



PHILANTHROPY
Australia

26 August, 2011

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Patrons

Sir Gustav Nossal AC CBE
Lady Southey AC

Dear Chris,

Re: Draft Public Ancillary Funds Guidelines 2011

Thank you for the opportunity to comment on the draft Guidelines for Public Ancillary Funds. Philanthropy Australia and its Members are highly appreciative of Treasury's willingness to consult with Philanthropy Australia and the philanthropic sector as part of this review. We believe this process is producing a workable set of Guidelines that will enable existing and new Public Ancillary Funds to go forward with confidence to strengthen Australian communities and community organisations.

Philanthropy Australia's submission will first make comment about the general principles and intention expressed in the draft Guidelines, and will then comment on specific items in the draft Guidelines.

Model Trust Deed

Philanthropy Australia suggests that the ATO make available a Model Trust Deed for Public Ancillary Funds. This will be extremely helpful in ensuring future Public Ancillary Funds work as closely to the ideal model as possible and will significantly simplify establishment of future Public Ancillary Funds.

Distribution

Philanthropy Australia welcomes the 4% minimum distribution requirement but suggests it be based on a rolling three year average of value of net assets. This would overcome the problem of uneven flows to the community which is the main shortcoming of setting minimum distribution rates based on a valuation at a single point in time, rather than net income.

We understand there is a view that many foundations which are accumulating funds for a particular purpose such as a capital project may be able to overcome the issue through contractual arrangements in multi-year grants which allow funds to be "clawed back" if misspent or unspent. However, this would cause problems for the majority of Public Ancillary Funds which must legally provide their grants as gifts rather than service arrangements and also there may be GST consequences.



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Portability

Philanthropy Australia welcomes the provisions for portability between Public Ancillary Funds and other ancillary funds as detailed in item 50 of the Guidelines. While recognising that this is outside the ambit of these Guidelines and would require an amendment to the Private Ancillary Fund guidelines, we would like to flag that there should also be provision for Private Ancillary Funds to allow transfer of capital to existing Public Ancillary Funds. Guideline 51 in the Private Ancillary Funds Guidelines goes part of the way in that it allows a Private Ancillary Fund to convert to a Public Ancillary Fund, but does not allow the transfer of capital into an existing Public Ancillary Fund. Philanthropy Australia suggests that the provision for transfer should include the ability to transfer the capital of a Private Ancillary Fund into an existing Public Ancillary Fund, either to add to its capital or to create a new sub-fund. We note that Philanthropy Australia's suggestions on the draft legislation should have laid the groundwork for this to occur. This issue of Portability stems from the principles of efficiency and transparency which we believe are as relevant to the philanthropic sector as other parts of the economy.

Specific comments on particular paragraphs in the draft Guidelines follow.

14.2. The individuals referred to in guideline 14 must be active directors of the trustee and a member of any other controlling body of the fund.

Philanthropy Australia suggests that the definition of an 'active director' needs elaboration, perhaps using the wording in question 1.28 in the Private Ancillary Funds Frequently Asked Questions on the ATO website.

*19. During each *financial year, a *public ancillary fund must distribute at least 4 per cent of the *market value of the fund's net assets (as at the end of the previous *financial year).*

Philanthropy Australia recognises that Treasury has made provision for the increased costs incurred by Public (as opposed to Private) Ancillary Funds by lowering the minimum distribution rate from 5% to 4%.

Philanthropy Australia suggests an additional note to this item, referencing that distributions must go to eligible entities as defined in the Trust Deed, which must be item 1 DGRs. While this is implicit and is stated in the note to item 10.2, it is worth repeating to reinforce the point.

*19.1. The fund must distribute at least \$11,000 (or the remainder of the fund if that is worth less than \$11,000) during that *financial year*

Philanthropy Australia is concerned that this requirement could endanger the perpetual nature of many small Public Ancillary Funds, particularly those which operate in regional areas. Community foundations, particularly in rural and regional areas, that serve small populations may take a decade or more to reach \$220,000 in their corpus. Despite their small size, their impact should not be underestimated; they are a locus for philanthropic activity, volunteering and community cohesion, and encourage philanthropy amongst individuals who would never have the wherewithal or the motivation to establish a standalone foundation. Philanthropy Australia recommends that a requirement to distribute 4% of assets should be all that is required. Concerns that this might lead to issues of expenses outweighing distributions can be dealt with elsewhere (for example, item 43 of the Guidelines).



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*19.2. No distribution is required during the *financial year in which the fund is established or during the next 4 financial years.*

We suggest a note is needed to point out that the four year exemption from distribution does not apply to any funds transferred under Clause 50. It is also suggested that to minimise potential misuse of this exemption the phrase “or until the financial year after net assets of \$220,000 is reached, whichever is occurs first”, be added. (This addition is consistent with the sentiment in 53). It is also suggested the Commissioner be given the authority to approve non distribution for a period of up to 2 years where a compelling case is provided (for instance to fund a major capital project).

19.3. Example 2: If a public ancillary fund leases office space to a deductible gift recipient at a discount to the market price, the fund is providing a benefit whose market value is equal to the discount.

