



Comments on Treasury Consultation: Distribution Guidelines for ancillary funds

Accumulation

- 1 *Should both PAFs and PuAFs be able to accumulate funds?*

Ancillary Funds can already accumulate funds subject to making the minimum distribution - but we understand this question is whether we support that the Commissioner should have discretion to allow a decrease in the required minimum distribution for the purpose of accumulating funds for a specific proposed grant or grants. We agree that both PAFs and PuAFs should be able to do this for specific projects.
- 2 *As public ancillary funds are not required to make a distribution in the year of establishment or the following four years, do they have the ability under the existing rules to accumulate capital for large projects?*

Yes, but this ability is very limited in the given timeframe and not sufficiently flexible. The four year period was intended to provide time for sufficient funds to be raised to start a normal granting process rather than for use for raising funds for one capital project – though this of course is possible. It seems unnecessary red tape to suggest that setting up a new public ancillary fund is the only solution to raising funds for a capital project. Allowing accumulation at any time with the Commissioner’s consent is a better option.
- 3 *Should a limit be imposed on the amount a fund may accumulate, either as an absolute asset value or a percentage of the value of the fund’s assets? If so, what would be appropriate values?*

Any limit here will inevitably block some proposals – if the Commissioner has discretion there is no need to provide limits.
- 4 *Are the matters for the Commissioner’s consideration appropriate? Should the Commissioner consider other criteria?*

The Commissioner should also consider the fundraising/accumulation plan and should consider the amount if any the trust intends to still distribute while accumulating.

As I understand the proposal, the funds raised through the decreased distribution must all be granted at the end of the period allowed that is an amount at least equivalent in value to the distributions it would have had to make if the lower distribution rate had not been agreed – is it intended that the Commissioner could agree to accumulation to increase the size of the corpus so that the income was sufficient to support the annual costs of a program, such as a research chair or similar university position or enable instalments for a building or a research project?
- 5 *Is a five-year period for accumulation sufficient, too short, or too long?*

There should be discretion as to the length – it may be a trust would want to accumulate for 10 years but in that time would still be making some distributions but less than the standard minimum distribution. This should be part of the Commissioner’s discretion.



- 6 *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?*

An administrative penalty should only be applied if the Commissioner has been misled – the trustee must retain its discretion as to how best to apply the funds to fulfil the trust's purposes. There are many reasons why the project might not be supported and the trustee should not feel it has to support it in order to avoid a penalty.

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?

If at any stage the trustee realises it will not fulfil the stated project it obtained the consent to accumulate, the trustee must notify the Commissioner and should be able to apply for consent to continue to accumulate for a different project or it should distribute to item 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.

If at the end of the accumulation period the trustee does not or cannot distribute for the agreed project then again there should be the option of distributing to a different project or it should distribute to item 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.

If money has been raised from the public for a particular stated purpose then the trustee will have to make it clear that it retains discretion to not apply the funds for the stated project but can distribute it to other item 1 DGRs. This is to avoid the possible situation where donors can request the money back if the accumulated funds cannot be applied for the stated project (ie the basis the funds have been given).

Transferring between ancillary funds

- 7 *Is there a concern if a PAF transfers assets to a PuAF given the latter has a lower minimum distribution rate?*

We don't have a concern about this.

- 8 *To address the risk of churning of funds between ancillary funds with different accounting periods, should the existing prohibition on transferring assets if any have been received from another ancillary fund with the two previous years apply to such transfers?*

This seems reasonable – but there may be issues with large public ancillary funds with a number of sub-funds and this may need to be considered at a sub-fund level.

- 9 *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?*

Agree that there does not seem to be a reason that a PuAF would want to transfer to a PAF except as currently enabled by the portability provisions which can be retained with the prohibition of including donations from the public.

- 10 *Should a fund require the Commissioner's consent before transferring assets?*



If it is PAF to PuAF done under the requirements then this should not be necessary.

Transfers counting towards the minimum distribution

- 11 *Who should be required to ensure the receiving fund distributes an amount equivalent to the value of the transferred assets: the giving fund or the receiving fund?*

The giving fund.

- 12 *Would the benefits to receiving funds of receiving additional resources be outweighed by the costs of administering the transferred assets?*

The receiving fund does not need to accept the grant if it is detrimental.

- 13 *What consequences should apply if the receiving fund does not distribute to type 1 DGRs an amount equivalent to the value of the transferred assets? For example, should an administrative penalty be imposed on the trustee of the fund?*

There needs to be some flexibility in this and the ability to ask for approval to accumulate as proposed above or extend the period of time to distribute. There may be good reasons why it could not be distributed for the requested purpose within 12 months. But an administrative penalty if there are no extenuating circumstances seems appropriate.

The provisions should allow for a PAF to grant to a PuAF for the specific project for which the PuAF has consent to accumulate.

- 14 *Should a fund require the Commissioner's consent before transferring assets? Should the receiving fund require consent?*

Consent does not seem to be necessary.

15. Are there other improvements that could be made to the operation of the ancillary fund guidelines?

Comments from our submission on the 2021 update of PuAF Guidelines:

Distribution

- 15 The proposed new definition of distribution appears too wide as the provision of money or property can be made on commercial terms e.g. to purchase goods or services from item 1 DGRs. Some foundations enter grant agreements on numerous conditions with item 1 DGRs and receive intellectual property or other benefits in connection with the grant.

We suggest the definition of distribution requires it to be consistent with the philanthropic nature of the fund (guidelines 8(b) and (c)) and does provide a benefit to the item 1 DGR, more than the customary margin they may charge for delivery of the goods and services to a for profit or government entity. It is the value of the benefit only that is included in the calculation of the minimum distribution. (We note this may assist with addressing the issues arising with determining when GST is payable in connection with grants by foundations.)

Perhaps one of the examples could cover this type of arrangement for clarity.

Benefits

- 16 Guideline 22(3) should be redrafted to be consistent with clause 5.2 of the model deed. A number of charities have public ancillary funds as fundraising



foundations and may have directors in common or one or more employees of the charity on the board and many employees as donors. Clause 5.2 allows the ancillary fund to make a grant to an eligible charity even if one of the directors or donors to the fund is also an employee of the recipient of the grant. The conflict of interest would need to be managed, but the director or donor who is also an employee could be said to receive an indirect benefit. This would be contrary to guideline 22(3) which is very strict and doesn't allow for some situations which are permissible under the model deed. See also clause 15.3 of the model deed which specifically permits an indirect benefit where the conflict of interest has been properly managed and the power exercised for a proper purpose.

Donors

- 17 Guideline 24(2) needs amendment as many gifts are made to public ancillary funds in cash in a bucket or similar and compliance with this guideline would be impossible.

State and Territory laws

- 18 Reinstate guideline 48 as a useful warning or reminder of the current difficulties caused by the differences in the State and Territory laws and the Commonwealth Charities Act in relation to making grants to non-charitable item 1 DGRs.

Portability

- 19 Guideline 27(b) and (c) should be amended to add 'or the sub-fund where Guideline 27(1)(a)(ii) applies'.

As always, I am happy to discuss any aspect of the proposal. I recommend that consideration could also be given to whether the discretion for matters under the Ancillary Fund Guidelines should sit with the ATO or the ACNC.

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