Public Ancillary Funds (PuAF)

Trustee Handbook

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By David Ward, August 2016
Public Ancillary Funds (PuAFs) play a significant role in the philanthropic landscape as a tax effective structure for public fundraising. From 1 January 2012 PuAFs became subject to detailed legally binding Guidelines; these were updated with some minor modifications in May 2016. The key legislative document is the Public Ancillary Funds Guidelines 2011, as amended 2016 (the Guidelines). This Handbook sets out what is required to operate a PuAF under the Guidelines and at law.

This is not a legal document but a “plain English” introductory guide. It draws on general information on charitable trust governance contained in the Trustee Handbook: Roles and Duties of Trustees of Charitable Trusts and Foundations Second Edition 2012, with the Third Edition of that document soon to be released. Detail about other charitable trust structures can be found in that document.

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Disclaimer: This booklet has been prepared as a general introductory guide. It is not advice, and must not be relied upon as advice. It contains generalisations and statements that are not necessarily comprehensive, complete or up-to-date. Some statements in the booklet are subject to legal uncertainty.
Public Ancillary Fund (PuAF) Trustee Handbook

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Background

Philanthropic trusts have existed in Australia for more than a century. While such trusts were generally exempt from income tax and donations had exemptions from estate taxes in some states, it was not until 1963 with the introduction of Public Ancillary Funds that a form of charitable trust allowed for tax deductible donations. The underlying concept of public funds is that the public are able and invited to contribute and the fund is operated in a public manner. Private Ancillary Funds were introduced in 2001 to provide a separate structure for private philanthropy.

In 2016 there were some 1650 active PuAFs including:
- Community Foundations with “sub-funds” for specific projects or donors
- Charitable Endowment Funds run by wealth managers, Trustee Companies and other organisations, many also with “sub-funds” associated with individual donors
- Foundations associated with particular charities, public institutions, schools or religious groups
- Foundations for fundraising events, typically challenge events
- Foundations associated with a corporate body or a celebrity.

The introduction and ready acceptance - after significant consultation and modification - of the Private Ancillary Fund Guidelines in 2009 lead the government to adopt a similar framework, acknowledging key differences, for Public Ancillary Funds during 2011 which came into effect from 1 January 2012.

Key features of Public Ancillary Funds are:
- established as not-for-profit entities solely for the purpose of providing money, property or benefits to eligible DGRs that are not ancillary funds.
- donations are income tax deductible for donors
- funds are exempt from income tax and can reclaim franking credits on Australian dividends
- the fund can and must invite the public to donate
- the decision making body i.e. the trustees or the board, must have a majority of ‘responsible persons’
- the fund can have sub-funds or management accounts for donors who can make recommendations on distributions, but it is the trustee who makes the final decisions
- a minimum annual distribution level of 4% of fund value (with some exceptions)
- the Commissioner of Taxation has compliance enforcing powers including imposing administrative penalties;
- the fund must have and adhere to a formal investment strategy and comply with the investment restrictions
- new funds must have a corporate trustee(s) (rather than individuals)
- PuAFs must furnish an annual return to the ATO and ACNC (these are now submitted through a combined online form to the ACNC)
- there is provision for funds to be transferred to another ancillary fund with the Commissioner’s approval (referred to as ‘portability’).

The Australian Charities and Not for profits Commission (ACNC) Act 2012 introduced a dedicated regulator for the charity sector, which includes charitable trusts and PuAFs. Governance standards and reporting obligations apply for the entire sector including PuAFs.

In 2016 a number of adjustments were made to the PuAF Guidelines 2011 in response to operational issues raised by the sector. The major changes for were:
- greater clarity provided around opportunities for providing benefit to eligible DGRs
- while the 4% minimum distribution was retained, some discretion was given to Commissioner of Taxation to approve lower levels in some circumstances.
- importantly for PuAFs, portability from PAFs to PuAFs was introduced for the first time.
Legislation Relating to Public Ancillary Funds

The Public Ancillary Fund Guidelines 2011 as amended (the Guidelines) is the primary legislative document for the operation of PuAFs. It is the taxation and fundraising aspects that make PuAFs an attractive vehicle for community and provide an opportunity for accessible philanthropy.

PuAFs are charitable trusts, so in addition to complying with the Guidelines and related federal income tax law, PuAFs must also comply with the ACNC Act, which regulates the entire charitable sector, and the requirements of the relevant state trustee legislation (which is broadly consistent across all states), state charitable fundraising (which varies widely but hopefully will soon be rationalised given ACCC and ACNC oversite) and common law particularly as it relates to fiduciary responsibility.

The trust deed is a PuAF’s governing document and may require or prevent additional specific activity. Deed amendments can only be made within the powers set out in the deed or by the Courts and any change may need to be reported to, or approved by, the ACNC or ATO. A Model Deed for new PuAFs and other ATO information can be found on the ATO website.

The most important legislation affecting PuAFs are:

- Public Ancillary Fund Guidelines 2011, as amended 2016;
- Australian Charities and Not for Profit Commission Act 2012,
- Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No.1) Governance and Reporting Requirements
- The relevant state Trustee Act; see page 26
- The relevant state Fundraising Act regulating fundraising for charitable purposes; see page 26
- Charities Act 2013 (Commonwealth definition of charity including for income tax purposes)
- Charities (Definition of Government Entity) Instrument 2013
- Tax Ruling TR 95/27 (on Public Funds following Bray v FCT) and Tax Determination TD 2004/23 on “sub-funds”

The common law concepts of charity (for state trust law purposes) and fiduciary duty of a trustee also apply (see Glossary).

The impact of this legal framework on PuAFs is discussed in detail in the following pages. The consequences of any breach of the Guidelines and/or legislation are discussed in the governance failure section on page 15. Other legislation may also impact on a PuAF’s operation depending on the management and range of activities.

The impact of such legislation is not discussed in this Handbook as, where applicable; directors’ responsibilities are no different from other organisations. This includes:

- Trustee company directors’ compliance with the Corporations Act 2001;
- The federal Privacy Act 1988; and
- If the PuAF employs staff, compliance is required with all relevant state and federal legislation such as Fairwork, WorkCover, Superannuation law, PAYG, FBT etc.
The Trustee

The trustee has the ultimate responsibility for the governance of each PuAF. The trustee of all new PuAFs must be a company (often public company limited by guarantee), an incorporated association, a Licensed Trustee Company, or (less likely) a combination of the above. Prior to December 2011 individuals were allowed to be trustees; existing PuAFs with individual trustees can continue with individual trustees (including replacement of individual trustees).

As the majority of PuAFs have a corporate entity as trustee, throughout this Handbook reference to “the trustee” also applies to all trustees should there be more than one; and references to “directors of the trustee” should be read as also referring to individual trustees where they remain. The directors of the trustee are responsible, accountable, and potentially joint and severally liable for the proper execution of the trustee’s duties as set out in the following pages.

Directors cannot be persons who are minors, are mentally incapacitated, are undischarged bankrupts, who have been convicted of an indictable taxation, fraud or dishonesty offence or who have been disqualified for being a director by ASIC or the ACNC.

As these are public foundations there must be a majority of individuals as directors/trustees with a degree of responsibility to the community at large, meeting the so called responsible person criteria. A wide range of professionals with a Code of Conduct and individuals serving in significant public roles meet the responsible person criteria; the Guidelines definition of responsible persons is set out on page 20. The public nature of PuAFs and charitable fundraising requirements in some states do not allow control of the board by members of the same family.

