

NATIONAL SECRETARIAT

Level 22, 68 Pitt Street, SYDNEY NSW 2000  
GPO Box 1595, SYDNEY NSW 2001

Telephone: (02) 9221 1983 / 9221 2404

Facsimile: (02) 9221 2639

E-mail: association@trustcorp.org.au

COPY

TA

Trustee  
Corporations  
Association  
of Australia

For the attention of Peter Mullins / Haydn Daw  
Australian Taxation Office  
Assistant Commissioner  
Law Design and Development (Entities)  
PO Box 900  
Civic Square CANBERRA ACT 2608

Dear Sirs,

**Comments on the exposure draft 'New Business Tax System (Entity Taxation) Bill 2000**

The Trustee Corporations Association (Association) represents all but one of Australia's statutory trustee companies, and seven of the eight Public Trust Offices.

Our members collectively have responsibility for the proper administration of assets worth over \$270 billion on behalf of some three million Australians.

The Association made two submissions (copies attached) to the Ralph Review of Business Taxation (Review), and welcomes this opportunity to make a submission on the Exposure Draft.

We support the Exposure Memorandum to the Draft's exclusion of trusts brought about by "court orders, death and the need to provide for people with legal disabilities"; and appreciate the adoption of these and other features / recommendations from our two submissions to the Review.

However, we wish to express our concern that the entity tax regime needs to be carefully applied to trusts; otherwise it will have a dramatic impact on many Australian families, including widows, minors and the socially disadvantaged, who are currently well serviced by trusts which are not established for purposes of tax minimisation.

Mindful that the scope of trusts 'excluded' from the proposed entity tax regime is yet to be defined, the Association submits that:

1. All testamentary trusts (ie those created by will, upon death) should be separate and excluded from the proposed entity tax arrangements.
2. The unreasonable and adverse revenue impact that the entity tax regime would have on life interest trusts created by a testamentary trust should be further considered, with a view to all life interest trusts being excluded from the proposed entity tax arrangements.
3. The 45 day rule for dividend imputation credits has not been resolved in the Exposure Draft, but will be a significant issue for a non-fixed trust – our 1998 submissions to the Australian Taxation Office (copy attached) refer.

The Association would be pleased to discuss our concerns in more detail and to assist in providing examples of issues faced by professional trustees and the beneficiaries of testamentary trusts.

Yours sincerely

*Kerrie Kelly*  
for Kerrie Kelly

Kerrie Kelly  
National Director  
2.11.00

cc Mr Mike Buckley, Manager, Business Entities and International Issues, Treasury

ANZ Executors &  
Trustee Company Ltd

AXA Trustees Ltd

Equity Trustees Ltd

Guardian Trust  
Australia Ltd

National Australia  
Trustees Ltd

Permanent Trustee  
Company Ltd

Perpetual Trustees  
Australia Ltd

Perpetual Trustees  
Tasmania Ltd

Public Trustee for the  
Australian Capital  
Territory

Public Trustee  
New South Wales

The Public Trustee of  
Queensland

Public Trustee  
South Australia

The Public Trustee  
Tasmania

Public Trustee  
Western Australia

Sandhurst Trustees Ltd

State Trustees Ltd

Tasmanian Trustees Ltd

Tower Trust Ltd

Trustees of Western  
Australia Ltd

NATIONAL SECRETARIAT

Level 22, 68 Pitt Street, SYDNEY NSW 2000  
GPO Box 1595, SYDNEY NSW 2001

Telephone: (02) 9221 1983 / 9221 2404  
Facsimile: (02) 9221 2639

COPY TA

Trustee  
Corporations  
Association  
of Australia

13 May 1998

Mr Simon Matthews  
Australian Taxation Office  
PO Box 900  
Civic Square  
CANBERRA ACT 2608

ANZ Executors &  
Trustee Company Ltd

Austrust Ltd

Equity Trustees Ltd

Guardian Trust  
Australia Ltd

IOOF Australia  
Trustees Ltd

National Australia  
Trustees Ltd

National Mutual  
Trustees Ltd

Permanent Trustee  
Company Ltd

Perpetual Trustees  
Australia Ltd

Perpetual Trustees  
Tasmania Ltd

Public Trust Office SA

Public Trustee of Qld

Public Trust Office NSW

Sandhurst Trustees Ltd

State Trustees Ltd

Tasmanian Trustees Ltd

Trustees of Western  
Australia Ltd

**Amendments To Part IIIA Of The Income Tax Assessment Act 1936 –  
Impact Upon Beneficiaries Of Discretionary Trusts**

I refer to my letter dated 11 May and to our telephone conversation on 12 May 1998.

