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Productivity Commission

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Dear Commissioners

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Further information for the Productivity Commission – Philanthropy Enquiry

Please accept my thanks for the considerable work undertaken by the Productivity Commission (PC) to produce its substantive Draft Report, *Future Foundations for Giving*. The final report will be an important tool for growing giving in Australia.

Perpetual is eager to continue to advocate for and invest in the growth of giving in Australia. For more than 140 years, Perpetual has brought Australian families and individuals to philanthropy, supporting them in their journey to use their wealth for the betterment of our communities. We remain committed to providing leadership to ensure Australia's giving community continues not just to grow but to have impact.

This document responds to some of the items the Commissioners have sought views and feedback on.

Concentration of the Licenced Trustee (LTC) Market – Information request 8.3

Information request 8.3 indicates that *due to market concentration over the last 10 years* the Commission is seeking further evidence on the administration of charitable trusts by trustee companies.

In this submission we will address the underlying premise of the request for information. Specifically, concern that the concentration of the LTC market reduces competition and leads to poor community outcomes.

In 2024, the market for trustee services, both the provision of corporate trustee structures and the market for administration support for lay trustees, has likely never been more abundant.

Today LTCs compete for appointment with individuals, public trustees, accountants, and other trusted advisers who act as trustees, as well as other unlicenced and government entities. Where a trust founder wishes to appoint a gratuitous trustee, they can choose an individual(s), if they wish to appoint a state-owned or not-for-profit trustee, they can choose a public trustee. If they wish to appoint a professional trustee, they can appoint a LTC.

As has always been the case, there are an enormous range of options available to trust founders and testators.



While LTCs do not hold the market share of charitable trusts, it should be noted, since the introduction of Private Ancillary Funds (PAFs) and the more significant use of Public Ancillary Funds (PuAFs), LTCs have continued to be appointed by individuals and families even within the crowded trustee market. This is because LTCs have always and will always continue to occupy a special role for those seeking the professional management of their philanthropic legacies.

Furthermore, LTCs and other professional advisers and trustees are a vital resource for growing giving in Australia. Outside of peer engagement, it is these trusted advisers who are most commonly responsible for bringing individuals and families to philanthropy (Scaife et al¹, 2013).

While the concentration of the LTC Market has not lessened the market for trustees, it has come with broader community benefits. These include:

- The ability to pool the resources of smaller trusts and provide larger grants to community organisations than would otherwise be available. This both reduces the red tape of applying organisations and provides a better cost/benefit ratio to charities who need to resource grant writers.
- Provision of economies of scale by reducing replication of tasks, better procurement options and capacity to provide aggregated insights for the market.
- The ability to invest in the development, and grow a cohort of, well trained and networked philanthropic professionals to further advance philanthropy in Australia (e.g., former Perpetual Philanthropic Team employees now lead philanthropy businesses at JBWere, Koda, Morgan Stanley and StartGiving to name just a few)
- Streamlined granting processes for the charities sector that provides transparency on decision making approaches.

The Unique Role of LTCs

Charitable trusts are long-term structures, aimed at providing funding to support the community sector over the longest possible time horizon. As many of the social and environmental challenges addressed through charitable trusts are wicked in nature, it's critical these trusts can provide benefits for generations beyond our own.

When establishing a charitable trust, individuals and families have many options available to them in the structuring of trusteeship, including use of individual responsible persons who may be for example, accountants, lawyers, or financial advisers. Philanthropists also have the option of utilising a Licenced Trustee Company that can provide professional trustee services over the longest possible time horizon. In most instances an LTC will be utilised where:

- Surety is sought on the professional and ongoing management of the trust structure over multiple generations.
- Family members have indicated a lack of interest in the trusteeship.
- An existing long-term, and in some instances, multi-generational relationships with the LTC provides confidence on trusteeship and asset protection.
- There are concerns around the complexity of the beneficiary relationships that require professional oversight.
- The court has appointed a professional LTC after ongoing issues with lay trustees in the management of a trust.