Conduct of Trustee meetings will be governed by the constitution of the company or association that is the trustee. If there is not a majority of responsible persons serving on the board, the trustee cannot make decisions other than to appoint new trustees/directors, protect fund property or deal with urgent matters.

The Commissioners of Taxation and the ACNC each have powers to suspend or remove trustees and appoint an acting trustee in circumstances where the PuAF has seriously breached the law or the Guidelines.

Directors of PuAFs are generally not paid. ASIC Special (charitable) Purpose Companies, if used as the trustee company, specifically do not allow payment of directors’ fees. Directors direct expenses relating to the PuAF may be reimbursed, but such payments need to be approved by directors. Where trustee remuneration is permitted by the trust deed and constitution of the trustee, the Guidelines require remuneration for trustee services must be ‘reasonable’ (with the explanatory material referencing trustee legislation and the Model Deed suggesting a maximum of 1.056% of fund value). Where the deed is silent, only Licensed Trustee Companies can be paid trustee fees which are governed by the provisions of the Corporations Act 2001.
The Responsibilities of the Trustee

The trustee has the ultimate responsibility for the governance of the PuAF. Directors of the trustee are accountable for directing the affairs of the fund to ensure it is well run, compliant with the its deed, the law and the Guidelines, and is supporting the purpose for which it was established. Directors have a fiduciary responsibility to protect and prudently invest trust assets and avoid any personal conflict of interest or real possibility of actual or perceived conflict of interest. They must exercise their powers with integrity and good faith and show care, diligence and skill in managing the affairs of the trust. PuAFs must be run solely for the benefit of eligible DGRs as set out in the deed and must not provide personal benefit to the founder, trustee, donors or any of their associates (unless eligible DGRS).

In Charity Law in Australia and New Zealand (Dal Pont, 2000), sets out the duties of charity trustees as:

- Acquaint themselves with the terms of the trust document;
- Execute the trust according to its terms and the general law to benefit the community;
- Protect and preserve the trust property;
- Exercise discretionary powers in good faith, upon real and genuine consideration and according to the purpose for which the power was confirmed;
- Not delegate their powers or discretions except in accordance with the deed, and
- Not invest trust funds in a manner not authorised by the deed, statute, regulations or court.

Under the ACNC Act 2012, as the “responsible entities” for a registered charity, PuAF directors are required to meet the five ACNC Governance Standards which are summarised as ensuring (this applies to all directors not just those meeting the responsible person criteria):

1. The PuAF operates on a not-for-profit basis and funds applied for the designated charitable purposes (which for PuAFs is to support eligible DGRs)
2. Accountability to members (not relevant for charitable trusts)
3. The PuAF complies with all relevant Australian laws (see page 4)
4. Directors are suitable (see page 5)
5. Directors understand and fulfil their duties (see below)

The duties of PuAF trustee directors in Standard 5 are set out in more detail and are largely consistent with the fiduciary duties of directors and trustees generally. The duties can be summarised as follows:

- to act with reasonable care and diligence
- to act honestly and fairly in the best interests of the charity and for its charitable purposes
- not to misuse their position or information they gain as a responsible person
- to disclose perceived or actual material conflicts of interest
- to ensure that the financial affairs of the charity are managed responsibly, and
- not to allow the charity to operate while it is insolvent.

The ACNC concludes “Generally, the duties mean that directors should act with standards of integrity and common sense.”

As the first duty of directors is to understand their responsibilities, from a practical perspective a detailed consideration of trustee duties can most usefully be achieved using a framework of the four core areas of PuAF activity. The following sections set out in detail what directors must do as a minimum.

- **Administration**
  The processes of managing the operations of the trust to meet its legal obligations.
- **Fundraising**
  The processes of raising the funds.
- **Investment**
  The management of fund investments to protect and grow the real value of the fund.
- **Distribution/Grantmaking**
  The distribution or granting by the fund to eligible DGRs.
The Duties of the Trustee: Administration

Competent administration is central to the good governance of every PuAF, this is a basic requirement under the Guidelines, trust law and the ACNC governance standards for a registered charity.

Record Keeping

- All trust assets must be held in name of the trustee or if authorised by the deed, statute or the Courts, a custodian of assets.
- Proper minutes of all trustee meetings must be kept. Decisions are by majority. If a director seriously disagrees with a proposal, particularly on a fiduciary issue, he/she should insist on getting legal advice, and recording the dissenting vote. If the issue goes beyond a single matter of judgement, a director should reconsider his/her position.
- Key documents; the PuAF Deed, trustee company Constitution, Investment Strategy, Returns, Minutes, etc. should be kept safely; financial statements must be kept for at least 5 years.
- Directors are required to avoid conflicts of interest and real possibility of actual or perceived conflicts. Declarations of interests should be kept and any potential conflicts must be disclosed and recorded along with the absence of the affected director from the specific decision making.
- Any transaction between the PuAF and a director of the trustee, the founder or associates thereof, must be at arms’ length basis and on a commercial terms or more favourable to the PuAF. All such transactions must be disclosed in the annual financial statements.
- All expenses charged to the PuAF must relate to PuAF activity and be reasonable for the specific activity; total expenses must be reasonable relative to the size of the PuAF. Investment expenses must be also reasonable relative to the funds under management.
- Claiming franking credits attached to Australian company dividends from the ATO adds substantially to a PuAF’s income – after the end of each financial year.
- Management accounts may be kept identifying sub-funds associated with specific projects or donors to which donations from that donor and related parties can be credited, as well as distributions attributed to that sub-fund.

Accounts

- Annual Financial Statements (usually Special Purpose) are required to be prepared which comply with Accounting Standards and the ACNC Act. An objective estimation of the market value of the fund must be done annually (usually 30 June); property assets must be valued by a certified valuer at least every 3 years. Financial Statements must be audited by a qualified auditor unless revenue and assets are <$1m when a review is sufficient (but only if the Deed allows review). The audit/review must confirm compliance with the Guidelines by the PuAF. Any related party transactions (other than gifts into the PuAF) must be disclosed in the Financial Statements.

Reporting

- PuAFs are required to lodge an annual income tax return to the ATO by 28/2 and also an Annual Information Statement to the ACNC by same date (these are submitted through a combined online form to the ACNC).
- Some deed amendments require the approval of the Commissioner of Taxation, and all deed amendments need to be reported to the ACNC. The resignation or appointment of directors requires advising the ACNC and ASIC.
- The trustee company, if registered under ASIC will be required to make an annual solvency statement and confirm the Annual Statement with ASIC (and pay the fee).
The Duties of the Trustee: *Fundraising*

Public Ancillary Funds are charitable fundraising vehicles. The process of fundraising from the public for the charitable purposes is governed by state law. There are different application processes, reporting and audit obligations and timeframes for each state. A PuAF needs a fundraising license in each state (and the ACT) where it conducts fundraising activity. This is one area where the entire sector (as fundraising legislation impacts on all other public charities as well as PuAFs) hopes will be streamlined and simplified considerably. In the meantime, material and application documents are available from the relevant authority in each state and the ACT (see page 26).


PuAFs must invite members of the public to contribute to the fund and proper receipts (see glossary) need to be issued to donors when requested, or as stipulated in fundraising licence conditions.

