



AUSTRALIAN CATHOLIC BISHOPS CONFERENCE

General Secretariat

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Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
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Dear Mr Leggett

Legislative Framework for Public Ancillary Funds

Submission in response to the Exposure Draft

The Australian Catholic Bishops Conference (ACBC) is the national body of the Catholic Bishops of Australia.

The ACBC appreciates the opportunity to respond to the Exposure Draft on Legislative Framework for Public Ancillary Funds (PuAFs) and offers the following comments. The ACBC supports improved standards of governance and accountability, regular valuation of assets, clear investment and distribution rules. The response to this Exposure Draft should be read in conjunction with the ACBC submission responding to the November 2010 Discussion Paper - *Improving the Integrity of Public Ancillary Funds*.

This submission is specifically directed to the Exposure Draft with only some passing references to the Guidelines and it is anticipated that a more detailed response to the Guidelines will be forwarded closer to the nominated deadline.

The ACBC notes the National Compact *priority for action* number 3: “Recognise sector diversity in consultation processes and Sector development initiatives.” In the case of PuAFs conducted by various Catholic Church entities, there are some significant features that differ from the general structure and operation of PuAFs in other sectors.

Operation of PuAFs within the Catholic Church

Before detailing four particular concerns with the Exposure Draft, the ACBC considers that it may be helpful to outline the operation of PuAFs in the Catholic Church. PuAFs within the Catholic Church may be divided into two broad categories:

The first category is a fund that contains a capital base and distributes its income regularly to other Deductible Gift Recipients (DGRs). These PuAFs are similar to the type of the fund that is generally the subject of the Discussion Paper. They usually operate at a high level of Church administration and are typically identified in terms such as “Archbishop’s Charitable Fund”. Unlike many other PuAFs that are “stand alone” entities, they form part of the overall financial administration structure of the Church. They seek to develop a long term secure capital base to generate investment income for distribution to a number of DGRs. By holding capital in this way administration and investment management is simplified and more cost effective rather than having multiple Church DGRs managing capital fund. Usually the trustee of such a fund is the statutory trust corporation of the Diocese.

As the guidelines currently stand, with a prohibition on distribution to entities associated with the trustee, this would effectively prohibit distribution from such funds to other entities within the Diocese whose funds are held by the same trustee. For example, the payment from a Diocesan PuAF to a school building fund for a diocesan school would be prohibited as the proposed legislation stands.

The management of these funds is usually entrusted to the Diocesan Development Fund and this raises the question of whether this would be regarded as an ‘arms length’ arrangement under paragraph 34 of the guidelines.

These funds will often accumulate capital, for example, from bequests, to build up the capacity for future distribution for recurrent expenditure by other DGRs, or to finance significant future capital works. The requirement for an annual distribution of a fixed amount of capital is an unnecessary restriction on the proper management and need for flexibility of these funds.

The second category of Catholic Church PuAFs does not have a capital base and operates simply as a conduit for distribution to other DGRs. These typically operate within Catholic parishes but some are diocesan based.

By way of example, parishes in the Catholic Archdiocese of Sydney use PuAFs extensively as a vehicle to distribute tax deductible donations to other DGRs particularly Parish School Building Funds but also other entities including, for

example, the Confraternity of Christian Doctrine (Roman Catholic public fund for religious instruction in government schools) and the St Vincent de Paul Society (a public benevolent institution). There are 135 out of 138 parishes in Sydney with PuAFs, all using the standard Trust Deed developed by Makinson & d'Apice, Solicitors, in 1997 and with the same name format *X Parish School Building & Catholic Charities Trust*. Some other dioceses have similar arrangements so that the number of such funds in Australia is approaching 200.

The purpose of this second type of PuAF is to streamline fundraising and simplify accounting. Donations are received from parishioners and they receive one receipt for the purpose of their income tax return, even though the destination of their donation may involve supporting a number of separate DGRs. Some parishes use this as a way to reduce “donor fatigue” and make donations to other DGRs throughout the year instead of having an additional special collection. It allows the parish to vary the distributions depending on need and the other income of the relevant DGRs. This in turn allows for more secure budgeting and management of charitable activities and projects. These PuAFs easily meet the requirement that they “neither be prolonged accumulators of funds, nor sparse distributors for funds”. In aggregate Sydney Archdiocese PuAFs distributed 98.9% of donations received in the year ended 30 June 2010.

Specific Concerns

While it is important to promote transparency and integrity in the conduct of PuAFs, the precise way in which this is to be achieved should not conflict with the National Compact 2010 *priority for action* number 5: “Reduce red tape and streamline reporting.”

The ACBC has particular concerns with the following aspects of the Exposure Draft which will increase red tape and add to the burden of reporting:

1. Inability for suitably qualified individuals to be trustees for new Church PuAFs.
2. The requirement that new Church PuAFs must have trustees that are constitutional corporations.
3. Requirement of Church PuAFs, particularly small parish based PUAFs to have accounts audited annually by a registered company auditor.
4. Requirement of Church PuAFs, particularly small parish based PUAFs to lodge annual tax returns.

