

EXPLANATORY STATEMENT

Taxation Administration Act 1953

Public Ancillary Fund Guidelines 2011

Authority

Section 426-103 in Schedule 1 to the *Taxation Administration Act 1953* gives the Minister the power to set out rules for the public ancillary funds and their trustees in the form of guidelines made by legislative instrument.

Section 426-103 is being inserted into the *Taxation Administration Act 1953* by Schedule 8 to the *Tax Laws Amendment (2011 Measures No. 7) Act 2011* which commences on 1 January 2012. Section 4 of the *Acts Interpretation Act 1901* provides that the Minister may make the guidelines prior to the commencement of section 426-103.

Commencement

The *Public Ancillary Fund Guidelines 2011* (the Guidelines) commence on 1 January 2012. This coincides with the commencement of the new regulatory regime governing public ancillary funds. The commencement is after the day the guidelines are registered on the Federal Register of Legislative Instruments.

Purpose

The purpose of the Guidelines is to set minimum standards for the governance and conduct of a public ancillary fund and its trustee. The Guidelines aim to ensure that public ancillary funds are properly accountable and act in the manner expected of an entity holding philanthropic funds for a broad public benefit.

A public ancillary fund is a form of ancillary trust fund designed to encourage philanthropy by providing the public with flexibility as to the range of deductible gift recipients they support.

Context

The Guidelines implement the final part of the Government's 2010-11 Budget measure to improve the regulatory framework for public ancillary funds. The first part of the measure involved introducing a new legislative framework which, amongst other things, provided the Commissioner with new administrative powers in relation to these funds and gave the Minister the power to make legislative guidelines about the establishment and maintenance of these funds.

Consultation

The Treasury conducted public consultation on the draft Guidelines between 14 July 2011 to 31 August 2011. There were 17 submissions in response to the consultation, which are available on the Treasury website.

Some amendments were made to the draft Guidelines in response to comments by respondents. Additional explanatory notes were also added into the text of the Guidelines to clarify particular issues of concern.

Penalties

The Guidelines are enforced through the imposition of administrative penalties. The Guidelines contain the details of those penalties.

While the *Taxation Administration Act 1953* imposes the penalty, the Guidelines determine the amount of the penalty. The amount of the penalty was left to be determined by the Guidelines so that it could be appropriately tailored to the nature and size of the breach, taking account of the trustee's level of culpability and the particular requirement that the public ancillary fund has not complied with.

The penalties complement other administrative powers of the Commissioner of Taxation that are contained in the *Taxation Administration Act 1953*, such as those to suspend, remove or replace trustees of public ancillary funds that breach the guidelines or other relevant Australian laws.

The Guidelines have been modelled on the *Private Ancillary Fund Guidelines 2009* which have been implemented successfully and have been well received by trustees.

Detailed explanation of guidelines

The guidelines have been drafted using plain English with a view to them being a self-explanatory set of governing rules for public ancillary funds and their trustees.

Guideline 1. The Guidelines are to be referred to as the *Public Ancillary Fund Guidelines 2011*.

Guideline 2. The Guidelines commence on 1 January 2012. This coincides with the commencement of the new regulatory regime governing public ancillary funds.

Guideline 3. The Dictionary to the *Income Tax Assessment Act 1997* contains the definitions of terms used in the Guidelines. The rules for interpreting the *Income Tax Assessment Act 1997* also apply to the Guidelines.

Guideline 4. The Guidelines specify the amount of the administrative penalty imposed under the *Taxation Administrative Act 1953* for breach of these guidelines. The amount of the penalty depends on the particular guideline that has been breached and may be a fixed amount or an amount determined by a formula. The amount of the penalty (if any) is set out under particular guidelines.

Guidelines 5 and 6. The on-going rules that a public ancillary fund must comply with are set out in Part 2 of the Guidelines. The transitional rules that apply to public ancillary funds are set out in Part 3 of the Guidelines.

Guideline 7. Sets out the object of the Guidelines.

Guideline 8. Sets out general principles that public ancillary funds must observe. These principles underpin the remainder of the rules in the Guidelines.

Guideline 9. Mandates that a public ancillary fund must be established as a valid trust. The validity of a particular trust will be determined under the relevant state or territory law (particularly the law of equity as affected by statute).

Guideline 10. A public ancillary fund must be set up and run solely to benefit other deductible gift recipients. However, a public ancillary fund cannot provide money to another ancillary fund. The governing rules of the fund must contain this purpose. References to the ‘governing rules of the fund’ throughout the Guidelines are generally references to the trust instrument of the fund but may also refer to the other documents governing the establishment or operation of the fund.

