



PHILANTHROPY  
*Australia*

28 May 2009

General Manager  
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The Treasury  
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**Patron**  
Sir Gustav Nossal AC CB

Dear Sir

**SUBJECT: CORPORATIONS LEGISLATION AMENDMENT (FINANCIAL SERVICES MODERNISATION) BILL 2009 – TRUSTEE COMPANIES**

Thank you for the opportunity to comment on the abovementioned Draft Legislation. Philanthropy Australia believes that the introduction of a national framework will encourage a more competitive environment with a reduced regulatory burden however we are concerned about oversight.

While at an entity level Commonwealth regulation looks relatively simple, the issues at an operational level are actually very complex and there are some strongly held views in different parts of both the philanthropic and community sectors. However everyone agrees that there is a need for a streamlining of the current state based approach to a national framework to promote understanding, efficiency, monitoring and compliance.

Philanthropy Australia believes:

- That it is in the interests of existing (and potential) charitable trusts and foundations that Trustee Corporations are able to charge fair and reasonable fees that enable them to provide a sustainable level of service.
- That it is in the interests of Trustee Corporations to offer a transparent and accountable service to meet the varied interests of the charitable trusts and foundations under their guardianship.
- That it is in the interests of the Trustee Corporations, the philanthropic sector and the wider community that Trustee Corporations actively participate in discussions on philanthropy and undertake effective grant-making and social investment for the benefit of the wider community.

Philanthropy Australia finds it extremely difficult to respond to the Exposure Draft without the provision of a workable disclosure regime and external dispute resolution framework. While we support in principle the objectives of the legislation we reserve support for the detail until a draft disclosure regime and a dispute resolution framework are released and can be considered. We will take the opportunity to make further submissions on the legislation.



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In the meantime, we see some key issues in the Exposure Draft which warrant comment.

Lack of a disclosure regime and lack of a dispute resolution framework

A disclosure regime and a dispute resolution framework are considered to be particularly critical where a trustee company is the sole trustee of historical charitable trusts. Some of our Members see a trade-off between transparent reporting and fee flexibility for trustee companies. These are key concerns for much of philanthropic community and are critical underpinnings to the acceptance of the proposed legislation.

While section 2.10 of the Commentary on the Exposure Draft Legislation specifically refers to the concerns for “the need for more cost effective and timely alternative dispute resolution mechanisms for beneficiaries to enhance the protection available for trust assets”, no dispute resolution framework has been provided.

Similarly, while section 2.11 of the Commentary on the Exposure Draft Legislation states that “trustee companies will be subject to the disclosure, conduct, advice and dispute resolution arrangements under the Corporations Act, as modified where necessary by regulations made under the *Corporations Regulations 200*” no disclosure regime has been provided.

The Trustee Companies maintain that their duty is to account to beneficiaries and co-trustees, and to keep them fully informed of their entitlement/involvement under a trust. Much of the complexity of the issue of disclosure surrounds historical charitable trusts, many of which are held in perpetuity, where the Trustee Company is the sole trustee and there is no named beneficiary. In this case it is not clear who may even know about the trust in question, let alone whether they can request information on whether or not the Trustee Company is carrying out its duties. We understand that the only authority able to challenge the management of such trusts is the relevant State Attorney General.

It is recommended that Treasury, in consultation with stakeholders, develop a workable disclosure regime and dispute resolution framework, prior to the Legislation going to Parliament.

Application of Chapter 7 to traditional trustee company services

Again this is a critical issue raised under “2.8 Policy issue: Application of Chapter 7 to traditional trustee company services”.

2.8 Policy issue: Application of Chapter 7 to traditional trustee company services

*In the case of a trustee company, the following questions need to be asked:*

- *Who is the client?*
- *When is a financial service being provided?*
- *What should be the extent of the trustee company's disclosure and other obligations to the client?*
- *What are a trustee's disclosure obligations under existing law (including legislation, common law and equity)? What additional disclosures are appropriate or necessary under Chapter 7?*

*Under what circumstances should a trustee company provide a Statement of Advice? Should this be only where the trustee company is providing financial product advice, as Chapter 7 currently requires?*

*What should be the disclosure obligations in relation to beneficiaries of trusts and deceased estates? It is acknowledged that the beneficiaries are not the persons who established the trust or estate. Also, the*