As discussed and agreed, I now provide the following information to assist the Australian Taxation Office in preparing the draft legislation.

As previously stated to you the Association believes that the exclusion in proposed section 160APHJ should, in addition to family trusts, include trusts of a kind referred to in section 102AG(2). We therefore submit that the exclusion in subsection 160APHJ(3) should read:-

(3) *if the trust:*

- (a) *is not a family trust within the meaning of Schedule 2F; and*  
(b) *is not a trust of a kind which has income that is excepted trust income pursuant to section 102AG(2);*

*the following paragraphs have effect:.....*

For your information the types of trusts mentioned in section 102AG(2) are:-

- 1 a trust estate that resulted from
- (i) a will, codicil, intestacy or an order of a court that varied or modified the provisions of a will or codicil; or
  - (ii) an intestacy or an order of a court that varied or modified the application, in relation to the estate of a deceased person, of the provisions of the law relating to the distribution of the estates of persons who die intestate;

- 2 a trust estate consisting of any property transferred to the trustee for the benefit of the beneficiary:-
- (i) by way of, or in satisfaction of a claim for damages in respect of:-
    - (A) loss by the beneficiary of parental support, or
    - (B) personal injury to the beneficiary, any disease suffered by the beneficiary or any impairment of the beneficiary's physical or mental condition;
  - (ii) pursuant to any law relating to workers compensation;
  - (iii) pursuant to any law relating to the payment of compensation in respect of criminal injuries;
  - (iv) directly as a result of the death of a person and out of a provident, benefit, superannuation or retirement fund
  - (v) directly as a result of the death of a person by an employer of the deceased person;
  - (vi) out of a public fund established and maintained exclusively for the relief of persons in necessitous circumstances; or
  - (vii) as a result of a family breakdown.
- 3 a trust estate consisting of any property:-
- (i) that devolved for the benefit of the beneficiary from the estate of a deceased person;
  - (ii) that was transferred to the trustee for the benefit of the beneficiary by another person out of property that devolved upon that other person from the estate of a deceased person and was so transferred within 3 years after the date of the death of the deceased person; or
  - (iii) being a verifiable prize in a legally authorised and conducted lottery and being a prize of which the beneficiary is the beneficial owner; or
- 4 a trust estate consisting of any property that, in the opinion of the Commissioner, represents accumulations of;
- (i) assessable income derived by the trustee during a year of income in relation to which Division 6AA of Part III applies, being assessable income that, in relation to the beneficiary, is excepted trust income;
  - (ii) assessable income derived by the trustee during a year of income in relation to which Division 6AA of Part III does not apply, being assessable income that would, in the opinion of the Commissioner, have been excepted trust income in relation to the beneficiary if Division 6AA of Part III were applicable in relation to the year of income during which the assessable income was derived; or
  - (iii) exempt income derived by the trustee to which subparagraph 102AG(2)(e)(i) or (ii) would, in the opinion of the Commissioner, apply if that exempt income had been assessable income.

The Association believes it is necessary that the exclusion covers all trusts mentioned in section 102AG(2) rather than simply nominating one or two types, as the legislation covering many of the trusts mentioned in that section varies from State to State, with the effect that a beneficiary may have only a contingent interest in one State but could have an absolute interest under the corresponding legislation in other States. Similarly, trusts (as mentioned in point 2 above) containing superannuation monies also vary between deeds with beneficiary's interests varying from absolute to contingent.

Trusts of a type mentioned at 1 and 3 above would include situations where a beneficiary under a will has only a contingent interest, eg the beneficiary must attain a certain age, or no legal interest as the trustee of the deceased estate must exercise a discretion in their favour, eg where a life tenant is only entitled to the income that the trustee determines.

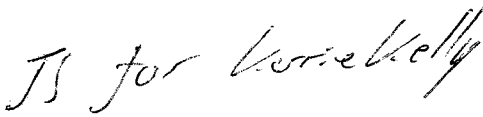
Unfortunately, since our conversation last night we have only had the time to ascertain the following examples of trusts caught by the proposed legislation:

State Trustees has approximately 1,000 of type 1 trusts but only administers 2-3% of all deceased estates in Australia. Accordingly, there is probably between 25,000 – 35,000 deceased estates of type 1.