Guideline 11. A public ancillary fund must be a not-for-profit entity. A not-for-profit entity is one which is not operating for the profit or gain of its members, whether these gains are provided directly or indirectly. Any surplus made by the entity must be directed towards carrying out the entity’s purposes.

The Commissioner of Taxation accepts an entity as being not-for-profit where its constituent or governing documents prevent it from distributing profits or assets for the benefit of particular people – both while it is operating and when it winds up. These documents should contain clauses providing for the entity’s not-for-profit character. The entity’s actions must be consistent with this requirement.

Guideline 12. A private ancillary fund must be operated solely in Australia. However, this does not prohibit the fund from distributing to deductible gift recipients that operate outside Australia.

Guidelines 13 to 16. Trustees have an obligation to exercise appropriate care and skill in managing public ancillary funds. Each fund must have at all times a majority of individuals on the controlling body of the fund who have a degree of responsibility to the community as a whole (responsible persons) who include individuals before whom a statutory declaration may be made. These responsible persons must be either a director of the trustee and/or a member of any other controlling body of the fund.

This rule is intended to ensure that independent and publicly trustworthy and accountable persons are actively involved in the management and protection of these monies which have been donated by the public for the benefit of the broader public and supported by significant philanthropic tax concessions. This requirement does not apply to state and territory Public Trustees. To ensure the protection of these monies, some individuals are ineligible to be involved in the decision making of a public ancillary fund. Some of these limitations are contained in the Guidelines but further restrictions in the *Corporations Act 2001* and state and territory law may also apply.

Guideline 17. If the governing rules of the fund change, the trustee must notify the Commissioner within 21 days.

Guideline 18. Trustees must remain accountable for certain decisions they make. The fund must not indemnify a trustee or certain associated persons in relation to those decisions.

Guideline 19. A public ancillary fund, as a philanthropic intermediary vehicle, must distribute a certain amount of its income and assets to active deductible gift recipients each year. This guideline determines that minimum. A newly established fund is not required to make a distribution in its first four years of operation.

A fund must be careful not to double-count a later year grant when calculating its minimum annual distribution. That is, a committed grant or grants in later years cannot both reduce the calculation of the fund’s net assets and be counted towards the fund’s distribution in those years.

Guidelines 20 to 23. Set out rules for when, and how, to work out the market value of the funds’ assets.

Guidelines 24 to 29. Set out record keeping requirements of trustees and a trustee's obligations to prepare financial statements and have an audit undertaken into the fund's affairs.

Guidelines 30 to 32. Trustees must prepare an investment strategy in relation to the fund's assets. The strategy aims to ensure the long term protection of the fund's philanthropic assets. Imposing an obligation to put in place an investment strategy avoids the need to impose inflexible and prescriptive investment limitations upon the fund.

Guidelines 33 to 40. In order to maintain the integrity of the tax system and to protect the philanthropic funds under management by trustees, some investment limitations are imposed on funds.

Guidelines 41 and 42. Trustees are generally prohibited from entering into uncommercial transactions or from providing benefits to related parties. An uncommercial transaction would include a transaction that is not entered into at arm's length or that a reasonable person in the position of the trustee would not have entered into having regard to all relevant circumstances.

Guideline 43. Allows the trustee to be reimbursed or remunerated out of the fund's assets for expenses incurred in managing the fund and for their services in administering the fund. However, those expenses and remuneration must be reasonable having regard to all the circumstances. A number of remuneration benchmarks are published by state and territory public trustees and representative bodies of professional trustees.

Guidelines 44 to 46. Public ancillary funds are public in nature and must be operated on that basis. A fund will be public in nature where the public is invited to contribute to the fund and the fund is operated in a public manner.

Guidelines 47 and 48. Public ancillary funds must comply with all relevant Australian laws. As philanthropic vehicles entrusted with the management of monies for the broad public benefit, they must operate in a manner consistent with public expectations and responsibilities.

Guideline 49. Public ancillary funds must ensure that all their monies on winding up or on ceasing to be public ancillary funds are distributed to deductible gift recipients.

Guideline 50. Subject to the agreement of the Commissioner, a public ancillary fund may transfer all its assets or the assets of a sub-fund to another ancillary fund. The fund must have already met the minimum distribution requirement and not have transferred its net assets to another ancillary fund during the previous 2 financial years. This allows donor the flexibility to choose which type of ancillary fund suits their circumstances and finances.

Guidelines 51 to 57. Transitional rules apply which are intended to help a public ancillary fund to transition into the new regime. Generally, the rules allow time for public ancillary funds to bring their existing affairs into compliance with the new arrangements.