

# Public Ancillary Fund Guidelines 2011

Draft Guidelines – August 2011

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LAWYERS

# Submission on draft Public Ancillary Fund guidelines

Thank you for the opportunity to provide comments and submissions in respect of Treasury's draft Public Ancillary Fund (**PAF**) guidelines (**Guidelines**). We refer to the comments made in our submission dated 17 December 2010 on Treasury's discussion paper for improving the integrity of public ancillary funds and confirm the views we expressed in that submission. However, we provide some additional specific comments in relation to the draft Guidelines as set out below.

## General principles

We continue to question whether it is necessary for PAFs to be established under a trust instrument. Treasury's review of the PAF regime provides an opportunity to consider alternative structures, such as the inclusion of PAF rules in the constitution of a company limited by guarantee. Whilst at general law a trust is not treated as an entity separate to its trustee, for various tax purposes (such as for deductible gift recipient status, goods and services tax, obtaining an ABN and TFN) a trust is deemed to be a separate entity to its trustee and this adds to administrative complexities (such as having to obtain two ABNs). In any event, the corporate trustee of a PAF is currently often structured as a company limited by guarantee for risk management purposes. Having a single entity structure such as a company limited by guarantee with PAF rules built into its constitution would reduce the compliance obligations in relation to the on-going management of such PAFs compared to where they are established as a trust. Such alternative structures would potentially better achieve the principle that PAFs should be open, transparent and accountable to the public rather than a trust structure.

The general principle of providing the Commissioner with regulatory powers in relation to PAFs should be considered in light of the future role to be played by the Australian Charities and Not-for-profits Commission (**ACNC**). Consideration needs to be given to whether the powers provided to the Commissioner in relation to PAFs would be passed over to the ACNC upon the commencement of its operations on 1 July 2012. We caution against the potential for a duplication of compliance obligations that may be owed in relation to imposing reporting obligations on trustees of PAFs to both the Commissioner and the ACNC.

## The trustee

Draft guideline 14 states that the majority of persons who are involved in the decision making of the PAF must be responsible persons. Draft guideline 14.2 states that such responsible persons must be active directors of the trustee and a member of any other controlling body of the PAF. This requires the responsible persons to sit on the board of the corporate trustee. We question whether this requirement is necessary. Currently, there is no requirement for a majority of board members of corporate trustees of PAFs to satisfy the majority responsible person requirement. Some current structures that have been adopted impose the requirement for the board of a corporate trustee to appoint persons to a management committee of the PAF and require a majority of persons who sit on that management committee to be responsible persons. The requirement in draft Guideline 14.2 will require existing PAFs with corporate trustees to review the status of their board members, and composition of their boards, and to amend their constituent documents accordingly. However, we question whether it is strictly necessary to require a majority of board members of a corporate trustee to be responsible persons, provided that otherwise a majority of responsible persons are at all times involved in the decision making of the PAF.

## Changes to governing rules

We question the strictness of the requirement in draft guideline 17 to notify the Commissioner of *any* change to the PAF's governing rules. We submit that minor amendments should be exempt from this requirement. The requirement in draft guideline 17 would place an undue burden on the Commissioner to review and approve each minor amendment and would add to the compliance burdens in managing PAFs.

## Minimum annual distribution

The minimum distribution rule in draft guideline 19 does not allow relief for special circumstances that may result in the lowering of the value of the net assets of the PAF in a particular income year, for example, such as in the global financial crisis. We submit that to cater for such special circumstances, there should be available to the Commissioner a discretion to waive the minimum annual distribution requirement for particular income years where special circumstances are present.

## Accounts

We submit that it would be simpler for draft guideline 24 to require the corporate trustee of the PAF to comply with the existing record keeping obligations in Subdivision 382-B in Schedule 1 to the *Taxation Administration Act 1953* rather than to restate the rule in the guidelines.

## Investment strategy

Draft guidelines 30 to 32 impose upon the corporate trustee the obligations to prepare and maintain a current investment strategy for the PAF. The guidelines should make clear that the board of the corporate trustee can discharge this obligation by engaging suitable financial advisors and other experts to develop an appropriate investment strategy for advice to and ratification by the board.

## Investment limitations

Draft guideline 33 places limits on the power of the corporate trustee of a PAF to borrow money. There is an exception which allows short term borrowing arrangements for the purposes of funding the minimum distribution requirements. We propose that it would be preferable to introduce a more flexible minimum distribution requirement rule rather than to force a borrowing to meet the minimum distribution requirements.

Draft guideline 40 also imposes the requirement that PAFs can not carry on a business and further states that undertaking public fundraising appeals would not contravene this requirement. We submit that further guidance on what is an acceptable public fundraising appeal would be desirable, for example, would a PAF be able to conduct BINGO activities on a regular basis?

## Uncommercial transactions and benefits to founder/donor

We confirm our comments in our submission of 17 December 2010 seeking clarification as to what an uncommercial transaction is.

Further, we submit that draft guideline 42, which prohibits the provision of any direct or indirect benefit to, among others, a donor, founder or any associate of these, may have an unforeseen and unreasonable impact. For example, what if an associate of the founder acts in the capacity of trustee of an otherwise eligible DGR recipient entity, that has no other substantive connection or influence in relation to the PAF? Surely, the guideline could not be intended to limit distributions to the DGR in such a situation. The potentially adverse implications of a strict application of draft guideline 42 may be mitigated by providing the Commissioner with a discretion to approve distributions to otherwise prohibited persons in particular meritorious circumstances.

## Donors

We submit that the substance of the notes to guidelines 44 and 45 should form part of the wording of the actual guidelines.

## Compliance with all relevant laws

We refer to our comments in our submission of 17 December 2010 where we raised the issue of whether PAFs that are structured as charitable trusts do in fact qualify as charities under particular State trust and charity laws. Although draft guidelines 47 and 48 implicitly deal with this issue, we do not believe that they adequately address this concern.

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