An example of type 2 trusts would include Victorian Workcover award trusts which the High Court has held are discretionary in nature, as well as superannuation proceeds trusts where the beneficiary has a contingent interest. State Trustees administers approximately 8,000 Workcover trusts which have approximately 13,000 beneficiaries.

If you have any questions in relation to the above or require further information please contact me on 02 9221 1983.

Yours sincerely

A handwritten signature in cursive script that reads "K for Kerrie Kelly".

Kerrie Kelly  
National Director

NATIONAL SECRETARIAT

Level 22, 68 Pitt Street, SYDNEY NSW 2000  
GPO Box 1595, SYDNEY NSW 2001

Telephone: (02) 9221 1983 / 9221 2400  
Facsimile: (02) 9221 2639

COPY

TA

Trustee  
Corporations  
Association  
of Australia

11 May 1998

Mr Simon Matthews  
Australian Taxation Office  
PO Box 900  
Civic Square  
ACT 2608

Dear Mr Matthews,

**Amendments to Part IIIA of the Income Tax Assessment Act 1936 -  
Impact upon Beneficiaries of Discretionary Trusts**

I refer to our letter dated 9 April 1998 and to your separate telephone conversations last week with Mr Keith Drewery, Senior Tax Manager of Perpetual Trustee Company Limited, Mr Brett Davis, Manager Taxation and Estate Planning State Trustees Limited, and myself.

The Association continues to be deeply concerned about the potential impact of this legislation.

We hold this view as we do not believe that most of the trusts that we mentioned in our submission dated 9 April would qualify as "family trusts" and be able to pass the family control tests as set out in sections 272-87.

The interests of the beneficiaries of most of the 20,000 trusts mentioned in our submission are either contingent, or they have no legal interest as the trust is discretionary. Many of the trusts that are administered are established by legislation or by a Court and the beneficiaries do not have the powers mentioned in sections 272-87.

Where the beneficiaries do have an absolute interest, the tests mentioned in sections 272-87 would be satisfied, however, we believe that this would only amount to a small percentage of the trusts. For example, State Trustees (Victoria) has estimated that of the 7,00 trusts that it administers in this category, only 100 - 200 trusts would satisfy the tests in sections 272-87.

In considering these matters, we would be pleased to assist you in preparing a definition which would cover the issues we have raised and have regard to State legislation, the nature of Workcover trusts and the like.

If you wish the Association to assist, or if you wish to discuss any of the issues raised, please contact me on 9221 1983.

Yours sincerely

  
**Kerrie Kelly**  
**National Director**

c:\data\winword\kerrie\tcasub.doc

ANZ Executors &  
Trustee Company Ltd

Austrust Ltd

Equity Trustees Ltd

Guardian Trust  
Australia Ltd

IOOF Australia  
Trustees Ltd

National Australia  
Trustees Ltd

National Mutual  
Trustees Ltd

Permanent Trustee  
Company Ltd

Perpetual Trustees  
Australia Ltd

Perpetual Trustees  
Tasmania Ltd

Public Trust Office SA

Public Trustee of Qld

Public Trust Office NSW

Sandhurst Trustees Ltd

State Trustees Ltd

Tasmanian Trustees Ltd

Trustees of Western  
Australia Ltd

COPY

9 April 1998

Telephone: (02) 9221 1983 / 9221 2404  
Facsimile: (02) 9221 2639

TCA

Trustee  
Corporations  
Association  
of AustraliaMr Simon Matthews  
Australian Taxation Office  
PO Box 900  
Civic Square  
ACT 2608

Dear Mr Matthews,

**Amendments to Part IIIA of the Income Tax Assessment Act 1936 -  
Impact upon Beneficiaries of Discretionary Trusts**

Following your recent discussions with Mr Keith Drewery, Senior Tax Manager of Perpetual Trustee Company Limited in Sydney, we set out below details of our Association's concerns in relation to proposed amendments to Part IIIA of the Income Tax Assessment Act 1936 (the Act) for your urgent consideration.

