

Health Alert December 2010

Improving the integrity of public ancillary funds

The Assistant Treasurer recently released a discussion paper on the proposed changes to public ancillary funds (PAFs), which are public funds that have deductible gift recipient (DGR) status that distribute to 'doing' DGRs (eg. DGRs that carry out charitable activities). This follows the government's announcement in the 2010-11 Federal Budget that it would introduce a new regulatory framework for PAFs.

Summary

The proposed changes will be similar to those introduced on 1 October 2009 for private ancillary funds (eg. private foundations, usually funded and controlled by high net worth individuals or companies), and will be effective from 1 July 2011.

The proposed changes for PAFs are intended to:

- include legislative guidelines governing the establishment and maintenance of the funds;
- require regular valuation of assets and clarify investment and distribution rules;
- provide the Australian Taxation Office with the power to impose administrative penalties on trustees for breaches of the guidelines, instead of the harsh 'all or nothing' penalty system that currently applies (eg. a penalty can be imposed instead of complete loss of DGR status);
- provide trustees of PAFs with greater certainty as to their obligations; and
- provide donors and the charitable sector with greater confidence that donations are being used effectively.

Key issues raised in the discussion paper

The discussion paper raises the following key issues:

- The Government intends to introduce guidelines that require PAFs to value assets annually. This 'closing value' is then used to calculate a minimum amount that must be distributed over the following 12 months (to the end of the following financial year). The minimum distribution rate is anticipated to be greater than 5% of the market value of the fund's net assets in each financial year. Private ancillary funds are required to distribute at least 5%. The current law does not expressly require PAFs to value their assets and distribute on an annual basis. We recommend that you consider how these new rules would impact your fund, and consider the following:
 - What would be the highest distribution rate that would not have adverse consequences? If the Government requires a higher minimum distribution rate, what would this mean for the fund?
 - Could the minimum distribution requirement mean that it would be better to wind up some PAFs and transfer these funds' assets to 'doing' DGRs?
 - For PAFs that are not continuing to receive significant donations, how will the minimum distribution rule affect them, given that they will eventually be wound down if the required annual distributions exceed their income?
 - If the required distribution rate for PAFs is higher than for private ancillary funds, would this create a bias towards establishing private ancillary funds? If so, what impact could this have on future fundraising for PAFs?
- To improve transparency and accountability, the Government proposes that these funds be required to lodge an annual income tax return.
- The Government is considering:
 - imposing a requirement for PAFs to have a corporate trustee; and
 - introducing rules dealing with the suspension or removal of trustees that are in breach of the guidelines or other relevant law.

What effect would this have?

- The Government is considering introducing 'fit and proper person' tests for trustees/directors of PAFs (eg. minimum training or other qualification standards). What impact could this have on current and future trustees and directors?
- To ensure liquidity and low risk, the Government intends to introduce investment rules for these funds. It is intended that PAFs should have an investment strategy that requires them to hold sufficient liquid assets. What impact will such rules have on current and proposed future investments in conjunction with the proposed minimum annual distribution rate?
- The proposed changes that apply to PAFs will be similar to those introduced on 1 October 2009 for private ancillary funds. What impact will this have?

Consultation process

The public consultation process provides an opportunity to comment on the discussion paper before 17 December 2010. The discussion paper is available online at www.treasury.gov.au.

Please let us know if you would like our assistance in determining the impact of the proposed changes on your circumstances or in making a submission on the discussion paper on your behalf.

Local Health Networks start to take shape

The *Health Services Act 1997* (NSW) has been amended to include provisions relating to the national health reform. Effectively, the amendments provide for the establishment of local health networks (**LHNs**) (in place of area health services) and give the framework within which the LHNs will operate. Under the Act, LHN governing councils must comprise between 6 and 13 persons who have:

1. expertise and experience in health, business and financial management;
2. expertise and experience in clinical and other health services;
3. where appropriate, a role representing universities, clinical schools or research centres;
4. knowledge and understanding of the community service by the LHN;
5. other backgrounds, skills, expertise, knowledge or experience appropriate for the LHN; and
6. knowledge of Aboriginal health.

The Act outlines a range of statutory functions of LHNs, including:

- ensuring appropriate frameworks are in place to support the maintenance and improvement of patient care;
- approving systems to:
- support efficient and economic operations;
- manage budgets to meet performance targets; and
- apply network resources equitably to meet community needs;
- ensuring strategic plans for the delivery of services;
- monitoring and providing strategic oversight of the LHN's financial and operational performance within the State-wide performance framework and measures;
- recommending the LHN CEO appointments and removals;
- conferring with the LHN CEO on operational performance targets and measures;
- approving the service agreements for the LHN;
- obtaining views as to the LHN's policies, plans and initiatives on health service and conferring with LHN CEOs regarding the involvement of the community and clinicians in planning services;
- advising the community, providers and consumers about the LHN's policies, plans and initiatives;
- endorsing the LHN's annual report; and
- liaising with councils and other LHNs on State-wide initiatives for health services.

The actual size of each LHN will depend on the size of the network and the complexity of services provided in that network, among other factors.

New South Wales has already announced the 15 Chairs of its 18 LHNs, with general members still to be recruited. The NSW LHNs will be established in January 2011 and the NSW Health system will progressively transition to the new structure over the following 6 to 12 months.

Tax Alert puts retirement village operators on notice

The ATO has recently released Tax Alert TA 2010/7, which deals with the GST implications of retirement village operators on-selling services to residents in an attempt to claim greater input tax credits.