While cash donation greater than $2 are generally fully tax deductible for donors. For property donations greater than $5,000 there is an ATO valuation process to follow; it is the responsibility of donors to ensure the ATO procedures are followed to have assets properly valued for deductibility purposes (see Glossary). It is expected that the process for donations of listed shares and public managed funds will be streamlined during 2016/17. Charitable donations cannot create an income tax loss for a donor but can be spread over up to 5 income tax years, [https://www.ato.gov.au/Forms/Election-to-spread-gift-deduction/](https://www.ato.gov.au/Forms/Election-to-spread-gift-deduction/).

When holding fundraising events such as gala, balls and auctions, where a minor benefit is being provided to a donor, care needs to be taken to ensure the specific criteria around deductible contributions is meet [https://www.ato.gov.au/non-profit/gifts-and-fundraising/running-fundraising-events/conditions-for-a-tax-deductible-contribution/](https://www.ato.gov.au/non-profit/gifts-and-fundraising/running-fundraising-events/conditions-for-a-tax-deductible-contribution/).

Fundraising events can be a very successful way of raising funds, but also bring risks (adhering to permit requirements, potential liabilities, cost overruns, reputational damage etc.) and therefore need to be properly executed (refer [http://www.nfplaw.org.au/events](http://www.nfplaw.org.au/events)). The proceeds from fundraising activity can be attributed to the balance of a specific sub-fund. However, the trustee is still responsible even if donors associated with a specific sub-fund are fundraising for the PuAF under the PuAF’s licence, so trustee scrutiny and an approval process for all fundraising activity is required.
The Duties of the Trustee: Investment

The trustee must manage trust assets for the purpose of the trust (to benefit an eligible DGR or eligible DGRs as stated in the deed). In considering trust investments, the trustee must exercise “the care, diligence and skill that a prudent person would exercise in managing financial affairs of others”. Where the trustee’s profession includes being a trustee or managing investments, the duty of care is higher - “exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing financial affairs of others” (State Trustee Acts).

Investment Strategy and Review
Each PuAF must have an Investment Strategy which includes the objectives of the fund. Investment activity must adhere to the Investment Strategy which is confirmed by the annual Audit/Review. There is only one Investment Strategy for the total PuAF, i.e. sub-funds cannot have separate investment strategies. Directors can take outside advice on investment matters and appoint an investment manager to execute the investment strategy, which can be paid for by the fund. A review of the investment strategy and portfolio is required at least annually, examining performance of the entire portfolio and individual assets, including

- Performance relative to fund Investment Strategy; and
- Documenting action taken to implement the Investment Strategy and Review.

Prudent Person
State trust law and the Guidelines require the trustee to consider inter alia:

- The benefits of diversification of trust investments
- Investing not speculating
- The purpose/objectives of the fund
- Balancing the risk of capital or income loss
- Maintaining the real value of capital and income
- The tax consequences of investment decisions and choices. The tax exempt status of PuAFs enables the refund of franking credits which enhances returns from Australian shares
- The liquidity of the investments having regard to cash flow and liability requirements including the timing of imminent and future distributions; and
- The costs of investment alternatives and transactions.

Investment Limitations

- PuAFs cannot run a business. The management of a direct investment portfolio of shares or rental properties for the purpose of deriving income to distribute is permissible and not caught by the “not carrying on a business” restriction.
- Investment transactions must be by way of arm’s length transactions on commercial terms, or terms more favourable to the fund unless the other party is an eligible DGR. Investment transactions cannot provide a material benefit directly or indirectly to the founder, donors, trustee, directors, employees or associates thereof, unless the party is an eligible DGR.
- Trustees must consider and manage any perceived or actual conflict of interest involved in holding particular investments.
- Collectables cannot be purchased and any donated must be sold within 12 months.
- The fund can only borrow limited amounts in very limited circumstances (i.e. to fund distributions or to settle certain transactions) for short terms.
- The trustee cannot give security over fund assets other than a guarantee for the benefit of eligible DGRs.
- Any directions or restrictions in the deed, or investment strategy or any subsequent Court Orders need to be observed (such as a prohibition on specific stocks).
The Duties of the Trustee: Distribution/Grantmaking

Directing grants to one or more eligible DGRs (as specified in the trust deed) to achieve a positive social impact is the core activity of a PuAF. Grantmaking can range from funding organisations providing immediate relief to those afflicted by poverty, sickness or disadvantage, to advancing education or the fine arts, through to funding organisations and research projects to identify new ways to solve long term medical, social or environmental problems. There is no single right way to grant.

Where there are sub-funds aligned to specific donors, it is generally good practice for the trustee to review any non-binding preferences indicated by donors before making distributions. The trustee must make the final decisions and is accountable for the PuAFs distributions being compliance with the deed and Guidelines. The trustee cannot commit to following any recommendation from donors.

Quantum

- PuAFs must distribute at least 4% of the net value of the fund at 30 June during the following financial year (with a minimum annual distribution of $8,800 unless all expenses of the fund are being met from outside the fund in which case the 4% minimum applies). This applies to the total fund. Often, the trustee will ensure each sub-fund distributes at least 4% of the applicable sub-fund value each year. The Commissioner of Taxation has authority to approve a lower minimum distribution amount in certain circumstances, for instance when a low yielding illiquid asset is donated to a PuAF as a testamentary gift. The matters the Commissioner will consider are set out in Attachment 2 on page 21.

- For new PuAFs no distribution is required in the year of establishment or for the following four financial years. This is to allow particularly Community Foundations to build sufficient base to be effective, but PuAFs that receive substantial funding during the first four years are encouraged to commence distribution earlier to fulfil their charitable purpose.

- Distributions are what is paid out each year to recipients. Future payments of multi-year commitments count as distributions in those future years and should only be paid subject to satisfactory progress and reporting each year. Distributions do not include expenses of the PuAF.

- While most distributions are of cash in the form of grants, PuAFs can also provide eligible DGRs support such as office space at below market rents, low or no interest loans, or a guarantee to enable an eligible DGR to borrow from a bank on better terms. In each case the value of the benefit to the DGR can be counted as part of the PuAF’s distribution. This type of support is further explained on page 14.

Recipients

- PuAFs can only distribute to eligible DGRs as defined in each Deed. Ensuring only eligible organisations receive distributions is one of the trustee’s key compliance duties.

- Only Item 1 DGRs are eligible DGRs to receive a grant from a PuAF. As a tax deduction has been given on donations to PuAFs they can only grant to organisations that are also DGRs. In effect, PuAFs are a holding vehicle in the process of donations passing from individuals to “doing” DGR entities, which are DGR Item 1. (Many other charitable trusts are not so restricted in their grantmaking because donations to them are not tax deductible).

- In no circumstances can PuAFs distribute to other PuAFs or Private Ancillary Funds (PAFs) even though they are DGR. PuAFs and PAFs can be recognised as they are listed on ABN Lookup as DGR Item 2.

- From 2014 PuAF new deeds have basically two choices for eligible organisations; either a) DGR Item 1s that are charities or b) DGR Item1 that are charities or DGR Item1 government entities that would be charities but for being a government entity. Before 2005 only a) above was possible. Between 2005 and 2014 it was possible for PuAFs to become ITEFs with additional grant flexibility depending on state of domicile (see next page) which has been grandfathered. PuAF deeds can be amended but expert legal advice should be obtained.
• A potential recipient’s tax status must be checked:

**ABN Lookup:** Potential recipient organisations can be searched for by name on the Australian Business Register using the ABN Lookup website: [www.abn.business.gov.au](http://www.abn.business.gov.au) (although there can be delays in updating information). This will indicate whether it is a DGR Item 1 or it manages a fund that is DGR Item 1 (note all distributions from PuAFs must go to the entity or fund that is the DGR Item 1) and also whether it is a registered charity with the ACNC or indicate it could be a Government entity.