These are considered in more detail below.

1. Inability for suitably qualified individuals to be trustees for new Church PuAFs.

Paragraph 426-102(1)(a) of the Exposure Draft mandates that each trustee of the PuAF is to be a constitutional corporation. It is acknowledged that the transitional

provisions permit existing PuAFs at 1 January 2012 to continue to appoint trustees that are not constitutional corporations as trustees.

However the ACBC considers that if a new PuAF is established, for example in a new parish, the current practice of individual trustees should be retained. This is a better reflection of internal church law with respect to parish governance. It is unnecessary, expensive and unduly onerous to require new Catholic Church PuAFs to have a constitutional corporation as trustee. The ACBC is not aware of any instances of maladministration of its many PuAFs nor is there any significant risk with the present forms of governance.

The requirements of ATO Taxation Ruling 95/27 that a public fund must be managed by members of a committee, is met by the requirement in church law that all parishes, dioceses and other church juridical persons must have a finance committee made up of people of outstanding integrity and expert in financial matters and civil law to assist the canonical administrator. It is accepted that the majority must be responsible persons and in this respect Catholic Church PuAFs comply.

The Exposure Draft continues to permit suitably qualified individuals act as trustees for private ancillary funds and therefore the ACBC believe that the right for suitably qualified individual trustees should also be retained for new PuAFs. An intermediate position may be to permit suitably qualified individuals to act as trustees of PuAFs where the capital base of the PuAF is less than \$2 million.

2. The requirement that new Church PuAFs must have trustees that are constitutional corporations.

The Exposure Draft mandates that only constitutional corporations may act as trustees of new PuAFs. As well as individuals, there are a number of Church corporate entities, some of which might not be considered to be constitutional corporations that presently act as trustees of PuAFs, which could be prevented from acting as trustees of new PuAFs if the Exposure Draft is not amended.

As well as utilising conventional entities such as corporations or incorporated associations, in all States and Territories, except South Australia, there is specific legislation establishing trustee corporations to hold Church property for the Catholic Church and most other Churches. In some instances entities are established by letters patent. Some legislation recognises as a civil corporation the church entity itself. In Western Australia the legislation establishes the Bishop (the canonical administrator of the Diocese) as a civil Corporation Sole. In some instances a parish priest (the canonical administrator) acts in the name of the parish in the civil law as an individual. In some States the legislation specifies the members who comprise the body corporate by reference to positions held, for example, the members of the Diocesan College of Consultors, or the Superior and Council of a religious order.

Depending on the precise circumstances some of these will be constitutional corporations but not necessarily all of them.

It would be a matter of serious concern if the Commissioner of Taxation could change those arrangements and remove trustees. At that high level of Church administration it is most unlikely that any deficiency in compliance would not be easily remedied without such drastic action.

3. Requirement of Church PuAFs, particularly small parish based PUAFs to have accounts audited annually by a registered company auditor.

The usual requirement in Catholic Church entities is for the audit to be completed by a CPA, CA or member of the National Institute of Accountants. The great majority of parish audits are carried out on a voluntary or pro-bono basis. The ACBC is very concerned with the requirement in the PuAFs Guidelines that audits to be completed by a registered company auditor, this will be an unaffordable and unnecessary expense especially for parish based PuAFs.

4. Requirement of Church PuAFs, particularly small parish based PUAFs to lodge annual tax returns.

The ACBC is of the view that the present powers of the ATO to inspect records and conduct audits, either randomly or on the basis of some suspicion are adequate. Some of the PuAFs that have share investments would already be lodging a return for the purpose of refund of imputation credits and for larger capital based funds such a return may not present major difficulties, although the timing of distribution decisions and its connection with the fund and tax “year ends” may be an issue.

The cost to PuAFs of providing the information to the ATO should also be taken into account as this is a cost that is ultimately borne by the beneficiaries of the charitable funds. The cost of reporting and lodging returns has to be proportionate to the value of such a return and commensurate with risk.

As is now the case with respect to the reporting requirements for Companies Limited by Guarantee the guidelines should consider a threshold turnover amount below which a return is not required.

A return should not be required from smaller funds, say with a capital base less than \$500,000 and not for those that simply act as a conduit for funds.

Exemption of Church based PuAFs

Church based PuAFs have a long history of compliance and internal law and process that mitigates risk. This formed the basis for the exemption of religious organisations from the NSW Charitable Fundraising Act. The ACBC respectfully suggests that a similar exemption should apply from the new PuAF legislation. It is suggested that this could be described by reference to the membership of a GST religious Group. The ATO has all the necessary information for such entities that would enable audits or other compliance checks should it ever have any concerns.

Other Comments

The special structure and nature of Church organisations requires that their operation of PuAFs should be properly understood and reflected in the legislation, especially the significant issue of their trustee arrangements.

The ACBC would appreciate an opportunity to meet with Treasury officials to further discuss the matters raised above, especially to ensure that the complex structures of Church entities are taken into account in the formulation of policy.

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