



16 May 2022

Director, Not-for-Profit Unit
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: charitiesconsultation@treasury.gov.au

Dear Sir/Madam,

Submission to the Consultation Paper on Distribution Guidelines for Ancillary Funds (March 2022)

Thank you for the opportunity to comment on the Consultation Paper, *Distribution guidelines for ancillary funds: Consultation on possible policy changes* (March 2022). I attach a submission on the Discussion Paper prepared by Ms Monica Hope and me. I hope this is of some assistance.

Please contact us for any queries or to discuss this submission further.

Miranda Stewart
Professor

Submission to the Consultation Paper on Distribution Guidelines for Ancillary Funds (March 2022)

Monica Hope and Miranda Stewart

Recommendations

Recommendation 1: The Guidelines are amended to allow the Commissioner to approve a lower minimum distribution rate for the accumulation of funds. However, the Commissioner should be required to consider a more comprehensive analysis of the specific project in making such a determination.

Recommendation 2: The Guidelines are amended to provide that an amount set aside for a particular project at the usual minimum distribution rate (not a reduced rate) may be treated as a qualifying distribution, for a period of up to 5 years, on application to the Commissioner. This would allow the accumulation of funds to support large projects where a lower minimum distribution rate is not requested by an ancillary fund.

Recommendation 3: The Annual Information Statement for all ancillary funds be published on a public register available for public inspection. To achieve this, amendment to the privacy information-withholding rules (which allow PAFs to withhold fund information), would also be required.

Submission

Introduction

The Taxation Administration (Private Ancillary Fund) Guidelines 2019 and the Taxation Administration (Public Ancillary Fund) Guidelines 2022 are made under the *Taxation Administration Act 1953* (Cth). References to ‘the Guidelines’ in this submission relate to those governing both Public Ancillary Funds (PuAFs) and Private Ancillary Funds (PAFs) (collectively, ancillary funds).

Part 1 of this submission addresses the accumulation of funds for large projects. We recommend Treasury consider implementing an application form for ancillary funds who wish to apply to the Commissioner for a reduced minimum distribution rate. This application would contain additional matters that the Commissioner should consider, in addition to those currently in the Guidelines, in deciding to allow an ancillary fund to accumulate funds.

Part 2 of this submission addresses the lack of reporting requirements and publicly available information for PAFs. The lack of information regarding PAF activity arises because of two matters: a PAF not registering with the Australian Charities and Not-for-profits Commission (ACNC), or a PAF that is registered requests that the ACNC withhold information regarding the fund from the register.

This submission makes comparisons and suggestions for Australian reform based on the approach of the Internal Revenue Service (IRS) in the United States and their regulation of private foundations.

1. Accumulating funds to support large projects

Discussion Questions

1. *Should both PAFs and PuAFs be able to accumulate funds?*
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?*
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?*
 - 3.1. *If so, what would be appropriate values?*
4. *Are the matters for the Commissioner's consideration appropriate? Should the Commissioner consider other criteria?*
5. *Is a five-year period for accumulation sufficient, too short, or too long?*
6. *What should the consequences be if an ancillary fund does not proceed to support the project for which it accumulated funds? For example,*
 - 6.1. *Should an administrative penalty be applied to the fund's trustees?*
 - 6.2. *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?*

1.1 Should both PAFs and PuAFs be able to accumulate funds?

We support the proposal that both PAFs and PuAFs should be able to accumulate funds to support a particular project. To achieve this, the amendment of the distribution rules to allow PAFs and PuAFs to accumulate funds (beyond an initial accumulation phase) is an appropriate policy change which would allow specific and targeted charitable giving to support large projects.

The proposed change would allow the Commissioner to grant an ancillary fund a lower annual minimum distribution than the prescribed 4% (PuAF) or 5% (PAF). This may be for a period of up to 5 years. If the Commissioner approves a zero distribution, the minimum distribution amount of \$8,800/\$11,000 would also not apply. This would support the gifting of larger amounts for specific projects. The support for large projects that need capital is

important and there is merit in allowing both PAFs and PuAFs to accumulate funds to put towards major projects.

However, granting permission for accumulation requires careful regulation to ensure that funds are delivered to eligible goals. The goal of permitting support for large projects must be balanced with the policy rationale behind the required annual minimum distributions which are designed to ensure ancillary funds meet their philanthropic goals.

