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Dear Sir/Madam

## **Submission in relation to Public Ancillary Fund Guidelines 2011**

Thank you for the opportunity to submit our comments in relation to the Public Ancillary Fund Guidelines 2011 (**Guidelines**).

In summary, we consider that:

- The proposed Guidelines need to be considered in the context of the broader not-for-profit (**NFP**) reform process. In particular, the proposed reporting and compliance role for the Australian Charities and Not-for-profits Commission and the proposed Treasury review of core governance principles for NFPs.
- The minimum annual distribution rate of four per cent of the market value of a Public Ancillary Fund's (**PubAF**) net assets is a significant improvement on the minimum annual distribution rate applicable to private ancillary funds.
- The proposal to deem an individual before whom a statutory declaration may be made as being a responsible person should achieve greater certainty. However, we recommend confirming that the guideline refers to State or Territory legislation as well as Commonwealth legislation and that the same deeming principle should be included in the private ancillary fund guidelines.
- Guideline 44 is superfluous and could be deleted. If it is retained, we recommend that further clarification be provided relating to whether it is necessary that the public actually contribute to the PubAF and what is meant by the PubAF being operated "in a public manner".
- Guideline 52 be amended to permit continued accumulation by a PubAF for a transitional period in accordance with any existing agreed accumulation arrangements.
- Guideline 17 should provide a longer period for changes to governing rules to be notified to the Commissioner or the Commissioner should otherwise have discretion to extend the time for notification.

**Our reference**  
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## 1. COORDINATED AND TRANSPARENT REFORM PROCESS

As noted in previous submissions we have made on NFP related matters, there is currently under consideration or review, a wide range of other exposure draft legislation, proposed amendments and ATO views relating (directly or indirectly) to the tax concessions for, and overall regulation of, NFPs. The Government has articulated its overall policy objective of reforming Australia's NFP sector to achieve more efficient and effective regulation, as well as improving the transparency and accountability of NFPs – and we endorse this objective. The Government has also identified policy rationales for individual reforms. However, what appears to be missing is a consideration of the way in which each individual reform fits within the overall policy objective and also the manner in which the individual reforms will interact with the others.

We reiterate our suggestion that the approach flagged by Treasury in the *Final Report – Scoping Study for a National Not-For-Profit Regulator (Final Report)* should be applied to the whole NFP reform process. In that *Final Report*, Treasury stated that the reform process should be broken down into “manageable goals within an overall timeframe” with “prioritised identified issues that can be addressed immediately”.<sup>1</sup>

This is particularly important as the proposed Guidelines will result in a new framework of requirements for PubAFs at a time when the Final Report has also recommended a reporting and compliance role for the Australian Charities and Not-for-profits Commission (the precise details of which are still to be determined), and that Treasury undertake a review to identify appropriate core governance principles for NFPs. Moreover, the Australian Charities and Not-for-profits Commission is intended to be a national “one-stop-shop” which consolidates Commonwealth regulatory oversight, yet the Guidelines entrench the role of the ATO.

In addition, we urge the Government to ensure that appropriate funding and resources are set aside to support both PubAFs and (in future) the Australian Charities and Not-for-profits Commission in familiarising themselves with and implementing the proposed Guidelines along with any further round of regulatory changes for PubAFs flowing from the *Final Report*.

## 2. MINIMUM ANNUAL DISTRIBUTION

As previously submitted, our view is that the distribution rate should be set at a level that permits PubAFs to continue in existence for a substantial length of time, although not necessarily indefinitely. This should ensure a significant application of PubAF funds to philanthropic purposes for the benefit of the current community.

Accordingly, we support the Government's proposal (Guidelines 19 and 19.2) to set the minimum annual distribution rate at four per cent of the market value of a PubAF's net assets and to suspend this distribution requirement for the financial year of the PubAF's establishment and the following four financial years.

## 3. DEEMED RESPONSIBLE PERSON

We support the Government's proposal (Guideline 14.1) to deem an individual before whom a statutory declaration may be made as being a responsible person. Such a measure will bring greater certainty about whether a person is a responsible person.

We note that the Guidelines do not specify whether the reference to “[a]n individual before whom a statutory declaration may be made” includes such persons under State and Territory legislation as well as Commonwealth legislation. We recommend that the

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<sup>1</sup> Commonwealth of Australia, The Treasury, *Final Report – Scoping Study for a National Not-For-Profit Regulator* (2011) 11.

Guideline confirm that it refers to an individual before whom a statutory declaration can be made in any Australian jurisdiction.

We also submit that a similar deemed responsible person guideline should be included in the guidelines applying to private ancillary funds.

#### 4. DEFINITION OF "PUBLIC"

Guideline 44 requires that a fund "must be public in nature". The notes to this guideline specify that this means that there must be an intention "that the public will contribute to the fund and are invited to do so and the fund is operated in a public manner ...".

