

Lander and Associates Consulting Pty Ltd

ABN 21 115 184 284

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Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
Canberra ACT 2600

By email: ppfreview2008@treasury.gov.au

Dear Sir,

I refer to the Discussion Paper titled “Improving the integrity of Prescribed Private Funds (PPFs)”, dated November 2008 and wish to make the following comments.

By way of background I am an independent consultant in community development advising the Not-For-Profit sector including philanthropists, foundations, charities and PPFs. I act as Responsible Person on a number of trusts, both public and private.

General comment – proposed changes in fundamental nature of PPFs

The primary aim of PPFs is to encourage private philanthropy. To this end the arrangements currently in place balance the public interest with the donor’s and trustees’ desire to see ongoing benefits for the community, involvement (often across generations) and a long term/perpetual legacy.

The ancillary fund model was the best vehicle available at the time to provide a legislative framework for PPFs and the approach of allowing accumulation of capital brought significant funds to the public domain while maintaining the conduit nature of the fund and its potential for long term operation.

To this end the current arrangements which allow the accumulation of a pre-determined capital base generally over an agreed period work well. In my experience this is a major attraction for donors and has been a key factor in creating a sense of philanthropy amongst high net worth individuals.

Removal of the ability to accumulate and maintain a capital base by requiring the wind down/closing of PPFs using the compulsory percentage distribution method will be a major disincentive and counter-productive in the long term.

The Government’s commitment to increase the amount of funds distributed needs to be carefully weighed against the possibility that some philanthropists will simply put their money into other areas should they see no opportunity for a fund in perpetuity.

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It is recommended that other means should be found to address the issues of (potential) abuse that concern the Government.

Specific comments – referenced to Discussion Paper items

Areas for improvement

Item 11. Simplifying the process by bringing the approval and regulatory process solely under the ATO is supported.

Item 12. ‘Private Ancillary Fund’ will be confused with ‘Public Ancillary Fund’, especially when brought back to an acronym. Perhaps ‘Endorsed Private Ancillary Fund’ (EPAF) would be appropriate.

Principle 1.

Item 19. The amount of work required in the compliance and administration of accumulation plans is not onerous. It is difficult to see how these ‘simpler’ arrangements will result in any less work.

If the Government proceeds with the distribution model proposed it is suggested that there be a range rather than ‘one size fits all’. PPFs reflect a range of objectives that vary from donor to donor. A published range gives both the donor and the ATO flexibility to make allowances for these differences.

There should be a lower rate to allow the building of the corpus. However, in light of the proposal to ultimately wind up PPFs, clarification of the principles/guidelines concerning the size and life are required.

Consideration needs to also be given to the use of funds for legitimate administrative and operational costs, especially as they relate to, for example, audit costs, costs of investigating and considering submissions for funding and costs associated with ensuring compliance with the regulations and law.

Principle 1b.

Consideration needs to be given to the effects of market fluctuations. Perhaps an averaging technique could be considered, such as averaging across the preceding 12 months initially and then over say 3 years on a rolling basis.

Principle 1c.

From a practical point of view a minimum PPF size is desirable. \$250,000 is still a significant amount of money but low enough to encourage the use of the vehicle.

Consistent with my earlier comments there should be no compulsory wind up. There should be provision to allow small funds to amalgamate in order to maintain the donor's wishes for their fund to have a long term life.

Principle 1d.

The public record should indicate the PPF's objectives.

PPFs should indicate if they will accept unsolicited public submissions and the method to be used.

The provision of contact details without these two qualifiers will result in an administrative nightmare for trustees as they will be inundated with requests that will require responses of some fashion. This will be particularly onerous for smaller funds.

Principle 2a.

Two years should be adequate. Suggest that the Commissioner have discretion to grant an additional 12 months.

The use of a corporate trustee should be compulsory. It provides a clearer management framework and greater protection for trustees/directors which more than offset the additional establishment costs.

Penalties need to be proportional to the breaches with flexibility to accommodate the various circumstances that may apply, especially where it may be inexperience rather than abuse.

Care must be taken to ensure that any penalty provisions are complementary to existing provisions under, say, trustee laws and that trustees are not exposed to a 'double jeopardy' of prosecution for the same issue in different jurisdictions.

While the Government's approach hitherto has been to leave it to the NFP or commercial sectors to advise PPFs (e.g., Philanthropy Australia, trustee companies or a few independent consultants), consideration should be given to broadening support advisory services, either through the ATO and a new Office of Charities.

Principle 2b.

The balance between well meaning philanthropists and 'fit and proper persons' is essentially right under current arrangements which see the requirement of at least one responsible person on each trust.

The current responsible person criteria are adequate.

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Rather than limit potential people of good character and intention, have a requirement that the trustee use professional advisers, as appropriate, if the skills are not within the skill set of the trustees. The skill sets may need to be set in an advisory sense, such as accounting, financial management, grant making, legal and administrative compliance.

Principle 3.

There are unlikely to be any major problems with a cap, however it is suggested that the number be over a rolling period, say 3 years, to maintain a level of potential flexibility, e.g., where there may be a large family involved over a number of generations.

Principle 4.

The approach of requiring conversion of all assets to liquid assets has several disadvantages and is opposed. The trustees should be allowed to maintain diversity to preserve the integrity of the fund over its life. Diversification is one of the keys to this approach.

Recent fluctuations in the world economy have clearly demonstrated the importance of having flexibility and the danger of being locked into one asset type.

For further clarification please contact the undersigned on 0419 352 803 or klander@bigpond.net.au.

Yours sincerely,

Ken Lander

BTP (Hons), Gr Dip Comm'n, FAIM, MFIA, MPRIA, JP
Director.