Permission to accumulate will also address the foreseeable situation that a PAF or PuAF may face the situation where the annual minimum distribution percentage is higher than or close to the rate of return for the fund. There is merit in lowering the distribution rate in some circumstances to impose a lower compliance burden on ancillary funds to redress this issue and allow the accumulation of funds. Thus, allowing accumulation of capital may assist a foundation in reaching its goal of perpetuity as a corollary to supporting large projects.

1.2 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?

Under the existing rules, PuAFs can accumulate capital to support a project in the first five years. However, the current rules do not permit the accumulation of funds into later periods, should the PuAF again seek to support a large project some time after its establishment. The amendment to the Guidelines to allow a PuAF to access a lower distribution rate at a later time would facilitate the accumulation of capital for large projects or the ability for a fund to have different periods of accumulation of capital over the life of the fund.

1.3 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?

Given the diversity of projects and goals of PuAFs and PAFs, it is difficult to set an absolute limit on accumulation in terms of asset value. It may be more feasible to set a limit in terms of the number of years in which accumulation is permissible (the five-year period is suitable, in our view). It may be possible to set a default limit as a percentage of the value of the fund's assets. This could operate as a default rule; for example, there may be permission to accumulate up to 10% of the value of the fund (at the accumulation start time), with the possibility of justification of a greater accumulation amount where a specific target for funding is clearly identified and substantiated.

We recommend that further consideration be given to the possibility of a default percentage of assets limit on accumulation in a PuAF or PAF. An alternative approach could

be a recommendation, and analysis based on justification for the specific project as further explained below.

1.4 Are the matters for the Commissioner's consideration appropriate?

Should the Commissioner consider other criteria?

The Commissioner's requirement to consider the criteria for granting a lower distribution rate, as articulated in the Guidelines, is insufficient.

We recommend that the Commissioner should also be required to consider the reasons why the accumulation of funds better assists the project and why annual (immediate) payments from the PAF or PuAF would not achieve the desired objective. This will require the Commissioner to consider information from the PAF or PuAF which includes a description of the project and its cost. This would also support a justification for a longer or larger accumulation than a default rule (see response to 1.3 above).

Currently, the PuAF and PAF Guidelines state that in determining whether (and by how much) the Commissioner should reduce the distribution rate, the Commissioner must have regard to:¹

15 Minimum annual distribution

(10) In determining whether, and by how much to reduce the rate, the Commissioner must have regard to:

- (a) the purpose and object of the fund; and*
- (b) the general market conditions in Australia; and*
- (c) the past, current and expected levels of returns from the fund's investments; and*
- (d) the long-term impact on the assets of the fund from not reducing the rate for a financial year; and*
- (e) the level of distributions made by the fund in previous financial years; and*
- (f) the investment strategy and distribution strategy of the fund; and*
- (g) the size of the fund; and*
- (h) the compliance history of the fund and the trustee; and*
- (i) the fees and expenses of the fund; and*
- (j) the terms and other circumstances relating to any gift to the fund under a will; and*
- (k) any other matter the Commissioner considers relevant.*

¹ *Taxation Administration (Public Ancillary Fund) Guidelines 2022 and Taxation Administration (Private Ancillary Fund) Guidelines 2019* Division 3, 15(10) ('Guidelines').

Specifically, the Commissioner must consider the 'likelihood of it going ahead; the fund's investment strategy; the size, fees and expenses of the fund; the fund's compliance history; and, if applicable, whether the fund failed to fund projects for which it previously received approval for a lower minimum or zero distribution rate'.² While these considerations are important, we suggest that a more comprehensive analysis of the specific project for which the amounts are set aside is required.

The above-quoted considerations look to the internal operations of the PuAF or PAF. That is, the Commissioner is to consider the fund's general compliance, past distributions and investment position and strategy. These considerations do not require the Commissioner to assess matters relating to the actual suitability of the accumulated amount and whether accumulation of funds is the best way to assist a given project. While the Commissioner is required to consider the 'likelihood of it going ahead', it is submitted that a more rigorous examination is required to ensure that the lowering of the distribution rate is appropriate.

Currently the application form to reduce the minimum ancillary fund distribution rate requires the applicant to state reasons for seeking to reduce the fund's distribution below the usual minimum distribution for the relevant year.³ These reasons are the same as those listed above, which we suggest are insufficient.