**ACNC Register:** will confirm those DGRs that are also registered charities. This register is generally more up to date than the ABR to check charitable status.

**ATO DGR Endorsement Notice:** For larger or multi-year grants and for those where details on the ABR are not up-to-date it is recommended that a copy of the organisation’s DGR Endorsement Notice from the ATO be requested from the potential recipient.

**Government entities** should also provide a letter from the ACNC or ATO confirming their “would be charitable but for being government entity” status, where applicable.

The discussion on the previous page on eligible DGRs can be summarised in this diagram or in the table on the following page.
<table>
<thead>
<tr>
<th>Type of PuAF</th>
<th>Eligible Recipients</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deed restricted to benefiting DGR charities only, all dates, and no declaration</td>
<td>DGR Item 1 and Charity registered with ACNC</td>
</tr>
<tr>
<td>Extended definition of charity in Deed post 1 January 2014 (and for Victorian deeds the additional declaration)</td>
<td>DGR Item 1 and Charity registered with ACNC and DGR Item 1 Government entities that would be charitable but for being a government entity</td>
</tr>
<tr>
<td>ITEF before 31/12/2013 governed in Victoria</td>
<td>DGR Item 1 and Charity registered with ACNC and DGR Item 1 government entities that would be charitable but for their link to government</td>
</tr>
<tr>
<td>ITEF before 31/12/2013 governed by NSW, QLD and WA law</td>
<td>Any DGR Item 1 which is income tax exempt whether a charity, government entity or other</td>
</tr>
</tbody>
</table>

Directors may identify what type of PuAF they are by examining the PuAF’s deed and whether there is a declaration opting in to state legislation. If unsure, seek expert advice.

**Grant Management**

- An acknowledgement or receipt needs to be obtained from each grant recipient as evidence of distribution to eligible organisations and will be required by the PuAF’s Auditor.
- If the grant agreement provides no material benefit to the grant-maker and specifies only the standard type of grant conditions, then the recipient should not be subject to GST in respect of the grant. The ATO’s Goods and Services Taxation Ruling 2012/2 provides guidance in terms of whether GST is payable on a grant. ([https://www.ato.gov.au/law/view/document?docid=GST/GSTR20122/NAT/ATO/00001](https://www.ato.gov.au/law/view/document?docid=GST/GSTR20122/NAT/ATO/00001)). The inclusion of the following terms in a grant agreement should not make GST payable, however any additional terms beyond these could make GST payable depending on the circumstances, if in doubt take advice:
  1. Specifying that the grantee use the grant funds for a particular purpose
  2. Setting the date for completion of the project funded by the grant
  3. Acknowledgement of the assistance of the grant maker in any published or displayed material
  4. Provision of a report on the use of the grant
  5. Requiring repayment of any unused amounts or seek permission to apply funds elsewhere
  6. Requiring separate management accounts to be set up for the grant

If additional grant conditions are included, then the grant should be grossed up for GST and (usually 75%) claimed back through the PuAF’s BAS return.
Issues for Further Consideration

In addition to the legal responsibilities, there are many issues directors of PuAF trustees should also consider to enhance the fund’s effectiveness and transparency. As all charitable foundations operate in a tax exempt environment, the expectation is that there will be significant community benefit. This ‘good practice’ is by no means a static concept, and expectations will continue to evolve due to a quest for improvement within the philanthropic sector and changing public and community standards.

Administration

- Have a written Code of Conduct covering: disclosure obligations; actual, potential and perceived conflicts of interest; and the ability for directors to seek advice etc.
- Develop a succession planning framework for directors and have a Trustee Dossier (see page 19) to remind directors of their duties and responsibilities and an induction program for new directors
- As PuAF are required to fundraise, in addition to the disclosures made available through the reporting to the ACNC, PuAF’s may wish to publish an Annual Report, setting out the investment strategy and performance. The approach to portability (see page 18), frequency of sub-fund balance advice to donors, grant recommendation process and fees (trustee and investment management) is also information of relevance to potential sub-fund donors. As explained on page 7, PuAFs can only incur reasonable costs, so due care needs to be taken to ensure careful management of expenses to keep them in proportion to what is actually delivered to the community through grantmaking.

Investment

All investors face investment risks, PuAFs are no exception. However, because of their long-term time frame and tax exempt status, PuAFs investment profiles are different from superannuation or personal monies. Risks assessment should not be limited to possible falls in capital value. The danger of inflation eroding the purchasing power of fund distributions over time and the potential volatility of distributions also need to be considered.

An Investment Strategy linked to the fund’s objectives is required. PuAFs tax exempt status means the Investment Strategy should have a focus on after tax returns. Some directors may want to consider further refinements including adopting an ethical, socially responsible or sustainable investment approach. Under trust law the purpose of holding investments is to generate funding to support the objects of the trust. Certainly, investments contrary to the trust purpose should not be held. The long term horizons of perpetual foundations may warrant including an assessment of the sustainability of business practice as part of the investment criteria. Also investment restrictions without which there would be a risk of alienating critical financial supporters may be considered. However, the trustee must be careful not to introduce additional risk of “financial detriment” by applying a restrictive investment policy.

Distribution

Directors are encouraged when considering grantmaking, and should encourage donors making recommendations, to apply diligence, skill and care. To paraphrase Aristotle, “giving money away is easy, but giving it away effectively and having impact is a very different matter”. Critical components of effective grant making include issue research and knowing what interventions have been tried previously. Conducting due diligence on potential grant recipients is important including assessment of the entity’s structure and tax status, mission, the experience and capacity of key staff and directors, and the financial strength including diversity of income streams. Collaboration with other funders on major projects can enhance effectiveness by increasing the funding, experience and resources available.

Beyond whether money was properly spent, trustees should accept a responsibility to evaluate whether grants for significant projects have been effective in addressing the identified problems; sometimes this requires external evaluation by an independent party.

Philanthropy is more than just making and giving away money. PuAF directors can also bring expertise, knowledge, influence and voice for the benefit of grantee organisations.
Providing non cash benefit to eligible DGRs

PuAFs exist to support eligible DGRs. This is primarily done through providing monetary grants directly to eligible DGRs for general purposes or to support specific projects or programs. PuAF trustees are also permitted to further the purpose of the fund through directly providing loans, investing in social bonds and/or providing guarantees to reduce the cost of commercial lending where the counterparty is an eligible DGR entity. (Impact Investing is the term generally used to describe foundation investments that provide a social return as well as providing a financial return to an investor. Impact Investing is much broader than just ancillary funds and general information can be found on the website of Impact Investing Australia (http://impactinvestingaustralia.com/)

The difference between what the recipient pays and what would have otherwise been paid is the quantum of the benefit provided and can be recorded as a contribution towards the 4% minimum distribution. The 2016 amendments to Guideline 19.3 contained three additional examples of how PuAFs can provide such benefit to eligible DGRs, and how these activities can contribute to meeting the PuAF’s minimum granting obligation under Guideline 19.

19.3. A distribution includes the provision of money, property or benefits. If the fund provides property or benefits, the *market value of the property or benefit provided is to be used in determining whether the fund has complied with this guideline.

