

PuAF Guidelines Response – Draft as at 15/8/11

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.

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

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 instead an amendment to the Private Ancillary Fund guidelines, we would like to flag that there should be provision for Private Ancillary Funds to be amended in future in order to allow them to transfer 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 not to transfer capital into an existing Public Ancillary Fund. We suggest 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 PA 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 feels that the definition of an 'active director' needs clarification, 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*

This seems to be a direct lift from the Private Ancillary Fund guidelines and would seem to be based on a distribution rate of 5% of corpus using a corpus of \$220,000 as the baseline. Philanthropy Australia suggests that a more appropriate figure would be 4% of \$220,000, which would be \$8,800.

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

A note is needed to point out that the four year exemption from distribution does not apply to any funds transferred under Clause 50. We would suggest 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). We also suggest 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 (ie, that other ancillary funds are not eligible recipients).

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

This is another phrase which appears 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”.

*36 & 42. 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, will this clause prevent a hospital foundation from giving to its associated hospital? There are sub-funds of community foundations which have been established as the fundraising arm of charities – would this clause mean that they are unable to distribute to their founding entity? To avoid such confusion this clause should be modified to exclude “distributions to eligible recipients”

47. Complying with all relevant Australian laws.

We believe 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 thought through as amendments to Trust Deeds may be required to allow facilitate the transfer of assets to an Item 2 DGR as part of the purpose; however, this may not need to be addressed in the guidelines.

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

Does this mean the end of the financial year (ie, 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 clarifying 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.