

Tax Alert

Private ancillary funds – trust deeds may need to be amended by 1 October 2012

August 2012

The *Private Ancillary Fund Guidelines 2009* (**Guidelines**) were made on 28 September 2009. The Guidelines commenced on 1 October 2009, subject to transitional provisions. The purpose of the Guidelines is to set minimum standards for the governance and conduct of a private ancillary fund (**Private AF**) and its trustee.

Private AFs are private funds that have deductible gift recipient (**DGR**) status that can distribute to certain DGRs (eg other than private AFs or public ancillary funds).

Timing

The transitional rule in the Guidelines provides that if the fund's governing rules prevent compliance with a requirement in the Guidelines, the fund is exempt from that requirement until 1 October 2012.

Also, the Guidelines provide that the trustee must seek to have the governing rules of the fund amended to comply with the Guidelines by 1 October 2012.

Trust deeds of Private AFs must contain certain provisions required by the Guidelines

These guidelines are:

- guideline 10.1 – the trust deed must include objects

that clearly set out the purpose of the Private AF;

- guideline 10.2 – on winding up or ceasing to be a Private AF, the net assets of the Private AF must be provided as described in paragraph (a) of item 2 in the table in s30-15 of the *Income Tax Assessment Act 1997* (**ITAA 97**).

Paragraph (a) of item 2 in the table in s30-15 provides that the sole purpose of an ancillary fund must be to provide money, property or benefits to a fund, authority or institution gifts to which are deductible under item 1 of that table; and for any purposes set out in the item of the table in Subdivision 30-B of the ITAA 97 that covers the fund, authority or institution.

This means that Private AFs must only distribute to particular types of DGRs and **not any** DGR. For example, they cannot distribute to other Private AFs or public ancillary funds (which are item 2, and not item 1, DGRs).

- guideline 11.1 – the trust deed must clearly set out and reflect that the Private AF is established and operated as a not-for-profit entity; and
- guideline 18 – the trust deed must prohibit the Private AF from indemnifying the trustee, or an employee, officer or agent of the trustee, for certain losses or liabilities (eg attributable to dishonesty, gross negligence, or recklessness, of the trustee, employee, officer or agent; or a deliberate act or omission known by the trustee, employee, officer or agent to be a breach of trust).

Any trust deed of a Private AF which does not contain these required provisions should be amended.

In addition, if there are any provisions in the fund's deed that prevent compliance with any of the Guidelines, then

those provisions should be amended.

Even if the trust deed does not need to be amended, the deed should still be reviewed to ensure that it does not need to be amended.

Taxation implications for amending the trust deed

In relation to capital gains tax (CGT), as generally Private AFs are also endorsed as tax concession charities by the ATO, they would be exempt from any CGT if there is any capital gain arising from amending the trust deed.

In relation to state and territory duty, the trustee would need to consider whether duty would apply. It would need to be considered if the amendment created a duty obligation, and if so, whether an exemption applied.

For example, in New South Wales, duty would apply if the amendment amounted to a declaration of trust. If so, it would need to be considered whether the amendment would be exempt as a declaration of trust over dutiable property held on trust for an exempt charitable or benevolent body under s275 of the *Duties Act 1997* (NSW).

There is an issue in relation to whether this exemption would apply to a Private AF. In the Supreme Court of NSW decision of *Sargents Charitable Foundation v Chief Commissioner of State Revenue* [2005] NSWSC 659, it was held that the exemption did not apply to the charitable foundation in the case.

In paragraph 8 of the Office of State Revenue NSW (OSR)'s Revenue Ruling DUT 34, the OSR lists a number of factors that it considers in determining whether a trust is a society or institution (which in turn is a condition for an entity being an exempt charitable or benevolent body). It is difficult to see how a Private AF could be a 'society' or

'institution'. Accordingly, if the amendment amounts to a dutiable transaction it will not be exempt from duty.

Notification to ATO

Amendments to a trust deed of a Private AF will necessitate the trustee completing, signing and sending to the ATO the notification of change to the governing rules of an endorsed Private AF, along with copies of all relevant executed deeds, within 21 days of the change.

Importance of compliance

The trustee of a Private AF is responsible for the governance of the fund.

It has a duty to ensure that the fund complies with its trust deed and the law (ie the general law and also legislation such as *Trustee Act 1925* (NSW), *Corporations Act 2001* (Cth), *ITAA 97*, and the *Income Tax Assessment Act 1936* (Cth).

Breach of the Guidelines may attract administrative penalties. The amount of the penalty would depend on the nature and size of the breach, taking account of the trustee's level of culpability and also the particular requirement that the Private AF has not complied with.

Also, compliance with the Guidelines by a Private AF and its trustee is one of the conditions for the Private AF being entitled to DGR endorsement (s30-125 of ITAA 97). Breach of the Guidelines may also impose a risk to the fund losing its DGR endorsement.

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