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*beneficiaries of 'perpetual' or charitable trusts may not be known. On the other hand, once the appointer or testator is deceased, there may be no-one to represent the interests of beneficiaries.*

*In relation to dispute resolution, a licensed trustee company will be required to have internal and external dispute resolution mechanisms as required by section 912A of the Corporations Act. It is intended that these mechanisms will operate alongside existing common law and legislative rights, for example the right to bring an action in the Supreme Court to remove a trustee. Are there specific conditions that should be imposed in relation to dispute resolution procedures involving clients of trustee companies?*

The Trustee Companies maintain that their duty is to account to beneficiaries and co trustees, and to keep them fully informed of their entitlement/involvement under a trust.

Much of the complexity of the issue of disclosure surrounds historical charitable trusts, many of which are held in perpetuity, where the Trustee Company is the sole trustee and there is no named beneficiary. In this case it is not clear who may even know about the trust in question, let alone whether they can request information on whether or not the Trustee Company is carrying out its duties. We understand that the only authority able to challenge the management of such trusts is the relevant State Attorney General.

Mindful of the need to increase efficiency and effectiveness, we suggest that pooled funds for charitable trusts and large charitable trusts should be included in any public disclosure regime. We suggest that the disclosure model for Prescribed Private Funds (PPFs) could be a useful model. A summary of a trust or common funds activities for the year, including:

- Distributions to beneficiaries
- Income derived
- Expenses of operation
- Net worth of the fund
- List of trusts in the fund
- Copy of the fund's audit report for the year, and
- Copy of the financial statements in support of the audit report.

We believe that public disclosure of an Annual Information Return, along the lines of the PPF model, would fulfil the demands of a transparent and accountable service to meet the varied interests of the charitable trusts and foundations under trustee company guardianship.

### Common Pooling of Funds

#### 2.4 Technical issue: Common funds - keeping of accounts

*Should this be expressed differently? For example, should it require the trustee company to record opening and closing balances (and if so, for what period)? What if the account is not in credit? Are there any relevant provisions of State or Territory law?*

We note that the Draft Legislation allows for 'pooling of common (sic trust) funds'. Common Funds exist within existing Trustee legislation as a vehicle for pooling investment activities of trusts. It is Philanthropy Australia's understanding that these Common Funds are currently audited.



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Philanthropy Australia suggests the same framework be used for the investment administration and grant distribution of charitable trusts to enable aggregation for economic size. This should lessen the administrative and regulatory burden of maintaining small charitable trusts, leading to a net community benefit.

Mindful of the need to increase efficiency and effectiveness, we suggest that pooled funds for charitable trusts and large charitable trusts should be included in any public disclosure regime. We suggest that the disclosure model for Prescribed Private Funds (PPFs) could be a useful model. A summary of a trust or common funds activities for the year, including:

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### Requirement for Australian Financial Services Licence (AFSL)

*A further change is made to existing subsection 911A(4) to ensure that persons who provide traditional trustee company services are not exempt from the need to hold an AFSL due to subsection 991A(2) (which provides a list of persons that are exempt from the requirement to obtain an AFSL). [Schedule 2, item 15, subsection 911A(4)]*

We are concerned that the legislation does not make it clear for those who are not part of a trustee company whether or not you are required to have an AFSL if you managing or administering a charitable trust or acting as a corporate trustee. Perhaps this should be made clearer under exemptions.

### Fees in relation to Charitable Trusts

We note that in relation to charitable trusts, the legislation provides for:

- 'grandfathering' of fees charged to existing clients; and
- capping of fees charged to new clients based on the fee regime set out in the Victorian Trustee Companies Act (1984). This will be a significant increase in fees charged to new clients in NSW and Queensland, while it will be a potential reduction in South Australia.

We also note that the Government is committed to a review of the fee arrangements in relation to charitable trusts after two years of operation.



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Definition of “Charitable Trust”

We note that the Legislation does not define a ‘charitable trust’ as the meaning of charitable trust is derived from case law. This may have unintended consequences, depending on how wide the net is cast.

Philanthropy Australia would welcome the opportunity to meet with Treasury to clarify and expand on the points raised in our submission. We would be happy to work with Treasury on developing a workable disclosure regime and dispute resolution framework.

Yours sincerely,

Gina Anderson  
Chief Executive Officer