Philanthropy Australia suggests replacing the words “deductible gift recipient” with the phrase “eligible recipient” in order to clarify the point that not all deductible gift recipients are eligible (i.e., other ancillary funds are not eligible recipients and any benefit provide to them would not count as a benefit).

Philanthropy Australia also suggests in keeping with the sentiment discussed at the Senate Committee examining social capital markets that a third example is given along the lines of:

Example 3: If a public ancillary fund makes a loan to an eligible recipient at a discount to the market price, the fund is providing a benefit whose market value is equal to the discount.

28. Each financial year the trustee must arrange for an auditor

This seems an onerous and expensive requirement for “pass-through” PuAFs which operate on a “funds in, funds out” basis, often acting as the repository for annual fundraising events, and also for very small PuAFs. Philanthropy Australia recommends that the Guidelines be consistent with the audit requirements for DGR endorsed companies limited by guarantee under the Corporations Amendment (Corporate Reporting Reform) Act 2010. The 2010 changes allowed companies limited by guarantee with annual revenue of less than \$1,000,000 and DGR endorsement to produce a financial report which can be “reviewed” by an auditor instead of requiring a complete audit. For PuAFs we believe \$1m net assets, rather than turnover, would be the more appropriate threshold for a “review”.

*40. The fund must not *carry on a *business.*

This is another phrase which appears to be lifted from the Private Ancillary Funds guidelines but which is not entirely appropriate for Public Ancillary Funds. Public Ancillary Funds are concerned with encouraging the public to become involved in philanthropy and in giving for the community benefit. Related businesses such as a consultancy which offers grant research and advice for external donors are essential to that process as they introduce donors in a stepped process. They also act as important generators of operational funds for community foundations. Philanthropy Australia suggests providing an exemption for “related businesses”.



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42 (also applies to 36). The fund must not *provide any benefit (except as set out in guideline 43), directly or indirectly, to:

- the trustee; or
- a *member, director, employee, *agent or officer of the trustee; or
- a donor to the fund; or
- a founder of the fund; or
- an *associate of any of those entities.

These clauses appear to be directly lifted from the Private Ancillary Funds guidelines and Philanthropy Australia suggests that it will cause unintended consequences for Public Ancillary Funds. For example, this clause may prevent a hospital foundation from giving to its associated hospital, or the Trustee of a community foundation from establishing a disaster relief fund (an item 1 DGR) in response to a local disaster with a view to making grants to that disaster relief fund. There are also charities that have established and donated to sub-funds of community foundations which have been seen as an extra fundraising option – this clause would appear to mean that the community foundation could not distribute to that charity.

To avoid such unintended difficulties Philanthropy Australia suggests that guideline 36 should be modified by adding “*except as a distribution to an eligible recipient*” after “financial assistance” and guideline 42 should be modified to read “(except as set out in guideline 43 *or as a distribution to an eligible recipient*)”.

43. *Fees and expenses.*

Philanthropy Australia suggests adding to following dot point to explicit cover payment of expenses directly by the fund

- to pay reasonable expenses incurred by the fund.

47. *Complying with all relevant Australian laws.*

Philanthropy Australia believes it would be useful to use State Fundraising Licences as a specific example given the requirement to invite the public to contribute to the fund.

50. *Portability.*

The second dot point of item 50 needs to specify that where a sub fund is the entity which will transfer to another ancillary fund, the requirement to distribute should be pro rata so that it is the sub-fund that must have distributed its minimum requirement, rather than the entire public ancillary fund.

The process of portability may need to be developed further with the Commissioner as amendments to the purpose of Trust Deeds (which the Commissioner must approve) may be required to allow facilitate



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the transfer of assets to an Item 2 DGR; however, this does not need to be addressed in the guidelines if the principle is clear.

53. the end of the 2014-15 financial year.

Does this mean the end of the financial year (i.e., by 30 June 2015) or by the end of the following year?

53. From the end of the financial year in which the value of the net assets of the fund at the end of the financial year reaches \$220,000

Presumably what is meant to be here is that the fund must distribute under Rule 19 in the year after it reached \$220,000?

54. If the fund's governing rules prevent compliance with a requirement of Part 2 to these Guidelines, the fund is exempt from that requirement until 1 January 2015.

Philanthropy Australia suggests that this should be 1 July 2015 to bring it in line with other transition rules and apply for a complete financial year.

*56. If a fund does not have a trustee that is a *constitutional corporation, then guideline 14 does not apply to the fund. Instead, at least a majority of individuals who are trustees of the fund must have a degree of responsibility to the Australian community as a whole.*

Philanthropy Australia suggests being explicit that a fund existing prior to 31 December 2011 which has individual trustees can continue with individual trustees and replace them with other individuals without the fund having to convert to a corporate trustee – similar to the wording in question 1.10 in the PAF Frequently Asked Questions on the ATO's website.

Philanthropy Australia again thanks Treasury for the opportunity to make comment on these Guidelines. We are committed to helping ensure a thriving and accountable philanthropic sector for the benefit of all Australians.

Yours sincerely

Dr Deborah Seifert
Chief Executive Officer