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21 July 2009

Manager  
Philanthropy and Exemptions Unit  
Business Tax Division  
The Treasury  
Langton Crescent  
Parkes ACT 2600



Dear Sir/Mdm,

**Response to the Draft - Private Ancillary Funds Guidelines 2009**

Macquarie Private Bank (MPB) is a division of Macquarie Group Limited. MPB provides wealth management and investment advice to high net worth family groups.

We welcome the new draft guidelines for Private Ancillary Funds (PAFs) and offer our comments in relation to three specific areas below.

**1. Investment limitations**

As a general comment we would like to see a better alignment of rules in relation to investment limitations for PAFs and self managed superannuation funds. Whilst acknowledging the differences in the structure and purpose of each type of fund, we suggest that an alignment would improve understanding and overall compliance. This will also add consistency to the process with the Australian Taxation Office becoming the primary regulator for PAFs.

**Cl. 34 The trustee must not borrow money or maintain an existing borrowing of money.**

There are circumstances where limited borrowings should be allowed. Situations may include: settlement of a trade, an investment acquisition or to fulfil a funding commitment where cash is not available due to unforeseen circumstances (for example, unexpected delay in settling a corresponding sale of trust asset). s. 67 of

Superannuation Industry (Supervision) Act 1993 (SIS) may be a reference point to the circumstances where limited borrow should be allowed.

Cl. 34 The trustee must not borrow or maintain an existing borrowing of money.

Cl. 36 The trustee must not give a security over, or in relation to, an assets of the fund.

Trustees may inadvertently breach both rules in their normal investment activities.

For example, in the most recent Telstra 3 Share Offer issue (T3), an investor in the T3 instalment receipt would have granted security to the Commonwealth until payment of the final instalment. A strict interpretation of cl. 36 would prevent a PAF from investing in T3.

It is also common in the unlisted arena where some investments have a partly paid or instalment structure. In these circumstances, security is usually granted over the paid up portion of the investment. Similar to T3, security over the investment will be released, once it is fully paid up. Unlisted investments of this nature may include private equity, property or other investments where funds are usually invested on a progressive basis. Whilst there is no borrowing in the above examples, a PAF may technically be in a leveraged position.

There may also be an alternate situation where a trustee chooses to invest in an internally levered managed investment trust (typically an equity trust). Leverage is gained without providing units of the managed investment trust as security, however the underlying investments of the managed investment trust is typically used to secure borrowings. The product is promoted as a geared investment, and an investor would have made the conscious decision to gear prior to investing.

We recommend that investments in all partly paid securities that are either listed or unlisted but widely held securities and invested at arms length be exempt from cl. 36. We would also like clarification of whether the second scenario of an internally levered investment is allowable under cl. 34 and 36.

Cl. 37 The fund must not acquire an asset (except by way of gift) from, and must not make a loan or provide any other kind of financial assistance to, a founder of the fund, a donor to the fund, the trustee, a director, officer, agent, member or employee of the trustee, or an associate of these entities.

We recommend that the related party provisions and arms length requirement outlined in s. 109 of SIS be applied to prevent any potential abuse in this area. We believe that a PAF should be allowed to acquire investment assets from related parties on a commercial basis and believe that cl. 37 may be too restrictive.

## 2. Donors

Cl. 47 “In any financial year, the fund must not accept donations totalling more than 10 per cent (in total) of the market value of its assets (determined at the end of the previous financial year) from entities other than...”

We recommend the removal of cl. 47. We believe that clauses 45 and 46 sufficiently articulate the key message that PAFs are private. A potential donor should not be prevented or discouraged from gifting to an existing PAF, and we believe that such action does not contradict with the founding principle that PAFs must be private in nature. There may be a variety of reasons why a potential donor prefers to gift to an existing PAF. For example, they may share the same vision as the founder of an existing PAF. Community organisations remain the sole beneficiaries of any associated cost savings.

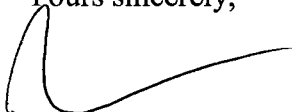
## 3. Multi year grants

The treatment of multi year grants has been highlighted as an area in need of clarification. Should the full sum of a three year grant (which we believe to be the average duration of a multi year grant) be counted against the 5% minimum distribution in the first year of grant, or should such grant be accounted for at the time of disbursement?

We would like to take this opportunity to congratulate Treasury for its consultative approach to this Review. We believe that the outcome and changes as a result of this Review will assist in improving the structural integrity of PAFs.

Please do not hesitate to contact myself on 02 8232 7700 or [francis.tan@macquarie.com](mailto:francis.tan@macquarie.com) if you require further clarification on this submission.

Yours sincerely,



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