As a matter of comparison, we note that private foundations in the United States are similar in structure and operation to PAFs in Australia. That is, they are generally supported by a small source, being family, an individual, or a corporation that privately funds them.⁴ Similarly, private foundations in the United States must pay out 5% of their assets a year in grants which support charitable activities. Private foundations can accumulate funds over a period of time and are permitted to set-aside amounts (which may be treated as qualifying distributions) for a specific project if certain conditions are satisfied.⁵

This set-aside for specific charitable projects is only allowed where a private foundation meets the suitability test (or the cash distribution test, which is not further discussed in this submission). Where the suitability test is met, a private foundation may set-aside funds for major projects, over a 60-month (5 year) period. Importantly, it is required at the time of the set-aside application that the private foundation establishes that (amongst other things) the 'project is one which can be better accomplished by such set-aside than by immediate payments of funds'.⁶

² Australian Treasury, *Distribution Guidelines for Ancillary Funds* (Consultation paper, March 2022) 4.

³ Australian Taxation Office, *Application to Reduce the Minimum Ancillary Fund Distribution Rate* (NAT 74894) <<https://www.ato.gov.au/Forms/Application-to-reduce-the-minimum-ancillary-fund-distribution-rate-form/>>.

⁴ 'Foundation Basics', *Council on Foundations* (Web Page) <https://www.cof.org/content/foundation-basics#what_is_private_foundation>.

⁵ United States Internal Revenue Code 26, §4942(g)(2)('IRC').

⁶ Ibid §4942(g)(2)(B)(i).

To qualify under the suitability test, a set-aside must be approved by the IRS by requesting approval in a private letter ruling. In making such a request the foundation must include:⁷

1. *A statement describing the nature and purposes of the specific project and the amount of the set-aside for which approval is requested,*
2. *A statement describing the amounts and approximate dates of any planned additions to the set-aside after its initial establishment,*
3. *A statement of the reasons why the project can be better accomplished by the set-aside than by immediate payment,*
4. *A detailed description of the project, including estimated costs, sources of any future funds expected to be used for completion of the project, and the location or locations (general or specific) of any physical facilities to be acquired or constructed as part of the project, and*
5. *A statement by an appropriate foundation manager that the amounts set aside will actually be paid for the specific project within a specified period of time ending not more than 60 months after the date of the first set-aside; or a statement showing good cause why the period for paying the amount set aside should be extended (including showing that the proposed project could not be divided into two or more projects covering periods of no more than 60 months each), and giving the extension of time requested.*

Importantly, in the United States, the IRS has focused on the requirement that the foundation must demonstrate that the specific project for which the amount is set aside is one that can be *better* accomplished by the set-aside than by the immediate payment of funds.⁸

Recommendation

We recommend that the Treasury consider the application of a similar ‘suitability’ test in permitting PuAFs or PAFs to accumulate funds in Australia. The information required to be furnished to the IRS in satisfaction of the suitability test, if provided in a similar manner to the US requirements, would assist the Commissioner in making an assessment as to whether lowering the distribution rate would be appropriate in the specific circumstances. This would also enable a focus on the specific charitable project that the ancillary fund wished to support.

The provision of a request by an ancillary fund which details the nature and purposes of their request for a lower distribution amount, will increase accountability and transparency

⁷ ‘IRS Advance Approval of Set-Aside’ *Internal Revenue Service* (Web Page) <<https://www.irs.gov/charities-non-profits/private-foundations/irs-advance-approval-of-set-aside>>.

⁸ ‘Suitability Test: Private Foundation Set-Aside’ *Internal Revenue Service* (Web Page) <<https://www.irs.gov/charities-non-profits/private-foundations/suitability-test-private-foundation-set-aside>>.

for the philanthropic sector. The importance of accountability and transparency for ancillary funds, particularly PAFs, is further discussed below.

We further recommend Treasury consider implementing an application form for ancillary funds that wish to apply to the Commissioner for a reduced minimum distribution rate. These further matters would be considered by the Commissioner in addition to those in the Guidelines. We recommend that an application to the Commissioner should require the ancillary fund to provide details of:

1. The nature and purpose of the project including estimated costs that the grant will support (current and future).
2. Reasons why the specific project can be better accomplished by a grant of accumulated funds instead of by immediate payment. This may include detailing any specific buildings, facilities, or infrastructure to be acquired pursuant to the grant.
3. Any future grants that are proposed to be paid by the ancillary fund (subsequent to the accumulated amount) in continued support of the project.