**Concerns***The legislation is far reaching and has unintended consequences*

The amendments are aimed at curbing schemes concerning trading in franking credits. However, we believe that, as drafted, the legislation will have the unintended consequence of affecting the entitlement to franking credits of beneficiaries of:

- discretionary trusts where the trust income results from damages for loss of parental support, mental or physical injury, workers compensation or criminal injury;
- certain death benefit trusts where the interests of the beneficiaries are subject to a contingency; and
- discretionary trusts created by way of Will ("testamentary trusts").

Two exceptions do exist for beneficiaries of 'family' trusts, as defined, and deceased estates during the course of administration by executors. However, the exclusions are not sufficiently wide to cover discretionary trusts created to protect the interests of the poor and disadvantaged.

It is appears to us unlikely that the Government meant that the poor and disadvantaged in society would be exposed to the penalties imposed by the proposal.

ANZ Executors &  
Trustee Company Ltd

Austrust Ltd

Equity Trustees Ltd

Guardian Trust  
Australia LtdIOOF Australia  
Trustees LtdNational Australia  
Trustees LtdNational Mutual  
Trustees LtdPermanent Trustee  
Company LtdPerpetual Trustees  
Australia LtdPerpetual Trustees  
Tasmania Ltd

Public Trust Office SA

Public Trustee of Qld

Public Trust Office NSW

Sandhurst Trustees Ltd

State Trustees Ltd

Tasmanian Trustees Ltd

Trustees of Western  
Australia Ltd

*The legislation is at odds with the aims of "Prudent Person" legislation*

"Prudent Person" legislation now operates in South Australia, Victoria, Northern Territory, Western Australia, Tasmania and was most recently passed in New South Wales. We believe that the proposed legislation is at odds with the "Prudent Person" legislation. Under "Prudent Person" legislation a trustee is required to make investment decisions which are 'prudent' and develop an investment strategy which considers the nature and purpose of the Trust.

A trustee may therefore make a decision to create a balanced investment portfolio including exposure to Australian equities. The result of that decision could be that a beneficiary is denied a franking credit on franked dividends received on investments forming part of a 'prudent' investment strategy.

*Thousands of beneficiaries will suffer unintended effects*

Members of our Association have advised that the proposals have the potential to impact upon approximately 20,000 trusts, with an equally substantial number of beneficiaries. The Public Trust Office in New South Wales and State Trustee Limited in Victoria have both advised that together they administer over 17,000 trusts which are potentially impacted by the proposals. (You will by now have received separate comments from the Public Trustee in New South Wales).

In such trusts, the beneficiaries depend upon the income generated by the trust. Such beneficiaries typically include the physically and mentally disabled and young people who cannot access funds from a trust until they reach a nominated age. The trustees administering these trusts would be extremely unlikely to have engaged in franking credit trading or enter schemes designed to exploit the benefit of franking credits at the direction of such beneficiaries. Such trustees and the relevant beneficiaries are not part of those taxpayers who are apparently targeted under the proposals.

*Should testamentary trusts be subject to the arrangements?*

The creation of a testamentary trust under a Will to provide for the deceased dependents are not included under the list of potential exclusions to the operation of the legislation - family trusts and deceased estates during administration. Indeed it seems to be a misunderstanding of such trusts that the explanatory memorandum specifically states that the exclusion for deceased estates should not include Testamentary Trusts (para.1.54).

Income generated in a testamentary trust for the benefit of minors as former dependents of the deceased is regarded as 'excepted trust income' and taxed at adult rates as opposed to the penalty tax rates that apply to minors unearned income ordinarily. However, these beneficiaries may, in future, be unable to qualify for franking credits on franked dividends included within their assessable income. The legislation has the effect therefore of diluting the intentions of section 102 AG of the Act.

We believe that at the least the exclusion for deceased estates should be extended to include trusts created by Will after the administration of the estate has been completed, where the income of the Trust would be 'excepted trust income', as defined in section 102AG to the beneficiary.

*Trusts and the process of tax reform*

The proposals have unfortunately not considered the nature of many trusts but rather considered that trusts as a whole are all created as a vehicle for tax avoidance. This is regrettable. The above comments reinforce the view of our Association that trusts fulfil a number of functions and should not automatically be viewed as tax avoidance vehicles.

If you wish the Association to provide further information, or if you wish to discuss any of the issues raised, please contact me on 9221 1983.

Yours sincerely



**Kerrie Kelly**  
**National Director**