We support the substance of this requirement but note that it appears to be superfluous because the requirements to be a public fund, as set out in Taxation Ruling TR 95/27 *Income tax: public funds (TR 95/27)*, are met through other guidelines, as set out below:<sup>2</sup>

Requirement	Guideline
The objects of the fund must be clearly set out and reflect the purpose of the fund	10.1
Gifts to the fund must be kept separate from any other funds of the sponsoring organisation	This is implicit in guidelines 9 and 10
Receipts must be issued in the name of the fund	46
The public must be invited to contribute to the fund	45
The fund must operate on a non-profit basis. Moneys must not be distributed to members of the managing committee or trustees of the fund except as reimbursement for out-of-pocket expenses incurred on behalf of the fund or proper remuneration for administrative services	11, 42 and 43
The fund must be managed by members of a Committee, a majority of whom have a degree of responsibility to the general community (this requirement does not apply to funds established and controlled by governmental or quasi-governmental authority)	14
Should the fund be wound-up, any surplus money or other assets must be transferred to some other fund qualifying under subsection 78(4) or 78(5)	10.2 and 49
The ATO also requires an undertaking in writing, or the inclusion of a clause in the constituent documents, that the ATO is to be notified of any changes to the fund's constitution or other founding documents.	17

Accordingly, we suggest that this guideline could be deleted. This would simplify the Guidelines because, as set out below, it is not entirely clear from the face of the guideline and note what is required to be "public in nature".

<sup>2</sup> Extracted from paragraph 9 of TR 95/27.

However, if this guideline is retained in its current form, it would be helpful if the following points could be clarified.

**(a) Necessity for public to contribute**

As currently drafted, it is unclear whether it is necessary for the public to, in fact, contribute to the fund in order for it to be treated as a PubAF. TR 95/27 indicates that the decision in *Bray v FCT* 78 ATC 4179 (**Bray**) requires that "the public, or a significant part of it, does in fact contribute to the fund" (paragraph 6(b)). However, the note to this guideline only requires that the public be invited to contribute, even though the decision in *Bray* is referenced.

We support a requirement for PubAFs to make genuine efforts to raise money from the public rather than private individuals. However, as indicated in our previous submission, we consider that it should not be a requirement that the persons approached actually donate money. This is because donations are likely to vary depending on circumstances both within and outside the control of a PubAF, such as the state of the economy and the relative popularity of the DGRs to which the PubAF intends to donate from time to time. We note that the factors in paragraph 9 of TR 95/27 appear to implicitly acknowledge that the level of actual contributions will not be critical.

Whether or not it is intended that the guideline requires that a significant part of the public do, in fact, donate to the PubAF, it would be helpful if the note to this guideline can expressly state whether or not the PubAF must receive donations from a significant part of the public.

**(b) Fund is operated in a public manner**

It is not clear from Guideline 44 and the associated note what is meant by the fund being "operated in a public manner". Although the note refers to guideline 14 (about requiring a majority of responsible persons to be involved in decision making) as an example of what is required, it is not clear what, if anything, else is required.

We consider that it would be helpful to be more specific in explaining what is meant by being "operated in a public manner". If necessary, the note could refer to the requirements set out in TR 95/27 and/or all of the relevant guidelines that assist in ensuring that a PubAF is "public in nature".

**5. TRANSITIONAL MEASURES**

The transitional provisions in the Guidelines do not contemplate that a PubAF may have an existing accumulation arrangement agreed with the Commissioner of Taxation. However, just as a private ancillary fund may have agreed an accumulation plan, so might a PubAF have agreed a plan with the Commissioner. We recommend that, as for the private ancillary fund guidelines, Guideline 52 be amended to permit continued accumulation in accordance with an agreed accumulation arrangement until:

- the arrangement expires;
- the arrangement is satisfied (in that the capital target is reached);
- the end of a sunset period (for instance, 30 June 2016 for a five year period in line with the private ancillary fund guidelines); or
- the PubAF chooses for the transitional rules to stop applying to it.

## 6. NOTIFICATION OF CHANGES TO GOVERNING RULES

Guideline 17 requires the trustee of a PubAF to notify the Commissioner within 21 days of any change to the PubAF's governing rules. We submit that this requirement is unnecessarily restrictive. Many PubAF we have acted for are administered by a small number of volunteers and have limited resources to keep up with various compliance and reporting obligations, not only including tax obligations. This workload will only be increased by the requirements imposed by the Guidelines.

While we support the requirement to notify the Commissioner of changes to a PubAF's governing rules, as this will ultimately provide comfort that any changes do not jeopardise the PubAF's access to tax concessions, there may be circumstances where it is difficult for the trustee of a PubAF to notify the Commissioner within 21 days.

This period is also shorter than the period currently imposed by section 426-40 of Schedule 1 to the *Taxation Administration Act 1953* to give the Commissioner information or a document that is relevant to an entity's entitlement to endorsement (which allows an entity at least 28 days from the time notice is given to provide the information or document).

We therefore submit that the time for notification of changes to a PubAF's governing rules should be extended, ideally to 60 days. Alternatively, the Commissioner should be given discretion to extend the time for notification where appropriate having regard to a PubAF's circumstances. We note that the case of *M W McIntosh Pty Limited v FCT* [2009] FCAFC 88 highlighted the need to allow flexibility in meeting notification requirements in the tax law.

Although we acknowledge that the Commissioner would have the power to remit the penalty for failure to comply with Guideline 17 where appropriate, we submit that a better approach would be to give the trustees of PubAFs every opportunity to comply with the requirement having regard to their circumstances.

Please contact Teresa Dyson on (07) 3259 7639 if you have any questions.

Yours faithfully

*Blake Dawson*