We offer the above recommendation as a suggested model for an Australian ‘suitability’ test but note that we also recommend the Treasury carry out further consideration of the application of a suitability test to applications made by Australian ancillary funds to access a lower distribution rate, perhaps considering other comparable jurisdictions.

More generally, the approach taken in the United States whereby amounts set aside for a large project may be treated as a qualifying distribution in the year set aside, is a policy change that may be beneficial to Australia. That is, the Commissioner may consider whether the set aside of normal minimum distribution rate (not a lower amount) for an ancillary fund would count as a distribution under the Guidelines on application by a fund to accumulate amounts for a period of up to five years. This would permit the accumulation of funds to support large projects where a lower minimum distribution rate is not requested by the fund. The application to the Commissioner in relation to this would require satisfaction of the matters listed above.

1.5 Is a five-year period for accumulation sufficient, too short, or too long?

A five-year period is adequate for the opportunity to accumulate funds acknowledging that accumulation for a large project might take many years. It is submitted that a five-year period is appropriate and balanced. A shorter accumulation period may not provide sufficient time for the accumulation of funds to support a project.

A period longer than five years has the capacity to counter policy objectives that funds should not accumulate their capital in perpetuity. Further, a longer accumulation period has the capacity to disturb the balance between accumulating funds to support large projects and the need to ensure continuity of gift-giving to sustain ongoing charitable projects. The uptake of a reduced minimum distribution rate by multiple funds has the capacity to reduce

ongoing contributions if funds favour the long-term accumulating capital to support large projects.

A five-year period is also in line with the set-aside period adopted in the United States where it must be satisfied that the amount will be paid for the specific project within five years. The amount set aside contributes towards the foundation's minimum distribution.

1.6 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?

There should be recourse to corrective action in circumstances where non-payment, or delayed payment, was not due to reasonable cause. However, a fund should be given the opportunity to establish that there was reasonable cause for not distributing any accumulated amounts and this would require assessment by the Commissioner.

Administrative penalties (as prescribed by the Guidelines) should apply where an ancillary fund does not proceed to support the project for which it accumulated funds.⁹ Currently, under the Guidelines, 30 penalty units is applicable if the shortfall is greater than \$1,000. Further, administrative penalties should apply to the trustee at a rate of 30 penalties (which is consistent with the other provisions therein).¹⁰

It is recommended that the Treasury undertake further research to assess whether an excise tax on failure to distribute (generally, or specifically in relation to accumulated amounts) would be an appropriate mechanism in Australia. In the United States, a foundation that fails to pay out the distributable amount in a timely manner is subject to a 30 percent excise tax on the undistributed income.¹¹

1.7 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?

The ancillary fund should be required to immediately distribute either the accumulated amount, or an amount equivalent in value to the distributions it would have had to make if the lower distribution rate had not been agreed, unless there is reasonable cause not to do so.

⁹ *Guidelines* (n 1) Division 3, 15(1).

¹⁰ *Guidelines* (n 1) Division 3, 21.

¹¹ *IRC* (n 5) §4942.

2. Other suggestions for improvement

Discussion Questions

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

2.1 PAF reporting and lack of accountability and transparency

We submit that there are two issues that arise in relation to the regulation of PAFs:

1. Not all PAFs are required to register as charities with the ACNC; and
2. PAFs that are registered with the ACNC may apply to have information withheld from the register.

