

CHARITIES ALERT SEPTEMBER 2016

THE ACNC'S 2016-17 CORPORATE PLAN

More simple regulatory and reporting obligations, and more public trust and confidence in the sector are expected if the ACNC's goals and priorities are met.

On 22 August 2016, the ACNC released its 2016-17 corporate plan (**Corporate Plan**). To view, [click here](#).

As stated in the Corporate Plan, the vision of the ACNC is for:

'charities that inspire confidence and respect'.

The ACNC's vision is pursued through its four Corporate Priorities:

- Priority 1: Maintaining and enhancing public trust and confidence in charities.
- Priority 2: supporting charities to be healthy and sustainable.
- Priority 3: Making it easier for charities by driving regulatory and reporting simplification.
- Priority 4: Sustaining an independent, transparent and well governed ACNC with a positive culture and a strong customer service focus.

Some key implications of the Corporate Plan and the ACNC's Corporate Priorities are as follows:

- One of key ACNC's goals is to have complete and correct information about the registered charities in the charity register. If this goal is achieved, the Australian public can use the charity register as a primary source of information about charities. This also increases the level of awareness of charities (including new charities) registered with the ACNC. It also means a greater expectation that charities will meet their reporting obligations under the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth).
- If the ACNC achieves its goal of providing tailor made, timely, accurate and accessible education and advice services to charities, charities will be in a better position to understand and comply with their legal and regulatory obligations.
- One of the ACNC's goals is to establish agreements with each state and territory to harmonise regulatory and reporting obligations (such as state taxation and charity definitions, fundraising, and incorporated associations legislation). If this goal is achieved, charities can expect to have simpler regulatory and reporting obligations to comply with. Also refer to the article on 'Streamlining the regulation of charities' in this edition of Charities Alert.
- In addition, the ACNC also has the goal of simplifying and streamlining reporting for charities in highly regulated sectors, such as the education,

health and disability sectors. If this goal is achieved, charities could expect their reporting obligations in these sectors to be simplified. Also refer to the article on 'Streamlining the regulation of charities' in this edition of Charities Alert.

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STREAMLINING THE REGULATION OF CHARITIES

Everyone associated with the governance and management of charities supports the aim of reducing red tape for charities. With greater certainty on its future the ACNC is now making headway in getting the states and territories on board to rationalise what is presently confusing and overlapping regulation by a myriad of government bodies. While engaged in this process, the ACNC has released some information that is very useful for charities having to navigate their way under the present regulatory structure:

- In its report *Cutting Red Tape*, the ACNC has included summary diagrams that provide a road map of what is required and from whom in relation to fundraising and state taxation exemptions for charities. The report may be accessed here [ACNC Cutting Red Tape: Options to align state, territory and Commonwealth charity regulation - Final report 23 February 2016](#), and the summary diagrams are on pages 18, 24 and 29 of the report; and
- The ACNC has published FAQs – Charities and Fundraising giving guidance on fundraising for members of the public and donors. The guidance covers how and why charities fundraise, how charities pay for fundraising activities, and what members of the public can do if they're concerned about a charity's fundraising activities. The guidance may be accessed here [ACNC FAQs: Charities and fundraising](#).

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AMENDMENTS TO ANCILLARY FUND GUIDELINES

Private Ancillary Fund Guidelines and Public Ancillary Fund Guidelines

The *Private Ancillary Fund Guidelines 2009* and the *Public Ancillary Fund Guidelines 2011* were amended by the *Private Ancillary Fund and Public Ancillary Fund Amendment Guidelines 2016*. The amendments were effective from 5 May 2016. The purpose of these guidelines is to set minimum standards for the governance and conduct of private ancillary funds (**private AFs**), public ancillary funds (**public AFs**) and their trustees.

See links to documents below.

- [Australian Government The Treasury Media Release – Amendments to the Private and Public Ancillary Fund Guidelines \(5 May 2016\)](#)
- [Private Ancillary Fund and Public Ancillary Fund Amendment Guidelines 2016](#)
- [Private Ancillary Fund Guidelines 2009 \(5 May 2016\)](#)
- [Public Ancillary Fund Guidelines 2011 \(5 May 2016\)](#)

In this article, references to the guidelines apply to both the *Public Ancillary Fund Guidelines 2011* and the *Private Ancillary Fund Guidelines 2009*, unless stated otherwise.