Example 1: If a public ancillary fund makes a gift of land to a public benevolent institution, it would include the market value of the land in calculating how much it has distributed.

Example 2: If a public ancillary fund leases office space to a deductible gift recipient at a discount to the market price, the fund is providing a benefit whose market value is equal to the discount.

Example 3: If a public ancillary fund invests in a social impact bond issued by a deductible gift recipient with a return that is less than the market rate of return on a similar corporate bond issue, the fund is providing a benefit whose market value is equal to the interest saved by the deductible gift recipient from issuing the bond at a discounted rate of return.

Example 4: If a public ancillary fund lends money to a deductible gift recipient at a discount to the interest rate which would be charged on a comparable loan sourced from a financial institution at arm’s length, the fund is providing a benefit whose market value is equal to the discount.

Example 5: If a public ancillary fund guarantees a loan provided by a financial institution to a deductible gift recipient, the fund is providing a benefit whose market value is equal to the discount to the interest rate which would be charged on a comparable arm’s length unsecured loan sourced from that financial institution.

Example 6: Continuing example 5, if the deductible gift recipient defaults on the loan and the fund is called on under the guarantee to make a payment to the financial institution on behalf of the deductible gift recipient, the payment is a distribution (being the provision of money, property or benefits).

Note 1: The Commissioner may approve safe harbour valuation methodologies to assist trustees in calculating the market value of a benefit provided to a deductible gift recipient – see Subdivision 960-M of the Income Tax Assessment Act 1997.

While this area of providing non-monetary benefit will continue to develop, it must be emphasised that for PuAFs, only eligible DGR entities can be the counterparty for rent subsidies, guarantees or below market loans. Advice should be taken in finalising documentation.

Where PuAFs have sub-funds providing non cash benefits to eligible DGRs through any of the options described above, this may complicate the management of sub-fund balances so extra care is needed.
Governance Failure

The trustee has ultimate responsibility for governance of each PuAF; in short, “the buck stops” with the trustee directors. They are responsible, accountable and potentially personally liable for the good management of the fund. Good internal processes obviously reduce the risk of compliance breaches. Directors should ensure none of the following occur, but of course must not limit their vigilance to only the following:

Administration
- **Misappropriation** of trust income or assets for the personal benefit of directors or donors
- Operating without a majority of responsible persons
- Failure to appropriately managed a conflict of interest
- Excessive expenses
- Failure to disclose a related party transaction in the Financial Statements
- Failure to have financial statements audited/reviewed by 28/2 for ACNC/ATO lodgement

Fundraising
- **Not fundraising** from the public
- Not having fundraising licenses in states where fundraising activity occurs
- Committing to a donor that their recommendations of grant recipients will be followed
- Inadequate record keeping for fundraising appeals
- Financial Statements not including required fundraising declarations and tables

Investment
- Failing to consider the benefits of diversification and importance of liquidity in drawing up and implementing the Investment Strategy
- Investing outside the parameters set out in the Investment Strategy
- Non arms-length related party transactions
- Using PuAF assets to support a related party business
- Carrying on a business through a PuAF.

Distribution
- Insufficient distribution – granting less than 4% of preceding 30 June value to eligible DGRs without specific approval from the Commissioner of Taxation.
- Granting to ineligible organisations;
  - Distribution to another PuAF or PAF
  - Distribution to non DGR charitable organisations; this includes situations where the money goes to the wrong part of an organisation (i.e. a grant goes directly to a school where the DGR Item 1 entity is the School Building Fund)
  - For non ex ITEF/extended definition PuAFs, distribution to non-charitable DGRs
- Redirection of grants through eligible DGR recipients to others pursuing different purposes.

For varying degrees of compliance breaches, the Commissioner of Taxation has powers to impose financial penalties on directors as set out in the Guidelines which are detailed on the next page. The ACNC Commissioner also has powers to impose penalties for breaches. Directors should take specialist advice immediately they think a possible breach of the Guidelines may have occurred, and move to rectify and then voluntary disclose to the ATO and ACNC.

Not achieving the desired outcomes from a PuAF’s investments or grants does not necessarily mean a governance failure. There will be times when a PuAF’s investments decline. The test is not whether, in hindsight, investment choices were not ideal, but whether prudent investment processes were in place and were followed, including proper diversification of the investment portfolio and annual reviews.
Administrative Penalties

Under the Guidelines there are Administrative penalties for various breaches of the Guidelines that can be levied by the ATO and must be paid by the trustee or the directors of the trustee company and specifically cannot be paid by the fund (TAA 426-120(4)). Under the Guidelines the fund cannot indemnify the trustee, or an employee, officer or agent of the trustee for dishonesty, gross negligence or deliberate act of breach of trust by the trustee, employees, officers or agents. Currently penalties are $180 per penalty unit as defined under Schedule 1 of the Taxation Administration Act 1953 and Crimes Act 1914.

The ATO has issued guidance how it will apply the penalty regime refer to the ATO’s PSLA 2014/1 (http://law.ato.gov.au/atolaw/view.htm?docid=%22PSR%2FPS20141%2FNAT%2FATO%2F00001%22)

For inadvertent first time mistakes; immediate rectification, self-reporting and taking steps to prevent a reoccurrence generally will be favourably taken into account by the ATO.

<table>
<thead>
<tr>
<th>Issue</th>
<th>Guidelines</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Failure to notify change of Deed</td>
<td>Clause 17</td>
<td>5 Units</td>
</tr>
<tr>
<td>Failure to distribute meet minimum distribution</td>
<td>Clause 19</td>
<td>30 Units*</td>
</tr>
<tr>
<td>Failure to rectify shortfall in distribution</td>
<td>Clause 19.5</td>
<td>10% shortfall</td>
</tr>
<tr>
<td>Failure to keep proper accounts</td>
<td>Clause 24</td>
<td>10 Units</td>
</tr>
<tr>
<td>Failure to provide accounts to the Commissioner on request</td>
<td>Clause 25</td>
<td>10 Units</td>
</tr>
<tr>
<td>Failure to prepare financial statements</td>
<td>Clause 26</td>
<td>10 Units</td>
</tr>
<tr>
<td>Failure to provide financial statements to ATO</td>
<td>Clause 27</td>
<td>10 Units</td>
</tr>
<tr>
<td>Failure to have accounts and compliance with Guidelines audited</td>
<td>Clause 28</td>
<td>10 Units</td>
</tr>
<tr>
<td>Failure to provide audit to the Commissioner</td>
<td>Clause 29</td>
<td>10 Units</td>
</tr>
<tr>
<td>Failure to have an Investment Strategy</td>
<td>Clause 30</td>
<td>10 Units</td>
</tr>
<tr>
<td>Failure to implement the Investment Strategy</td>
<td>Clause 31</td>
<td>15 Units</td>
</tr>
<tr>
<td>Breach of Investment limitations including related party transactions, pledging and borrowing, and collectibles</td>
<td>Clauses 33 -38</td>
<td>30 Units</td>
</tr>
<tr>
<td>Running a business in the fund</td>
<td>Clause 40</td>
<td>25% of profit</td>
</tr>
<tr>
<td>Uncommercial transactions</td>
<td>Clause 41</td>
<td>30 Units</td>
</tr>
<tr>
<td>Provision of benefit to founder, trustee, donor, director or associates thereof</td>
<td>Clause 42</td>
<td>Value of benefit</td>
</tr>
<tr>
<td>Acting trustee not following ATO instruction</td>
<td>TAA** 426-160</td>
<td>100 Units</td>
</tr>
<tr>
<td>Former trustee failing to provide books to Commissioner within 14 days</td>
<td>TAA 426-165(1)</td>
<td>50 Units</td>
</tr>
<tr>
<td>Former trustee failing to act as instructed by ATO</td>
<td>TAA 426-165(5)</td>
<td>50 Units</td>
</tr>
</tbody>
</table>

* If shortfall in distribution is greater than $1000, the shortfall must also be rectified which is an additional distribution in the year of rectification. ** Taxation Administration Act 1953.