These two issues create a gap in the available information regarding the activities of a group of PAFs - resulting in reduced accountability and transparency. Notably, it has been stated that 'beyond minimal regulatory compliance, PAFs are largely free to decide to whom and for which activities they will be accountable, select the means by which they will be accountable, and reflect these decisions through the lens of why they wish to be accountable'.¹²

In this regard, we observe that PAFs 'are unusual in an international philanthropic context, given the exemption from public reporting (e.g. disclosure of finances, investments, grantmaking, and trustees) available to them'.¹³ They perform the same or similar functions to those of charities, but the absence of their capacity to fundraise from the public at large has afforded them less regulation than a 'charity'.¹⁴

The flexible nature of the Guidelines allows PAFs to become registered charities, triggering the more transparent reporting schemes under the Charities Act, governed by the ACNC. Where an ancillary fund is registered with the ACNC, there is publicly available information about the entity. This valuable information includes a financial overview from their most recent Annual Information Statement, who the charity helps, and a general statement of their activities. The provision of this information is consistent with the objects of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) which are to 'maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector'.¹⁵

¹² Alexandra Williamson, Belinda Luke and Craig Furneaux, 'Why Be Accountable? Exploring Voluntary Accountability of Australian Private Ancillary Funds' (2017) 77(3) *Australian Journal of Public Administration* 375.

¹³ Ibid 376. See too Elizabeth Cham, 'The Rise and Fall of Australia's First Independent Regulator for the Not-for-Profit Sector: A Missed Opportunity for Philanthropy.' (2014) 5(3) *Voluntary Sector Review* 407.

¹⁴ 'Public and Private Ancillary Funds and the ACNC', *Australian Charities and Not-for-profits Commission* (Web Page) < <https://www.acnc.gov.au/tools/guides/private-and-public-ancillary-funds-and-acnc>>.

¹⁵ 'Regulatory Approach Statement Object 3', *Australian Charities and Not-for-profits Commission* (Web Page) < <https://www.acnc.gov.au/raise-concern/regulating-charities/acnc-regulatory-approach-statement>>.

Conversely, in some circumstances a PAF may remain unregistered, in which case its accountability is more restrictively limited to the Commissioner. Ancillary funds that are not registered as charities with the ACNC must lodge a paper ancillary fund return with the ATO. Comparable information is not published in relation to their ancillary fund return and this leads to a data deficit of publicly available information about their activities.

The publishing of information for unregistered PAFs would facilitate public trust and confidence in the Australian not-for-profit sector and increase accountability. We submit that accountability of all PAFs is necessary for three main reasons: the corresponding tax incentives afforded to funds; the effect and impact that philanthropy has on others (the community); and finally, the power-asymmetries that arise as a result of financial donations.¹⁶ There should be more transparency of PAF activity to the public in relation to their charitable giving.

This will be increasingly important where a PAF is permitted to accumulate funds over the course of five years. In our submission, it is crucial for there to be scrutiny and proper consideration as to where those funds are to be applied. In that sense, there needs to be a balance between the acknowledgement of the voluntary giving nature of PAFs (and that they can give to wherever they wish), and the policy underpinning PAFs which is to ensure that ‘philanthropic sector in society is justified at least in part because of its redistributive or... “eleemosynary” aims’.¹⁷

We note that a 2017 Report by the ACNC into public trust and confidence in Australian Charities has found that ‘the need for transparency around how charities use resources, including monetary donations, is paramount’.¹⁸ There has been a steady decline in trust and confidence in Australian charities and a decline in the number of people who are likely to consider most charities trustworthy.¹⁹

Again, comparing with the United States, researchers have addressed perspectives of accountability and found that Australian foundations are less concerned with issues of accountability than are US foundations.²⁰ In the early years of widespread use of private foundations in the United States, there was a lack of information regarding fund activity. This led to large scale reforms of the United States’ not-for-profit sector under the Tax Reform Act of 1969. Today, foundations are required to report their grant-making activities

¹⁶ Peter Frumkin, ‘Accountability and Legitimacy in American Foundation Philanthropy’ in Kenneth Prewitt et al (eds), *Legitimacy of Philanthropic Foundations: United States and European Perspectives*, (Russell Sage Foundation, 2006) 99, 101.

¹⁷ Rob Reich, *Just Giving: Why Philanthropy Is Failing Democracy and How It Can Do Better* (Princeton University Press, 2018) 68. Relevantly, see all of Chapter 2 ‘Philanthropy and Its Uneasy Relation to Equality’.

¹⁸ Australian Charities and Not-for-profits Commission, *Public Trust and Confidence in Australian Charities* (Market Research Report, 20 November 2017) 3.

¹⁹ *Ibid* 2,3.