¹ Williamson, Alexandra & Scaife, Wendy (2013) [From entrepreneur to philanthropist: the 'second half of the game'](#), In Davidsson, P (Ed.) *Proceedings of the 2013 Australian Centre for Entrepreneurship Research Exchange (ACERE)*. Australian Centre for Entrepreneurship Research Exchange (ACERE), Australia, pp. 1-16.

The role of LTCs should be celebrated as a vital part of the philanthropy eco-system. LTCs are heavily regulated, and as fiduciaries, they are required to act in the best interests of the beneficiaries, families, and individuals they work with. They have the highest regulatory duty of care and as such, are trusted by philanthropic founders over generations.

Case Study A: The Walker Estate – generations of change protected.

Thomas Walker Charitable Trust

The Thomas Walker Charitable Trust was established in 1886 by the late Thomas Walker – a colonial merchant banker and philanthropist – who left a bequest of 100,000 pounds in his Will towards the establishment of a hospital for the reception and restoration to health of convalescent patients from the Hospitals of Sydney or elsewhere. He was survived by his daughter, Dame Edith Walker who had appointed Perpetual Trustee Company Limited (PTCo) as the executor of her estate and in 1922 appointed PTCo as the Co – Trustee of the Thomas Walker estate, subsequently becoming sole trustee in 1939.

The Walker Trust is required by the Walker Trust Act 1938 (NSW state legislation) to distribute income for the benefit of 5 named beneficiaries, 4 of which are NSW public hospitals. It is a principle of charitable law that public hospitals are not considered charitable because they are funded by governments and are considered to be an arm of government. The Charities Act 2013 (Commonwealth legislation) confirmed this position and accordingly public hospitals are not eligible to register as a charity with the ACNC. This meant that from 1 July 2014 the Walker Trust could no longer distribute to the public hospital beneficiaries for general purposes because to do so would disqualify the trust from registration as a charity. From January 2014 distributions to these public hospitals for non-charitable purposes from the Trust were suspended pending resolution of this matter

In seeking a resolution to enable the Walker Trust to fulfil its obligations, PTCo in collaboration with Herbert Smith Freehills lobbied the NSW Attorney-General's Department to request a change to the Charitable Trusts Act 1993 (NSW). Specifically, PTCo requested the Attorney-General prescribe a class of trusts under Section 22C of the Charitable Trusts Act 1993 that allows the Walker Trust to continue distributing to non-charitable DGR recipients such as public hospitals without adversely affecting the Trust's income tax exempt status. The change brought NSW charitable trust law in line with the position in Victoria allowing trusts in Australia's two largest states a pathway to funding government-related entities such as hospitals.

In 2017, the Charitable Trusts Act (NSW) 1993 was successfully amended, allowing the Walker Trust to release over \$1.8 million in distributions across the 4 named hospital beneficiaries, benefitting multiple patients. Reinstating distributions allowed PTCo to honour the purpose of the Walker Trust and charitable intentions of the Walker family. The change also facilitated approximately 25 similar NSW Charitable Trusts and subsequent Charitable Trusts to utilise the powers of Section 22C and distribute to state Government Entities for purposes over and above government funding, benefitting the wider community. Perpetual was able to use its significant legal, regulatory and trustee expertise to identify and secure an outcome for the benefit of the community. This is a key example of the advantage of LTCs and the role they play in protecting the wishes of founders and ensuring maximum public benefit.

Of an additional note, current day familial descendants of Thomas Walker continue to have their wealth and philanthropy supported, advised, and protected by Perpetual.

Switching Providers

When establishing any charitable trust, the founder can ensure there is appropriate power within the deed to enable the removal and appointment of a trustee. A large number of deeds across every decade of trust we administer, include wording that allows for Perpetual to be removed by an appointor, founder, successor or trustee. The ability to remove and appoint alternative trustees is not new. In some instances, however, the

appointor wishes to ensure the trustee (LTC or otherwise) *of their choice* is in place for the longest possible time horizon as long as they are able to fulfill their duties.