In addition to the Administrative Penalties, the ATO and ACNC have the power to suspend or remove the trustee and to appoint an acting trustee where the Commissioner is satisfied the fund, or any trustee of the fund, has breached the Guidelines or Australian law. The Commissioner is also permitted to share PuAF compliance information with State Attorneys General who can instigate legal action if there is a suspected breach of trust or fiduciary duty to seek restitution (to restore the foundation to the position it would have been in had the breach not occurred).
## Annual Checklist

The following checklist is prepared to assist directors check off their compliance obligations to ensure the PuAF is properly managed and not in breach of the Guidelines.

<table>
<thead>
<tr>
<th>Administration</th>
<th>Ongoing</th>
<th>By Dec</th>
<th>By June</th>
</tr>
</thead>
<tbody>
<tr>
<td>Has there been any change to the Deed? Where required was ATO approval gained? Was the ACNC Commissioner notified?</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Have ACNC and ASIC been advised of any change in Directors or their addresses?</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ensure a majority of Responsible Persons</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are necessary state fundraising licenses in place?</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prepare annual financial statements</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ensure the Audit/Review covers both the Financial Statements and compliance with the PuAF Guidelines</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Confirm no benefit has been provided to the founder, major donors, the trustees, directors or associates.</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Approve accounts confirming comply with ACNC Act</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lodge ACNC/ATO Return</td>
<td></td>
<td>28/2</td>
<td></td>
</tr>
<tr>
<td>Lodge claim for refund of franking credits with ATO</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Investment</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ensure the Investment Strategy is current</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ensure all investment decisions been consistent with the Investment Strategy</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ensure any related party transactions were on commercial terms and are disclosed in Financial Statements</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Confirm sufficient liquidity for grants</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Confirm there has been no borrowing or pledging of fund assets and no purchase of restricted assets</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Review investment strategy and performance</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Distribution</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Based on previous 30 June valuation, set 4% minimum distribution level.</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Review grant commitments and set target level of new grants</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the minimum amount been distributed, usually at least 4% of the previous 30 June value been distributed?</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ensure all grants being paid to “eligible DGRs”</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are there any additional grant conditions that may require GST to be paid?</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ensure receipts been received from all recipients</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Portability and Winding up a PuAF

Portability has been introduced into the ancillary fund framework to allow trustees (and donors) increased flexibility in managing these community assets and to reduce red tape by allowing the transfer of ancillary fund assets between trustees. There is no change in the fact that donations have been irrevocably given to the community, but there is now some flexibility of seeking a change in structure as individuals and their family’s circumstances and capacities change. Where the PuAF is no longer the desired structure, the process for winding up set out in the trust deed must be followed.

Sub-fund portability
For PuAF sub-fund holders, portability provides two significant benefits:

- Given the entry level for PuAFs sub-funds are usually 10% or less of what is required to establish an individual PAF, it allows donors to start a giving vehicle with more modest sums and build up over a number of years before considering establishing a standalone PAF.
- It provides donors with a potential option if the performance of a PuAF disappoints, whether it be investment, client service or other factors, to request to move the sub-fund to another PuAF.

This is why portability is such an important feature for donors to consider when selecting a PuAF. Nevertheless, it is within the decision making powers of PuAF trustees to decide not to allow portability. If PuAF trustees decide not to make portability available, it is good practice to inform prospective donors about this policy before a sub-fund is established, as it is important for potential sub-fund holders to understand that this option will not be available to them. If a PuAF has a website, it is also good practice to outline this policy clearly on the website.

If the transfer to an existing Private or Public ancillary fund is desired, the sub-fund holder requests the PuAF trustee to apply to the ATO for approval. Prior to applying, the trustee needs to ensure:

1. The PuAF has a Portability clause as per Clause 4.8 in ATO Model Deed 2014. [https://www.ato.gov.au/Forms/Public-ancillary-fund-model-trust-deed/](https://www.ato.gov.au/Forms/Public-ancillary-fund-model-trust-deed/) If this clause is not in the Deed then it can be introduced by a Deed of Amendment and specialist advice should be taken. This amendment needs to be advised to the ACNC and ATO.
2. The sub-fund has met Guideline 19 to 19.6 on minimum grant distribution (4%) for the financial year in which the transfer is being sort.
3. The assets being transferred have not been received by way of transfer from another ancillary fund in the previous two financial years or if being transferred to a PAF no assets raised by public fundraising are being transferred
4. Directors are comfortable with the trustee and operations of the fund into which the assets are being transferred and should get a letter from the trustee of stating that it is a complying Ancillary Fund and indicating willingness to accept the transfer
5. The trustee then applies the ATO for a transfer and setting out compliance with 1-4 above.

PuAF Windup, transfer or cessation
Should the directors decide they no longer want to continue managing the PuAF, there are four options available:

1. By deed retire as trustee in favour of a new trustee company
2. Make large grants to eligible DGR(s) in accordance with the deed and spend out the PuAF. The trust will cease when there are no more assets; ensure all liabilities are paid.
3. Wind up the PuAF in accordance with its deed.
4. Apply to the Commissioner of Taxation to transfer the full net assets of the PuAF to become a part of another existing Public Ancillary Fund through portability process (see above).

The process of winding up or transfer needs to be carefully managed to ensure continued compliance with the Guidelines for the current year (including final audit of that year), payment of all liabilities and full capture of all assets (accrued franking credits are not available until after year end). Expert advice should be considered. Both the ATO and the ACNC must be advised if the PuAF ceases and the ABN cancelled.
Trustee Dossier

To assist directors, particularly first time directors, understand and subsequently remind themselves of their duties and responsibilities, it is recommended that each PuAF Director has a dossier as a basic reference document containing the following:

1. A copy of the Trust Deed any subsequent Amendments, declarations, Court Orders and copies of correspondence to/from the ATO approving the Fund. A copy of the trustee company constitution should also be readily available for reference;
2. A copy of the Public Ancillary Fund Guidelines 2011 as amended;
4. A copy of all policy documents endorsed by the trustee – particularly the Investment Strategy, and trustee Code of Conduct, and any delegation authorities;
5. Where investment managers have been appointed with investment mandates - details of the investment managers, the funds allocated to each, and the terms of the mandates;
6. A list of directors, with all disclosures of other organisations each director is involved with that may potentially give rise to a real or perceived conflicts of interest;
7. A copy of the Directors and Officers Insurance Certificate (if applicable); and
8. A copy of this Handbook.

The trustee dossier should be reviewed from time to time to ensure all documents are current.

There should also be an induction program for new directors, particularly those totally new to the director and trustee role, to ensure they are fully aware of their legal responsibilities and the operational procedures of the PuAF. Philanthropy Australia has some online training programs which complement the material provided in this handbook.
Attachment 1: Qualification to be the “Responsible Person”

Each PuAF must have a majority responsible persons as a directors or members of the controlling body. An ATO definition of a responsible person is set out in the ATO Model PuAF Trust deed with detail of the qualification requirements are set out in Guideline 14 below.