²⁰ Alexandra Williamson et al ‘Founders, Families, and Futures: Perspectives on the Accountability of Australian Private Ancillary Funds’ (2017) 46(4) *Nonprofit and Voluntary Sector Quarterly* 747, 748.

and their assets to the IRS. This data can then be used to provide valuable analysis of the state of foundation funding.

Funder perspectives on philanthropy in Australia agree that 'greater transparency and sharing of information are important'.²¹ It is necessary to ensure that funds, which have been subject to concessional tax treatment, are directed to the achievement of philanthropic ends'.²²

The Foundation Center, in partnership with the US Studies Centre at the University of Sydney, and Philanthropy Australia, wrote a report in 2016 titled 'U.S. Foundation Funding for Australia' (Foundation Center Report).²³ Regarding ways that better dissemination of information might be achieved, the Foundation Center Report states that:

*Ideally, in the future, this information will be complemented by detailed information on philanthropic activities by Australian foundations, leading to a more complete picture of philanthropic funding flows. Through an annual publication or an interactive database, similar to those that exist in the US, Mexico, and China, funders would be able to understand the landscape of both funders and grant recipients. This information could help grantmakers identify funding gaps, catalyze collaborations, and inform strategic decision making, all in the service of a more effective sector.*²⁴

In line with this suggestion, we recommend amendments to the Guidelines to mandate disclosure with submitting and publishing Annual Information Statements for PAFs (that are not registered as charities) and the removal (to some extent at least) of the privacy information-withholding provisions.

The filing of an annual information form by foundations, as required in the United States, was a significant first step towards increased accountability. The US Form 990-PF details the return of a private foundation (as completed by the foundation) and provides the public with financial information regarding that fund. It should also be noted that there are varied reporting requirements between the States of the US, with some requiring the IRS forms to be completed and others requiring independent audits and reporting of certain transactions.²⁵

It is the public nature of this reporting that is distinguishable with the reporting obligations imposed on PAFs, in respect of their grant making activities and assets, to the ACNC or ATO,

²¹ Foundation Center, *U.S. Foundation Funding for Australia*, (Report, 2016) 2,3

<<https://www.philanthropy.org.au/about-us/us-foundation-funding-for-australia/>> ('*Foundation Center Report*').

²² Department of the Prime Minister and Cabinet, 'Community-Business Partnership Develops New Tax Initiatives to Promote Philanthropy' (Media Release, 12131, 1 July 2002)

<<https://pmtranscripts.pmc.gov.au/release/transcript-12131>>.

²³ *Foundation Center Report* (n 21).

²⁴ *Foundation Center Report* (n 21) 17.

²⁵ Cindy Lott et al, *State Regulation and Enforcement in the Charitable Sector* (Research Report, Centre on Nonprofits and Philanthropy, September 2016) Executive Summary VI.

and the capacity to rely upon the range of circumstances that permit the withholding of information from the ACNC register.

Recommendation

We therefore recommend that amendments should be made to the Australian regulatory regime in a similar manner, with emphasis on a mandatory reporting scheme by all PAFs. Lodgement of information statements and explanatory information, on records and registers open to public inspection, will foster a transparent environment that allows for all activities to be better tracked. This is in line with the objectives of the ACNC to enhance public trust and confidence in the Australian not-for-profit sector.

All PAFs should be required to lodge information statements, imposing an obligation and not merely a choice. Annual Information Statements for PAFs that are not registered as charities should be provided and published on an appropriate database by either the ATO or the ACNC. This is similar to the approach adopted in the United States whereby the IRS mandates that a tax-exempt organisation must make available for public inspection its annual information return (in the case of Private Foundations, this is the form 990-PF).

Additionally, restrictive regulatory provisions enabling information-withholding should be removed from the legislation to achieve that end and promote more transparent reporting of PAF gifting activities. This would require amendment to the privacy withholding rules for PAFs. Currently, PAFs may opt to have their information withheld and as such, there is no record of their existence or activities on the ACNC register.

We recommend that further analysis be done by the Treasury in this regard. Further research may consider whether the ACNC or the ATO should be responsible for the publishing of information statements for PAFs not registered as charities. Additionally, there may be merit in requiring all PAFs to register as charities to ensure a coherent approach with the provision of Annual Information Statements by all ancillary funds. Finally, further research would assist in determining whether the removal of the information withholding provisions could increase accountability by allowing public access to information concerning fund activity.

Monica Hope and Miranda Stewart