More recently, changes to the Private Ancillary Fund (PAF) and Public Ancillary Fund (PuAF) guidelines enable portability of those trust types. This includes a move from a PuAF to an alternative PuAF, a PAF to a PuAF or a PuAF to a PAF. You will find in submissions made to government on these guideline changes, that Perpetual has been consistent in our support for that capacity. You will also find that there has been no occasion where Perpetual, acting in its capacity as a sole trustee of a PuAF or PAF, has ignored the request of a founder, regardless of their appointor powers, to move to an alternative trustee. Respecting and protecting the wishes and intentions of the founder and testator is a vital part of trusteeship, and it is why the governing documents of a trust are crafted so carefully.

Perpetual is aware that from time to time, charitable trust founders may provide clear instruction in their governing documents as to the future management of their trusts, but for a variety of reasons, they do not make these intentions clear to some family members.

Since the Corporations and Markets Advisory Committee (CAMAC) Inquiry on charitable trusts in 2012, Perpetual provides, as part of its onboarding process, a checklist that includes establishing with the founder the type of appointor powers they wish to have within their charitable foundation deeds. Perpetual also minutes annual and bi-annual meetings with charitable trust founders and their successors, and at these meetings establishes whether there are any changes they would like to make to the trust documentation covering everything from preferred beneficiaries, through to investment policies and approaches. This is to ensure we document as accurately as possible the clear wishes and intentions of the founder in their appointment of an LTC, and to provide clear articulation for any stakeholders who wish to understand how we act and make decisions to protect those intentions after the death of the founder.

An individual should be free to appoint the trustee of their choice and critically to decide themselves upon the terms of the trust. If a founder wishes to ensure a mix of trustees working in conjunction with a professional trustee, they already have the power to do so in the establishment of the deed. If the founder wishes to provide appointor powers to someone else, or even to a committee, they already have the power to do so.

Any recommendation that may reduce trust in philanthropy and impact bringing new generations of individuals and families to philanthropy should be avoided. This includes recommendations that suggest new portability provisions that are at odds with the intent of the testator.

Case Study B – Poynton Bequest

The Poynton Bequest is a charitable trust that makes distributions to two Australian charities, one a large cultural organisation (Organisation A) and the other an education organisation (Organisation B). This testamentary charitable trust was established by Dr Orde Poynton, who was well aware that he may gift the funds directly to his nominated beneficiaries, as his Will also include some direct gifts.

Instead of providing a gift directly to the two nominated beneficiaries, Dr Poynton expressly provided for the funds to vest in a charitable trust. Dr Poynton's wishes were so clear that his will states:

'I expressly declare that *Organisation A* and *Organisation B* and the Trustee thereof shall not be entitled to the capital of The Poynton Bequest or any part thereof and that the trusts herein before declared concerning the income thereof shall in no way vest in or entitle *Organisation A* and *Organisation B* to the same it being my intention that The Poynton Bequest and the investments thereof shall remain under the management and control of my trustee in perpetuity'.

Dr Poynton clearly cared about the work and mission of the two nominated beneficiaries and his gifts provide for them in perpetuity. It is also clear that Dr Poynton wanted to select an independent professional trustee to administer these wishes, despite knowing he could gift to them directly. These provisions may be a surprise to the beneficiaries or to friends and family, but the testator's intentions are precise and clear. The prospect of

forced portability would significantly vary the expressed and incredibly clear wishes of Dr Poynton who appointed a LTC to protect an intention that is perpetual in nature.

