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Dear Director

Response to Consultation Paper on distribution guidelines for ancillary funds

Ashurst welcomes the opportunity to make a submission to The Treasury regarding the proposed changes to ancillary fund distribution guidelines.

Ashurst commonly advises not-for-profit entities and engages in a significant amount of pro bono work in the not-for-profit sector. We are pleased to provide our comments below in response to selected questions included in the *Distribution Guidelines for Ancillary Funds* consultation paper dated March 2022.

1. CONSEQUENCES OF ANCILLARY FUNDS ACCUMULATING BUT NOT DISTRIBUTING

Question 6 asks: what should the consequences be if an ancillary fund does not proceed to support the project for which it accumulated funds? For example:

- Should an administrative penalty be applied to the fund's trustees? (**question 6.1**)
- Should the fund be required to immediately distribute to type 1 DGRs an amount equivalent in value to the distributions it would have had to make if the lower distribution rate had not been agreed? (**question 6.2**)

We respond to question 6.2 in the affirmative. The ancillary fund should be required to immediately distribute to type 1 DGRs an amount equal to the minimum annual distribution rate during the years it benefitted from the lower distribution rate. This should be calculated on net assets from the end of the year prior to the year in which the fund failed to support the project for which it accumulated assets.

This method of calculating the minimum annual distribution rate would nullify any financial advantage gained from accumulation for a project which ends up not being funded. It also ensures that donated funds are distributed to type 1 DGRs, as intended by the donor, even if the specific project or recipient may be different from those originally intended.

Accordingly, we consider that the administrative penalty suggested in question 6.1 is unnecessary. Payment of an administrative penalty would require funds to be used other than for the purpose of supporting type 1 DGRs.

2. TRANSFERS BETWEEN ANCILLARY FUNDS

2.1 Minimum distribution amount

We submit that transfers between ancillary funds should only satisfy the transferor fund's minimum annual distribution rate if, on a look through basis in relation to the same year, the transferee fund distributes an amount equal to the transfer to a type 1 DGR. This would ensure that transfers between ancillary funds would not reduce the total amount of funds distributed to type 1 DGRs.

We also agree with the stipulation that the transferee's distribution to a type 1 DGR using funds from the transferor ancillary fund does not count towards the transferee's minimum annual distribution. To do so would double count a transfer between ancillary funds thereby reducing distributions reaching type 1 DGRs.

2.2 Transfers from PAFs to PuAFs

Question 7 asks: is there a concern if a PAF transfers assets to a PuAF given the latter has a lower minimum distribution rate?

We submit that the minimum annual distribution rate should be equalised between PAFs and PuAFs. Applying a uniform minimum annual distribution rate to both types of ancillary funds alleviates a concern about PAFs accessing a lower minimum annual distribution rate.

Even if the minimum annual distribution rate is not equalised, we submit that transfers from a PAF to a PuAF should not be of concern given the funds will no longer be controlled by the PAF so it is unlikely that such transfers will be made with a view to minimising distributions.

2.3 Transfers from PuAFs to PAFs

Questions 9 and 9.1 ask:

- Should any ancillary fund be able to transfer assets to any other ancillary fund, or should transfers be limited, for example a PAF may transfer to a PuAF but not the other way around?
- Should the existing prohibition on moving assets contributed, either directly or indirectly, by the public from a PuAF to a PAF apply to these transfers?

We submit that transfers from PuAFs to PAFs not be allowed. Money donated to PuAFs by the public should not come under the control of a private entity that manages a PAF. Those assets should be transferred to type 1 DGRs as the public donors would have expected when donating.

Please contact Geoffrey Mann (03 9679 336) or Bronwyn Kirkwood (03 9679 3798) if you have any questions or wish to discuss our submission.

Yours faithfully

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