Key implications of the amendments to ancillary fund guidelines

Below are the key implications of the amendments to the ancillary fund guidelines:

- Ancillary funds may apply to the Commissioner of Taxation for a lower annual minimum distribution rate at any time under certain circumstances.

When determining whether to reduce the rate and what the reduced rate should be, the Commissioner must take into account a number of relevant factors, such as general market conditions in Australia, the past, current, and expected levels of returns from the fund's investments, the level of distributions made by the ancillary fund in previous years, investment strategy of the fund and distribution strategy of the fund (Guideline 19.7).

The Commissioner stated in the ATO website that they will consider such applications only if the ancillary fund has met its annual lodgement obligations. [Click here](#) to read the ATO's publication on applications to reduce the minimum ancillary fund distribution rate.

The amended guidelines also provide guidance on determining a distribution by providing a benefit through an ancillary fund investing in a social impact bond. If an ancillary fund invests in a social impact bond issued by a deductible gift recipient, the benefit provided by the ancillary fund would be the market value of the interest saved in the financial year by the deductible gift recipient from issuing the social impact bond at a discounted rate of return (example 3 in Guideline 19.3).

Also, if an ancillary fund lends money to a deductible gift recipient at a discount to the interest rate that would be charged on a comparable loan sourced from a financial institution at arm's length, the market value of the discount would be treated as the benefit provided by the ancillary fund to the deductible gift recipient (example 4 in Guideline 19.3).

- The *Private Ancillary Fund Guidelines* are updated to include some improvements already made to the *Public Ancillary Fund Guidelines*.

For example, more individuals are allowed to qualify as responsible persons of a private AF (ie can be directors of the trustee of the private AF).

Under the new Guideline 14.2 of the *Private Ancillary Fund Guidelines*, an individual with a degree of responsibility to the Australian community as a whole also includes an individual before whom a statutory declaration may be made.

Some examples of these individuals included in the guideline are dentists, legal or medical practitioners, nurses, pharmacists, justices of the peace, members of the various professional accounting associations in Australia, and teachers employed on a full-time basis at a school or tertiary education institution.

These individuals were already allowed to qualify as responsible entities of public AFs (Guideline 14.1).

Another example of such updating to the *Private Ancillary Fund Guidelines* is that the portability feature of ancillary funds (ie transferring from an ancillary fund to another ancillary fund under certain circumstances) is now also available to private AFs (Guideline 51A). Prior to the amendments, portability was only available to public AFs.

- Both guidelines were amended to reduce certain compliance requirements where these were already required by other legislation/regulations. For example, under Guideline 17.1, the trustee need not notify the Commissioner of Taxation of changes to the ancillary fund's governing rules if the trustee is already required to notify the ACNC of these changes under Division 65 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

For private AFs with less than \$1m of revenue and assets in a financial year, they have the choice of instead of having their financial statements and compliance with the guidelines audited by an auditor, having them reviewed by a reviewer. This has the effect of widening the class of individuals who can undertake a review (Guideline 28.1A of the *Private Ancillary Fund Guidelines 2009*).

- Both guidelines were amended to expand on the factors that the trustee must have particular regard to, when preparing and maintaining the investment strategy of the fund (Guideline 30.2). These are status of the fund as a registered charity, material conflicts of interest in holding particular investments, and the terms and other circumstances relating to any gift to the fund under a will.
- Furthermore, both guidelines were amended to permit the trustee to give security over, or in relation to, an asset of the fund, if this is to guarantee the repayment of money lent for the sole benefit of one or more DGRs (Guideline 35.1). The amendment would assist ancillary funds to provide guarantees for borrowings by a deductible gift recipient.

It is important that the trustees and directors of corporate trustees of ancillary funds comply with the amended guidelines. This is because a breach of the guidelines could mean that they are liable to administrative penalties (s426-120 in Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953)).

Although the Commissioner of Taxation may remit all or part of an administrative penalty (s298-20 in Schedule 1 to the TAA 1953), in the Commissioner's Practice Statement Law Administration PS LA 2014/1 Administration of penalties for failure to comply with Ancillary Fund Guidelines, the Commissioner expresses his view that remission of a penalty in relation to breaches of certain guidelines would only occur in exceptional cases.

[Click here](#) to view the ATO's PS LA 2014/1.

Also, compliance with the Guidelines is one of the conditions for the ancillary fund being entitled to DGR endorsement (s30-125 of ITAA 1997). Breach of the Guidelines may also impose a risk to the ancillary fund losing its DGR endorsement.

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