The option for portability exists now. When establishing any trust, including a charitable trust, the founder can ensure there is appropriate power within the deed to be able to remove and appoint a trustee. Dozens of the deeds we administer as trustee include wording such as:

The person or persons other than Perpetual Trustee Company Limited comprising the Trustee (and if more than one by unanimous resolution) may, after giving no less than 90 days' notice in writing to Perpetual Trustee Company Limited, remove Perpetual Trustee Company Limited as a trustee of the Trust Fund and the removal will take effect from the day following the expiration of the notice period given in the notice.

This ensures that a founder can provide portability for a number of reasons. Many other founders, like Dr Orde Poynton in the example provided above, carefully select a prudent and single continuing trustee as they clearly do not want to have portability for their trust, unless there is a breach of trust.

This undoubtedly demonstrates that portability exists now – as it should – at the discretion of the founder.

Fees

The Corporations Act (the Act) Section 601BE(3)(a) states that fees charged by a licenced trustee to charitable trusts must be paid from trust income rather than capital. All other trust structures aside from charitable trusts can take fees from either capital or income under Section 601TBE (2).

Perpetual again requests that the Commission consider bringing charitable trusts in line with all other trust structures and enable fees to be charged from either income or capital.

Many testamentary charitable trusts are capital restricted, meaning the trustee can only distribute income to beneficiaries. When the Trustee Companies Act (Vic) was altered in 1995, to limit the capacity of charitable trust trustees to distribute and therefore erode capital, interest rates were much higher than they are today. The overall sentiment of that change remains important, a trustee must not erode capital in such a way that diminishes the capacity of a trust to grow over time and provide increasing levels of income support for the benefit of the community. The unintended consequence of that 1995 amendment, in any time of sustained and low interest rates, has been to limit the funds available for distribution, despite growth of trust capital. Optically, to income beneficiaries, the trust is growing, but their income distribution is impacted wholly by trustee fees.

There will be periods where it is more sensible for the trustee to take fees from capital rather than income and vice versa. Perpetual believes that providing experienced trustees with the capacity to decide from where fees should be taken, has the potential to increase funding for the charitable sector without diminishing the future potential of these trusts. ASIC currently provides wording that could be utilised, namely requiring that the charging of fees must not significantly affect the capital of the trust and is a fair reflection of the work and expertise required. We believe strongly this will assist in a release of more dollars to the sector.

Maximising Community Benefits

An LTC like Perpetual can provide additional benefits to community via its ability to scale and professionalism.

Charitable trusts, in whatever legal form, make distributions to the community each year. These distributions are governed by the Trust Deed, and in accordance with the associated legislation and guidelines.

Some trust deeds reflect the wishes of the founder to provide funds to a variety of organisations, others to a sector, or geography, or a combination of factors important to the founder. Let's consider a couple of different case studies.

Case A: A founder wants to make a difference in a cure for Alzheimer's. A trustee may be able to discharge that duty by simply doing a website search on Alzheimer's medical research, finding an organisation with the appropriate tax status, and making a distribution.

Whilst this would satisfy trust law, this may not meet the wishes of the founder. As the founder would want to ensure there is a cure for Alzheimer's as quickly as possible, how can the trustees assure themselves that the research is, for instance:

- Focused 100% on the search for a cure for Alzheimer's.
- Is rated highly by independent senior medical researchers as compared to other research initiatives.
- Is not being duplicated without benefit in other locations.
- Has not been outdated by recent overseas research.

Providing such a service is not a quick or a cheap option. It involves the careful consideration of each trust instrument and requires having or acquiring specialist skills. In Perpetual's case, we utilise and maintain a database of organisations and projects and employ the services of a medical research assessors who review publicly available submissions for funding. To ensure we are not conflicted in decision making or recommendations, we also have a panel of external assessors to review projects run by organisations with which Perpetual or its staff has any link. This approach is rigorous, defensible, and centres on maximising community benefit as best we can in line with the intentions of the philanthropists we work with.

Case B: A founder wants to make a difference in the geographic area of Toowoomba in Queensland. Once again, there are some simple ways in which a trustee may exercise their discretion. However, to maximise the benefits to the community, this requires local knowledge and an understanding of community projects underway, and how the many existing charitable non-profit organisations in the region are already addressing the local social and geo-demographic issues.

