

Public Trustee for the Australian Capital Territory
Improving the integrity of public ancillary funds
Response to Discussion Paper November 2010.



The Public Trustee for the ACT administers the Capital Region Community Foundation GreaterGood which provides a facility and incentive for the public to create their own charitable accounts (during lifetime or through their wills) as a perpetual source of funding for charities.

Public Ancillary Fund structure is the preferred model of charitable accounts and facilitates the private sector contributing to charitable causes in the community.

These accounts are in essence perpetual and include combined community accounts, memorial accounts under will, lifetime accounts for persons with high value or repetitive giving routine, scholarship accounts, charity specific accounts, accounts for corporations desirous of visible participation in the community and workplace giving accounts enabling businesses/departments and their employees to combine in charitable pursuits.

The government encourages this activity through the allowance of income tax deductions. In this way, contributors to public ancillary funds have a say in how their tax dollars are spent in the charitable area. They can donate more, mindful of some tax relief in keeping with their tax bracket.

It is also recognized that many capital settlements to charitable ancillary funds, particularly those under will, have received no tax benefit.

The move by government to provide a regulatory climate to encourage Australia to emulate the successful overseas experience of growth in foundations and public funds is welcomed. In doing so consideration should be given to ensuring the avenue of a PuAF remains attractive thereby encouraging the private sector to share with government the burden of charitable funding.

We specifically address your consultation questions as under:

1. What is an appropriate minimum rate for a public ancillary fund and why

It is submitted that the appropriate distribution rate should be the net income produced.

Market rates of income return vary and capital values fluctuate. Income returns of growth assets after dividend imputation recovery are likely to approach 5% and in fact the long term performance of Public Trustee funds average 4.7% income over the long term.

Distribution of net income is simple to apply and audit. Many charitable accounts have been created under will and the terms specifically direct distribution of net income.

Capital based formulas are unnecessary and will add to compliance complexity with no recognizable benefit.

Consideration should also be given to appropriate flexibility for distributions. Many charitable accounts have been created to provide educational scholarships which by nature will vary from year to year depending upon suitable student recipients each year. Additionally, charitable projects can have a longer preparation term than 12 months.

Prior to 1999 in the ACT, the trustee act had a restricted list capital secure approach to trustee investment. This has been substituted with the prudent person investment rule and the trustee now has access to growth assets. An allowance to capitalize income may no longer be a necessity. Likewise a requirement to distribute more than the net income in any year is not recommended.

2. Asset Valuation

Under the prudent person trustee investment rule, most assets are managed funds and listed stocks which are liquid and readily valued.

There may also be direct real property which has valuation costs. Many rental properties would be under management by registered real estate agencies which are quite capable of making market appraisals. The referred 'other appropriate entity' should include specifically a registered real estate agency.

3. Income Tax Return

Most funds would already lodge the required ATO form to recover dividend imputation credits. Lodgement of an annual income tax return as a compliance requirement is readily achievable. However it is noted that the beneficiary statement of distribution schedule of the Trust Tax Return for some PuAFs would be extensive and have its complexities. It is noted that distributions are often decided subsequent to the close of a tax year and therefore distributions in a tax year will only approximate income received in that tax year.

4. Penalty Regime

Agreed. However, given that past breaches are reportedly unintentional oversights, education and rectification notices would be preferable. Directors are generally persons of responsibility and volunteers of good intention.

PuAFs do not share the problem associated with PrAFS of a less than complete divesting of control. PuAFS incorporate a total arms length divesting of control from the settling party ensuring diversion of funds from charitable objects is less likely.

5. Corporate Trustees

Corporate trustees are a preferable model particularly for funds with a well diversified investment portfolio as required by the prudent person investment principle. Additionally it is noted that the extra accountability of statutory Trustee Corporations makes them well placed for the role of trustee for PuAFs.

6. Fit and Proper Person

The ATO test of persons of responsibility in the community appears sufficient. Statutory trustee corporations would fulfill this test and achieve the requirement of public participation through a board of persons of responsibility in the community.

7. Transitional

Depending on the new arrangements to be introduced, ample time to conform would be necessary given that many accounts are testamentary and subject to trusts imposed under will. If extraordinary provisions were introduced, amendment of terms to comply would be problematic.

8. Public Fund

There are no concerns for formalization of these guidelines on the observation that a board of persons of responsibility in the community satisfies guideline 4 of public participation in administration.

9. Investment

The uniform prudent person investment rules under State and Territory trustee legislation should be adequate and an overlay of additional rules is an unnecessary complication adding little value.

The Public Trustee for the ACT would encourage consultation with our industry association, the Trustee Corporations Association of Australia, regarding implication of any proposed changes on the considerable contribution to charitable funding provided through the Trustee Industry and additionally with our core charitable representative body, Philanthropy Australia.