Submission to Treasury in response to Exposure Draft for
TAX LAWS AMENDMENT (PRESCRIBED PRIVATE FUNDS) BILL 2009

INTRODUCTORY COMMENTS

This submission is made by Eureka Benevolent Foundation Limited (EBFL) (ACN 122 698 766) as trustee for Eureka Benevolent Foundation (EBF) (ABN 11 470 885 302), in response to the Explanatory Material and Exposure Draft for the TAX LAWS AMENDMENT (PRESCRIBED PRIVATE FUNDS) BILL 2009. References here to EBF can be construed as a reference to EBFL where the context requires it.

EBF is a PPF[1] established in 2006. Relevantly in the context of this submission, as the corporate trustee of EBF, EBFL is a public company limited by guarantee. EBFL is a special purpose company; the Constitution of EBFL provides that its sole undertaking is to be the trustee of EBF.

EBF is supportive of some of the changes proposed in the Exposure Draft, but is seriously concerned about a number of substantial matters that we believe need to be addressed as a matter of urgency before the proposed implementation of the new supervisory regime on 1 October 2009.

Until the proposed guidelines for "the establishment and maintenance of private ancillary funds" are available it is not possible to make complete or final comments on the Exposure Draft. We do not know what the guidelines will contain, or how their provisions will interact with the draft legislation.

EBF's other concerns are as follows:

1. The most important issue arising from Treasury's review of PPFs is the proposal that PPFs be required to distribute 15% of their previous year's closing value. This matter remains unresolved, despite the acknowledgement in 1.14 of the Explanatory Material acknowledging that "*the majority of respondents also cautioned against increasing the minimum distribution rate for PPFs to a point where PPFs are unable to exist in perpetuity*", because the draft guidelines are not yet available and Treasury proposes that this matter be dealt with in the guidelines.
2. The Explanatory Material proposes that the guidelines "*will be made by way of a legislative instrument*" (see para 1.12 of the Explanatory Material). *EBF has been shocked by the Treasury's proposals which it believes abrogate the basic principles under which EBF and other existing PPFs were established; particularly perpetuity, privacy and independent governance within the framework of relevant State trustee legislation. In order to restore trust and to provide certainty to trustees, EBF believes that it is essential that any changes made by the government are approved by the Parliament, and that further material changes can only be made with the approval of Parliament and not by regulation.*

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[1] The terms PPF and PAF (Private Ancillary Fund) are generally used interchangeably in this paper except where the context requires a specific reference.

3. EBF is very concerned about the proposal for disclosure of its PAF status in the Australian Business Register. This, combined with the ability to search the corporate records maintained by ASIC, appears to effectively remove the privacy of PPF donors and trustees.

These and other concerns about the contents of the Explanatory Material and Exposure Draft are addressed below.

COMMENTS ON THE EXPLANATORY MATERIAL

1 - REQUIRED DISTRIBUTIONS

We refer to our previous submission in which we recommended that the distribution rate should be set at the previous year's inflation rate + 3%, to be applied to the market value of the fund's net assets at the end of the previous year. As an alternative, we believe that a fixed rate of 5% would be satisfactory.

We are unable to make further comment on this matter until we see the draft guidelines.

2 – LEGISLATIVE CERTAINTY

We have noted above that *EBF has been shocked by the Treasury's proposals which it believes abrogate the basic principles under which EBF and other existing PPFs were established; particularly perpetuity, privacy and independent governance within the framework of relevant State trustee legislation. In order to restore trust and to provide certainty to trustees, EBF believes that it is essential that any changes made by the government are approved by the Parliament, and that further material changes can only be made with the approval of Parliament and not by regulation.*

We are unable to comment further until we see the content of the draft guidelines, except to note that we would be very concerned about any provision within the guidelines that give power to make further changes by regulation.

3 - PRIVACY

As noted above, EBF is most concerned about the proposal that it will be identified as a PAF on the Australian Business Register. When combined with the requirement that all PAFs have a corporate trustee and the ability to search ASIC's corporate records, this proposal will effectively destroy the privacy currently available to PPF founders.

In this regard we note that Self Managed Superannuation Funds (SMSFs) similarly enjoy a substantial tax concession. SMSFs must meet regulatory requirements, including disclosure of their position to the ATO and ASIC filings, but are not required to be publicly identified as superannuation trustees or to make further public disclosure. *EBF sees no substantive policy*

reason why PPFs or their trustees should be required to make more public disclosure than SMSFs.

Further, we note that public disclosure of additional information, for example the assets and income of the fund, the identity of donors and amounts received by way of donations would represent a substantial intrusion into the private affairs of some families, and would act to discourage donations which represent an important net contribution to the charitable sector. Moreover, such disclosure would also discourage the establishment of PPFs, with the loss of the benefits to the community discussed above.

Finally, it is doubtful that such disclosure would provide any net benefit to the community, while representing a substantial administrative burden to the PPF. Such disclosure would inevitably generate unsolicited approaches for donations, each of which need to be addressed fairly and responded to. In EBF's case for example, our fund's strategy is to focus on humanitarian causes. Many other worthwhile charitable causes exist, but enquiries from them would need to be declined. Such responses would involve unnecessary administrative cost and effort, and could needlessly cause offence and damage trustees' reputations, community standing and relationships.

4 - OTHER CONCERNS

Joint and several liability for directors

1.41 of the Explanatory Material provides for joint and several liability of the trustee company and its directors. This provision is misguided and should not be pursued. Firstly, most trustee companies will be nominally capitalised and there is no point in imposing a financial penalty if it cannot be met. The penalty should be imposed on the directors.

Imposing joint and several liability on the directors for penalties is unreasonable and misguided. It is unreasonable because there is no reasonable basis for imposing a penalty on one director for the transgressions of another. If more than one director transgresses then each of them should suffer the appropriate penalty, but it is unreasonable for the directors to be jointly liable for the transgressions of another director simply by virtue of shared office. Further, it is not sufficient for a director to have statutory defences against a joint penalty because that requires the director to conduct a defence against a penalty that ought not to have been levied. It is a well established principle of natural justice that no man is responsible for the transgressions of another. The proposal at 1.41 violates that principle.

The proposal to impose joint and several liability on directors is misguided because it will sharply curtail the pool of available directors for PAF trustees. If directors are jointly and severally liable, families will find it difficult to persuade anyone outside the family to become a director of a PAF trustee. *Paradoxically, joint and several liability for directors is therefore likely to reduce the robustness of PAF governance, rather than increase it.* Policy should be directed towards supporting external involvement in the governance of PAFs. For example,

consider a PAF with humanitarian objectives. Such a PAF would sensibly benefit from the involvement of a minister of religion, Rabbi or other person holding a religious office. Such a person would, however, be ill-advised to join the board of the PAF unless they knew all the other directors intimately since they could potentially be liable for transgressions that they were not even aware of. Although a religious person could contribute substantially to the mission of a PAF as a director, but they might reasonably also have an incomplete understanding of the legal obligations of the trustee and expect to rely upon other directors in that regard.

DGR and ITE status should be automatic

We note that 1.23 and 1.24 of the Explanatory Material appear to be contradictory. A trust fund that meets the requirements to be a PAF should be entitled to be endorsed as a DGR (subject only to the general requirements that apply to all entities seeking endorsement as a DGR), and to have Income Tax Exempt status.

Miscellaneous provisions

1.45 represents law to instruct trustees to comply with another law, and is superfluous and ought not be proceeded with.

1.47 and following paragraphs present substantial obstacles in the context of State trust law, and State stamp duties and conveyancing laws. These should be carefully considered before these provisions are proceeded with.

[End of submission]