In this case, as the founder did not state a specific charitable non-profit organisation(s), it is also important to allow all organisations in the region to freely compete for the distribution (or part thereof) from the trust.

Perpetual's approach to ensuring trusts consider appropriate funding and all available charitable non-profit organisations can apply for funding is multi-faceted. In some cases, the community engagement is bespoke and in others we utilise our 'Funding Round' process.

Perpetual is transparent on the assessment approach undertaken to allocate funds to ensure community organisations can understand both how to put forward a great proposal, but also to ensure that those organisations focus their limited resources in the right way.

Other Items

Mandatory Distribution Rates, PAFs and PuAFs

The Commission is seeking a view on whether an increase in mandatory distribution rates may impact bringing people to philanthropy.

In the last financial year, Perpetual partnered with individuals, families and trusts to facilitate the distribution of \$185 million into communities. \$48 million of that amount was distributed by Private Ancillary Funds (PAFs) managed by Perpetual, all of which are committed to adhering to the government imposed 5% minimum yearly distribution amount. However, Perpetual's clients have consistently demonstrated a commitment to exceeding the yearly minimum requirement. Since 2019, we have seen PAFs we advise consistently distribute above 5% of the portfolio value.

Amendments made to the Private Ancillary Fund Guidelines by the government in June 2020, incentivised higher levels of distribution during the COVID-19 pandemic by allowing a PAF to reduce their future minimum

annual distributions. This change was designed to provide support to charities throughout a time of heightened need, recognising the crucial role played by philanthropic organisations in addressing societal challenges.

Perpetual's clients have remained steadfast in their commitment to supporting charitable beneficiaries, with none capitalising upon this incentive to reduce their giving below the minimum rate when they previously over-distributed. The generosity of Perpetual's clients is further evidenced by the fact that since the onset of COVID-19, the number of PAFs distributing above the 5% requirement has remained consistent. This illustrates that clients' giving behaviour is more centred around utilising available funds to address community needs, rather than merely adhering to regulatory requirements.

For PAFs where Perpetual serves as the sole trustee, the commitment to over-distribute remains, with more than half of these PAFs distributing above the minimum requirement in the 2023 financial year. By exceeding the minimum distribution threshold, these funds aim to find the balance of maximising community impact, while also ensuring the sustainability of their supporting portfolios. This strategic approach acknowledges the importance of balancing short-term charitable giving with long-term financial stability, thereby fostering a more resilient philanthropic sector.

With current inflationary environments, the 5% PAF rate walks the right line between allowing philanthropists to invest for growth in buying power, while ensuring distributions are at a reasonable level to maintain community trust. Philanthropists do not need regulation to be more generous. Potential future philanthropists may however be disincentivised by any increase in minimum distribution rates that makes management and growth of a perpetuity trust harder.

With regards to PuAF mandatory rates, Perpetual is cautiously supportive of alignment with PAFs at 5%. Many individuals who use PuAFs do so due to the lower entry level and pooled approach provided by those structures. In our experience, the lower mandatory rate is not a key consideration point. Perpetual does recognise however there are many PuAFs established in support of hospitals and other government entities, that may have differing views as they are not established purely as vehicle for philanthropists. It's important that a variety of PuAF trustee views are sought.

Smoothing Provisions

PAFs and PuAFs also have ample tools available to them for the smoothing of distributions, including through the provision of multi-year commitments. As outlined above, most of the families we work with did not take up smoothing provisions available through the COVID-19 adjustments. We would want more detail on any smoothing provision recommended to ensure there is no unintended community impact in allowing designed volatility in philanthropic distributions.

I welcome the opportunity to engage with the PC on any matter raised in this document. I also refer to Perpetual's original submission which writes in support of several broader initiatives.

Kind regards

Caitriona Fay

Managing Partner, Community and Social Investments