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21 August 2019

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The Treasury
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By Email: dgr@treasury.gov.au

Remake of Sunsetting Private Ancillary Fund Guidelines

Dear Sir/Madam,

Philanthropy Australia welcomes the opportunity to make this submission to the Treasury in response to the draft *Taxation Administration (Private Ancillary Fund) Guidelines 2019*, which remake the *Private Ancillary Fund Guidelines 2009* ('the Guidelines') that expire on 1 October 2019.

We wish to make the following general comments in relation to the regulatory framework for private ancillary funds (PAFs), as well as suggest some minor drafting changes and clarifications which we believe would enhance the effectiveness of the Guidelines.

General Comments

Firstly, PAFs are a critical institutional structure that supports growing philanthropy in Australia. Philanthropy Australia believes that a well-designed regulatory framework is essential to ensuring that PAFs provide an effective and flexible vehicle for individuals, families and businesses to achieve their philanthropic goals and benefit the community.

PAFs are the most highly regulated charitable structure in Australia, and we support an appropriately calibrated and risk-based approach to the regulation of PAFs in order to provide an assurance to the community that PAFs are used for their intended purposes.

Secondly, Philanthropy Australia believes that the current minimum annual distribution is appropriate and strikes the right balance between ensuring that there is a regular and substantial flow of philanthropic funds towards eligible deductible gift recipients (DGRs) whilst enabling the real value of philanthropic assets to be maintained over time, should the trustee of a PAF have that preference. We therefore support the retention of the existing minimum annual distribution and the Commissioner of Taxation's discretion to approve a lower distribution when warranted, as reflected in the draft Guidelines.

Thirdly, whilst not within the scope of this consultation process, Philanthropy Australia wishes to reaffirm the importance of addressing the cumbersome and unworkable approach to protecting the privacy of PAF donors under the Regulation 40-10 of the *Australian*

Charities and Not-for-profits Commission Regulation 2013 (Cth). We note that the final report of the Australian Charities and Not-for-profits Commission Legislation Review recommended that this issue be addressed, and we would encourage the Treasury to progress this as a matter of priority.

Specific Comments

Philanthropy Australia was extensively involved in the development of the 2016 revisions to the Guidelines. We believe that overall, the Guidelines are functioning as intended, and we are not proposing any significant changes as part of this consultation process. This also accords with advice from the Treasury that the Government does not envisage making any substantial revisions as part of the process of remaking the Guidelines.

In terms of minor drafting changes and clarifications which we believe would enhance the effectiveness of the Guidelines, we recommend the following:

References to Deductible Gift Recipients

Given that PAFs can only provide money, property or benefits to a so called 'Item 1' deductible gift recipients, Philanthropy Australia recommends that references to 'deductible gift recipient(s)' in the examples within section 15(4) and in section 21(6)(b) should be changed to 'eligible deductible gift recipient(s)'.

Section 15(4) – Evaluation of Grants

It is recognised that incorporating an evaluation framework into grantmaking represents best practice. Whilst a philanthropic foundation can provide additional funds as part of a grant to enable a grantee to commission such an evaluation, there are also benefits to commissioning an independent evaluation. This may necessitate the philanthropic foundation directly paying a consultant to undertake such an evaluation.

Philanthropy Australia believes that it would be beneficial to insert a new example into section 15(4) of the draft Guidelines, which provides that where a PAF directly funds the evaluation of a program funded by a grant to an eligible DGR, this expenditure can be included within the PAF's minimum annual distribution. Suggested wording for such an example is included below:

Example 7

Where a private ancillary fund provides funding to an organisation for the purposes of undertaking an evaluation of a program funded by a grant to an eligible deductible gift recipient, this is considered the provision of money, property or benefits for the purposes of this section and can be included within the minimum annual distribution.

Section 18(3) – Disclosure of Uncommercial Transactions

Philanthropy Australia recommends that the words '(except for gifts)' be inserted into this section, to make it clear that gifts do not need to be disclosed as uncommercial transactions. This would be consistent with the wording of the similar clause within the *Public Ancillary Fund Guidelines 2011*, so that section 18(3) reads as follows:

*(3) All transactions (except for gifts) between a *private ancillary fund and a founder of the fund, a donor to the fund, the trustee, a director, officer, *agent, *member or*

*employee of the trustee, or an *associate of any of these entities must be disclosed in the financial report.*

Section 28 – Portability

Philanthropy Australia welcomed the changes made in 2016 that allowed for the portability of private ancillary funds. There are some instances, however, where portability between one private ancillary fund and multiple ancillary funds may be desirable, or where not all the assets of a private ancillary fund need to be ported out.

For example, where there is the end of a marriage, there may be a desire to port assets from a private ancillary fund into two sub-funds within separate public ancillary funds and then close the private ancillary fund. Alternatively, and again in a situation where there is the end of a marriage, there may be desire to port part of the assets from a private ancillary fund into a new private ancillary fund, with the original private ancillary fund continuing in operation.

Philanthropy Australia would therefore recommend a change to section 28 of the draft Guidelines to allow for this. Suggested wording is provided below:

*With the agreement of the Commissioner, a *private ancillary fund may transfer assets to one or more other *ancillary funds if:*

- (a) the private ancillary fund has already complied with section 15 for that financial year (about minimum annual distributions); and*
- (b) none of the assets of the private ancillary fund have been received from another ancillary fund during the 2 previous financial years.*

Other Matters

Philanthropy Australia also refers the Treasury to the submission prepared by Alice Macdougall, Special Counsel with Herbert Smith Freehills, which recommends a number of other changes to the draft Guidelines, which Philanthropy Australia supports.

Next Steps

Philanthropy Australia once again thanks the Treasury for the opportunity to provide these comments. If the Treasury wishes to discuss any of the matters raised in this submission further, please do not hesitate to contact Sarah Wickham, Policy & Research Manager (swickham@philanthropy.org.au, 03 9662 9299).

Yours Sincerely



Sarah Davies

Chief Executive Officer