare a fund to be a
11 prescribed private fund.

12 (2) Despite subsection 12(2) of the *Legislative Instruments Act 2003*,
13 the declaration has effect during the period:

- 14 (a) commencing at the time specified in the declaration, which
15 must be before the commencement time; and
16 (b) ending just before the commencement time.

17 120 Transitional—prescribed private funds

18 *Scope*

19 (1) This item and item 125 apply to a trust if, just before the
20 commencement time, the trust was a prescribed private fund (whether
21 or not because of a determination made under item 115).

22 *Prescribed private funds taken to be private ancillary funds*

23 (2) The trust is taken, at the commencement time:

- 24 (a) to be a private ancillary fund; and
25 (b) to have been endorsed as a deductible gift recipient under
26 section 30-120 of the *Income Tax Assessment Act 1997*.

27 (3) For the purposes of paragraph 426-105(b) in Schedule 1 to the *Taxation*
28 *Administration Act 1953*, the trustee of the trust is (or all of the trustees
29 of the trust are) taken, at the commencement time, to have agreed, in
30 accordance with that paragraph, to comply with the private ancillary
31 fund guidelines as in force from time to time.

32 125 Transitional—prescribed private funds without single 33 corporate trustees

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- 1 (1) This item applies to the trust at a particular time (the *relevant time*) if:
2 (a) the trust did not satisfy the requirements of paragraph
3 426-105(a) (single corporate trustee) in Schedule 1 to the
4 *Taxation Administration Act 1953* at any time during the
5 period:
6 (i) commencing at the commencement time; and
7 (ii) ending at the relevant time; and
8 (b) the relevant time occurs before 1 July 2011.
- 9 (2) That paragraph in that Schedule does not apply to the trust at the
10 relevant time.
- 11 Note: The effect of subitem (2) is that the trust may be a *private ancillary*
12 *fund* at the relevant time.
- 13 (3) The following provisions in that Schedule do not apply in relation to the
14 fund at the relevant time if, at that time, the trustee of the trust (or at
15 least one of the trustees of the trust) is not a corporation:
16 (a) section 426-120 (Administrative penalties for trustees of
17 prescribed private funds), so far as it relates to directors;
18 (a) sections 426-125 to 426-165 (Suspension and removal of
19 trustees).