Responsible Person

an individual who:

1. performs a significant public function;
2. is a member of a professional body having a code of ethics or rules of conduct;
3. is officially charged with spiritual functions by a religious institution;
4. is a director of a company whose shares are listed on the Australian Securities Exchange;
5. has received formal recognition from government for services to the community;
6. is an individual before whom a statutory declaration may be made; or
7. is approved as a Responsible Person by the Commissioner.

Guideline 14

At all times, a majority of the individuals involved in the decision-making of the fund must be individuals with a degree of responsibility to the Australian community as a whole.

Note 1: Those individuals with a degree of responsibility to the community as a whole are generally known as ‘responsible persons’. This requirement is stricter than the requirement applying to private ancillary funds. The Private Ancillary Fund Guidelines 2009 require at least one of the individuals involved in the decision-making of the fund to be a responsible person.

Note: ‘Individuals with a degree of responsibility to the Australian community as a whole’ would generally include: school principals, judges, religious practitioners, solicitors, doctors and other professional persons, mayors, councillors, town clerks and members of parliament. Generally, individuals who are accepted as having a degree of responsibility to the community as a whole are known to a broad section of the community because they perform a public function or they belong to a professional body (such as the Institute of Chartered Accountants, State Law Societies and Medical Registration Boards) which has a professional code of ethics and rules of conduct. Individuals who have received formal recognition from the Government for their services to the community (for example, an Order of Australia award) will also usually have the requisite degree of responsibility.

14.1. An individual with a degree of responsibility to the Australian community as a whole includes an individual before whom a statutory declaration may be made.

Example: An individual before whom a statutory declaration may be made includes those who are licensed or registered to practise in a range of occupations such as a dentist, legal or medical practitioner; a nurse, a pharmacist, a bailiff, a bank officer or officer of a building society or credit union with 5 or more continuous years of service; a clerk of the court; a justice of the peace, a judge, a magistrate; a member of various professional associations including a member of Engineers Australia, a member of Chartered Secretaries Australia; a member of the various professional accounting associations in Australia; a marriage celebrant, mayors, town clerks and members of Parliament; a government employee with 5 or more years of continuous service; a teacher employed on a full-time basis at a school or tertiary education institution.
Attachment 2: Accessing a lower minimum distribution rate

The 2016 Guideline changes introduced a degree of flexibility to allow the Commissioner of Taxation to approve a distribution level lower than the 4% for a PuAF. The conditions suggest the Commissioner will apply this Guideline sparingly and guidance is expected from the ATO later in 2016.

The Assistant Treasurer in her announcement of the Guideline amendments flagged a potential further review of the minimum distribution framework.

"The Government will, at a future date, assess whether the Commissioner’s discretion to amend the minimum distribution rates is a viable long-term solution."

Accessing a lower minimum distribution rate for a financial year

19.7. Upon application, in the approved form, the Commissioner may reduce (but not to zero) the minimum annual distribution rate for a fund for a financial year. The reduction may be subject to any conditions the Commissioner thinks fit.

19.7.1. Recognising the purpose and object of the fund, the Commissioner must only reduce the minimum annual distribution rate if the Commissioner is satisfied that there are circumstances that warrant the Commissioner reducing the rate.

19.7.2. The Commissioner may reduce the minimum annual distribution rate at any time, including after the relevant financial year has finished.

19.7.3. In determining whether to reduce the rate and what the reduced rate should be, the Commissioner must have regard to:

- the general market conditions in Australia; and
- the past, current and expected levels of returns from the fund’s investments; and
- the long-term impact on the assets of the fund from not reducing the rate for a financial year; and
- the level of distributions made by the fund in previous financial years; and
- the investment strategy and distribution strategy of the fund; and
- the size of the fund; and
- the compliance history of the fund and the trustee; and
- the fees and expenses of the fund; and
- the terms and other circumstances relating to any gift to the fund under a will; and
- any other matter the Commissioner considers relevant.

Note 1: Having regard to the general market conditions in Australia, could include reviewing the Reserve Bank of Australia’s target for the cash rate (which is the overnight money market interest rate), the base interest rate, current returns of other ancillary funds, and the performance of approved stock exchanges. It could also include examining changes in conditions over time.
Attachment 3: Glossary of Terms

Acquittal
An acquittal is a report showing the grant-maker how the grant was spent. It will include information on the expenditure (inputs) of the as well as information on what happened as a result of the grant (outputs) and whether it achieved its aims (outcomes).

ACNC
Australian Charities and Not-for-Profits Commission

ACNC Registered Charity – previously referred to as a Tax Concession Charity (TCC)
A Registered Charity is an entity which has been registered by the ACNC as having charitable purposes which is a precondition for being endorsed for income tax exemptions by the ATO (Previously referred to as a Tax Concession Charity (TCC)). It is important to note that not all organisations which are tax exempt are Registered Charities. Also, not all DGRs are Registered Charities. An entity’s tax status can be checked using ABN Lookup. All charities are also listed on the ACNC Register (unless privacy has been approved).

ATO
The Australian Taxation Office

Bequest
A bequest is a gift left in a Will, sometimes referred to as a testamentary gift. A charitable bequest can be a gift of money or of property (including shares, real estate or art works) to a charity or a charitable foundation. There are CGT concessions for testamentary gifts to DGR entities including PuAFs.

Charity
The word "charity" can be used to describe a type of organisation or a concept. For federal purposes the meaning of charity is defined by the Charities Act 2013. This is broadly consistent with the Common Law interpretation that applies in state jurisdictions. For practical purposes charities are generally regarded as organisations registered with the Australian Charities and Not-for-Profits Commission.

DGR
Deductible Gift Recipient. An ATO classification of an organisation or fund that enables donors to that organisation or fund to claim an income tax deduction (subject to eligibility criteria).

DGR Item 1 – There are a number of classifications of entities eligible to be endorsed as DGR Item 1 by the ATO including Public Benevolent Institutions, Health Promotion Charities, Public Universities, Public Hospitals, organisations on the Register of Environmental or Cultural Organisations and public funds of Charitable Institutions. Other organisations are specifically listed in tax legislation. Public Ancillary Funds can only distribute to DGR Item 1s (but not all DGR Item 1s are eligible for all PuAFs to support, see page 11.)

DGR Item 2 – Private Ancillary Funds and Public Ancillary Funds are DGR Item 2s. Ancillary Funds cannot distribute to another DGR Item 2.

Deductible Contribution
A contribution of money or property in relation to a fundraising event (including galas, balls, dinners) which provides the donor with a minor benefit. https://www.ato.gov.au/non-profit/gifts-and-fundraising/running-fundraising-events/conditions-for-a-tax-deductible-contribution/
Donation Receipt
To ensure donations to a PuAF qualify for donor tax deductibility under ITAA 1997, the PuAF’s receipt must include:

- the name of the donor
- the name and ABN of the PuAF
- the date and the amount donated
- that it was a gift.

Donation of Property
Any donation of property (which includes listed shares and managed funds, land and buildings and other physical assets) of a value greater than $5,000 must be valued by the ATO for the donor to be eligible for an income tax deduction. The ATO form to request a valuation is available [https://www.ato.gov.au/uploadedFiles/Content/SME/downloads/PGH_16806_CertDon_PhilProgram.pdf](https://www.ato.gov.au/uploadedFiles/Content/SME/downloads/PGH_16806_CertDon_PhilProgram.pdf)
It is expected that the process for donated listed shares and public managed funds will be amended later in 2016/17 to simplify the valuation process for these assets.