The Tax Alert is an 'early warning' for retirement village operators that the ATO is examining arrangements with features substantially similar to the following:

- The operator enters into a contract to acquire a service (eg. electricity from an energy company). The operator assumes the role of an electricity retailer, and on-supplies the electricity to the residents of the retirement village units under separate contracts.
- The energy company invoices the operator for the electricity supplied to the retirement village.
- The operator charges individual residents for their use of electricity at a rate equivalent to that charged by the energy company.
- The operator treats its supply of electricity to residents as a taxable supply, separate from its input taxed supply of residential accommodation. On this basis, it claims input tax credits (or decreasing adjustments) on some of its acquisitions, including infrastructure costs for things like wiring and sub-stations, which it argues are related to the taxable supply of electricity.
- Further, the operator claims as input tax credits a higher percentage of its costs for its general acquisitions relating to the operation of the retirement village than it might if it was not making the purported taxable supplies of electricity.
- This arrangement may replace existing contracts for a direct supply of electricity from the energy company to village residents or may be in place from the beginning of the village's operation.
- The operator may also supply other services to village residents under similar contracts.

The ATO has raised the following concerns in relation to this arrangement:

- Whether the operator's supply of electricity would be a taxable supply within the meaning of section 9-5 of *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (the **GST Act**).
- Whether the operator would be entitled to input tax credits under Division 11 (or decreasing adjustments under Division 129) of the GST Act on its acquisitions that are said to relate to that taxable supply and if so, to what extent.
- The anti-avoidance provisions of Division 165 of the GST Act may apply to the arrangement or to part of it.
- Any entity involved in the arrangement may be a promoter of a tax exploitation scheme for the purposes of Division 290 of Schedule 1 to the *Taxation Administration Act 1953* (Cth).

You can access a copy of Tax Alert TA 2010/7 [online](#). If you are engaged in an arrangement similar to the one described in this Tax Alert and you are concerned about its implications on your arrangement, we suggest you seek professional tax advice. Our tax team regularly advises on these types of issues.

Legislation update

Public Health Bill 2010 (NSW)

The *Public Health Bill 2010* (NSW) received its second reading speech on 24 November 2010. The Bill seeks to:

- improve public health;
- control public health risks;
- promote infectious disease control; and
- recognise local government in protecting public health.

It will empower the Minister to better deal with public health risks, set out safety measures for drinking water and public swimming pools, provide for disease control, promote public health registers, including the Pap Test Register and includes enforcement tools such as inspections and inquiries, powers to demand information, and various offences.

South Australian Public Health Bill 2010 (SA)

The *South Australian Public Health Bill 2010* (SA) received its second reading speech on 29 September 2010. The Bill proposes to protect South Australians' health and reduce "preventable illness, injury and disability" by:

- extending the functions of the Minister, Chief Public Health Officer, South Australian Public Health Council, Councils, "authorised officers" and emergency officers;
- providing for State and Regional public health plans;
- providing for State Public Health Policies by the Minister;
- creating offences such as intentionally or recklessly causing a serious or material risk to public health;
- setting out measures for preventing non-communicable conditions; and
- setting out measures for managing significant emergencies.

Regulations under the *Health Insurance Act 1973* (Cth)

The following regulations under the *Health Insurance Act 1973* (Cth) commenced on 1 November 2010:

- the *Health Insurance (Diagnostic Imaging Services Table) Regulations 2010* (Cth), providing a table of diagnostic imaging services and fees for section 4AA(1) of the Act, providing for who may provide a diagnostic imaging service and reporting requirements for certain services;

- the *Health Insurance (Pathology Services Table) Regulations 2010* (Cth), providing a table of pathology services and fees for section 4A of the Act, and outline pathology services eligible for Medicare benefits, their fees and rules for interpretation of the table;
- the *Health Insurance Amendment Regulations 2010* (Cth) to amend the *Health Insurance Regulations 1975* (Cth) to recognise Addiction Medicine, Sexual Health Medicine and Sport and Exercise Medicine as medical specialities, adding each as a new item; and
- the *Health Insurance Amendment (Pathology Requests) Bill 2010* (Cth), for which the second reading speech was given on 20 October 2010, which proposes to improve patient choice, price and convenience in pathology services by encouraging competition among providers, removing the requirement that a request be made to a particular practitioner or laboratory proprietor to gain a Medicare benefit for a pathology service by or on behalf of that practitioner.

Health Legislation Further Amendment Bill 2010 (NSW)

Assented to on 16 November 2010, the *Health Legislation Further Amendment Bill 2010* (NSW) proposes to amend the *Health Records and Information Privacy Act 2002* (NSW), with its second reading speech given on 20 October 2010. The Bill:

- defines a healthcare identifier under the *Healthcare Identifiers Act 2010* (Cth) to be health information; and
- sets out when someone may or may not use or disclose a healthcare identifier (being an offence

carrying a \$66,000 fine for companies and a two-year prison term and/or \$13,200 fine for individuals).

Human Tissue Transplant Amendment Bill 2010 (NT)

The *Human Tissue Transplant Amendment Bill 2010* (NT) seeks to rename the *Human Tissue Transplant Act* (NT) the *Transplantation and Anatomy Act 1979* (NT). The second reading speech for the Bill was given on 21 October 2010.

Surrogacy Bill 2010 (NSW)

The *Surrogacy Bill 2010* (NSW) proposes to amend the *Assisted Reproductive Technology Act 2007* (NSW), a private member's Bill sponsored by John Hatzistergos. Its second reading speech was held on 21 October 2010. It would "recognise certain surrogacy arrangements, prohibit commercial surrogacy arrangements and provide for the status of children of surrogacy arrangements" by:

- is provided only after an independent counsellor's report;
- requiring the Director-General to set up a register of surrogacy arrangements;
- giving affected parties access to the register; and
- extending enforcement powers in relation to providers of assisted reproductive treatment.

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