Eligible DGR
This term is used throughout this Handbook to describe organisations that are able to receive distributions from a PuAF, remembering it varies depending on the individual PuAF deed, refer Page 11.

Extended definition of charity
An option (not available for ACT, NT or TAS domiciled PuAFs) in PuAF deeds to allow a PuAF to support not only DGR Item1 charities, but also DGR Item1s that are government entities, that would be charities but for the link to government, i.e. State Museums, Libraries and Art Galleries and Public Hospitals.

Fiduciary Duty
Common law duty of the highest standard of care and in respect of charitable trusts, for trustees to exercise rights and powers to a manage a trust in good faith for the benefit of charitable purposes of the trust and not in their own interest.

Foundation
The word ‘foundation’ does not have a legal meaning, but is generally used to refer to an entity, usually a trust, which holds and invests money, and distributes grants for community benefit.

Franking Credits/ Imputation Credits
Under Australian tax law, tax exempt charities are entitled to receive cash refunds of franking credits attached to dividends received from Australian companies. Application to the ATO needs to be made using the prescribed form NAT 4131 after the end of each financial year.

Grant
For PuAFs a grant is a distribution, usually of money, to an eligible DGR. Grants can be given for a particular project or purpose or simply to support the eligible DGR’s ongoing operations.

Indictable Taxation Offence
A taxation offence that is punishable by imprisonment for a period exceeding 12 months is, when committed by a natural person, is an indictable offence. **Taxation Administration Act 1953 - Sect 8ZA**

ITAA97 and ITAA36
Income Tax Exempt Fund (ITEF)
A type of Ancillary Fund created between 1 July 2005 and 31 December 2013 to enable PuAFs to also support certain non-charitable DGRs under the relevant state charity legislation. NSW, Queensland and WA allowed any DGR Item 1 recipient to be eligible while Vic and SA restricted additional eligible entities to being government entities that would be charities but for their links to government. The 2013 Charities Act abolished ITEF category, but granting provisions were grand-fathered, see page 12.

Impact Investing
Generic term for investments made by philanthropic entities to support a charity or social business with the intention to generate measurable social or environmental impact as well as a financial return.

Model Deed
The ATO Model PuAF Deed can be found https://www.ato.gov.au/Forms/Public-ancillary-fund-model-trust-deed/

Penalty Unit
Measure used to calculate the amount of a penalty for a breach as set out in the Guidelines, see page 16. Currently the penalty unit is $180 as defined under the Crimes Act 1914.

Public Ancillary Fund (PuAF)
Public Ancillary Fund is a tax deductible fund for public fundraising that cannot be controlled by one family.

Private Ancillary Fund (PAF)
Formerly known as Prescribed Private Funds [PPFs], Private Ancillary Funds (PAFs) are a tax-deductible private foundation for individuals, families and companies.

Private Charitable Trust
A private charitable trust is established via a Trust Deed with a charitable purpose. While it can be income tax exempt, donations to such trusts are not tax deductible.

Responsible Person
An individual with broad community responsibilities as defined by the ATO. The majority of people serving on the board or controlling body for each PuAF must meet the responsible person requirement. For qualification details see page 20. Note: the ACNC use the term “responsible person” to mean all members of the board or controlling body of any charity so is different.

Receipt
Refer Donation Receipt.

Social Impact Bond (SIB) – Social Benefit Bond
A social impact/benefit bond is a relatively new financial instrument in which private investors provide up-front funding to service providers to deliver improved social outcomes. If these outcomes are delivered, there are cost savings to the government that provide the return to investors.
Standard Grant Conditions
If the grant agreement provides no material benefit to the grant-maker and specifies only the standard type of grant conditions, then the recipient should not be subject to GST in respect of the grant. The ATO’s Goods and Services Taxation Ruling 2012/2 (https://www.ato.gov.au/law/view/document?docid=GST/GSTR20122/NAT/ATO/00001) provides guidance in terms of whether GST is payable on a grant. It is generally accepted that the inclusion of the following terms in a grant agreement would not make GST payable (however any additional terms beyond these could make GST payable depending on the circumstances), if in doubt take advice:

1. Specifying that the grantee use the grant funds for a particular purpose
2. Setting the date for completion of the project funded by the grant
3. Acknowledgement of the assistance of the grant maker in any published or displayed material
4. Provision of a report on the use of the grant
5. Requiring repayment of any unused amounts or seek permission to apply funds elsewhere
6. Requiring separate management accounts to be set up for the grant

Socially Responsible Investing (SRI)
An investment strategy that seeks investments that are considered socially responsible because of the nature of the business being invested in. Common themes of SRI include avoiding investments in companies that produce or sell products that could be considered harmful to the environment or society (e.g. gaming, alcohol, tobacco, child/employee exploitation) and seeking out companies that are activity engaged in social responsibility and sustainability and/or other socially beneficial endeavours.

Testamentary Charitable Trust
A testamentary charitable trust is established by a will with a charitable purpose. While it can be income tax exempt, donations to it are not tax deductible.

Tax Concession Charity (TCC) - see ACNC Registered Charity

Trust
In simple terms, a trust describes a fund or property legally held or administered by a Trustee for the benefit of others. There are many different types of trust, not all of which are for the public benefit. In philanthropic terms, a charitable trust is the legal vehicle used to hold and invest money or property which is disbursed for the public benefit for charitable purposes.

Trustee
A Trustee is a person or entity managing a trust. There are many types of trust, including charitable trusts. Trustees of charitable trusts in Australia may be individuals, groups of people or organisations. The types of people who are Trustees will depend on the legal structure of the trust. The trustee of any PuAF settled since 1 October 2009 must be a company or incorporated association.

Trustee Company
A company acting as Trustee for a Trust.

Licensed Trustee Companies
Corporations that are legally authorised under the Corporations Act 2001 (and before that state Trustee Company legislation) to serve as executors of wills, as Trustees of charitable and non-charitable foundations, and provide other executor and trustee services.
Attachment 4: Legislation

Public Ancillary Guidelines 2011 as amended

PS LA 2014/1: Administration of penalties for failure to comply with Ancillary Fund Guidelines

Australian Charities and Not for Profit Commission Act 2012,
Australian Charities and Not-for-profits Commission Amendment Regulation 2013
(No.1) Governance and Reporting Requirements

The Charities Act 2013
Charities (Definition of Government Entity) Instrument 2013

Tax Determination TD 2004/23 on “sub-funds”;

State Trustee and Fundraising Acts

Victoria
Trustee Act 1958; Fundraising Act 1998, Fundraising Regulation 2009

NSW
Trustee Act 1925; Charitable Fundraising Act 1991, Charitable Fundraising Regulation 2008

Queensland
Trusts Act 1973; Collections Act 1966, Collections Regulation 2008

SA
Trustee Act 1936; Collections for Charitable Purposes Act 1939

WA
Trustee Act 1962; Charitable Collections Act 1946, Street Collections Regulations 1999

Tas
Trustee Act 1898; Collections for Charities Regulations 2001

ACT
Trustee Act 1925; Charitable Collections Act 2003, Charitable Collections Regulation 2003

NT
Trustee Act 1907;
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