Private Ancillary Fund (PAF) Trustee Handbook

Third edition

By David Ward, February 2020

Supported by

Private Ancillary Funds (PAFs) have become a major vehicle for individual and family philanthropy. Since introduction in 2001 as Prescribed Private Funds (PPFs) almost 1800 PAFs have been established with total funds now approaching $10 billion. The key legislative document is *Taxation Administration (Private Ancillary Fund) Guidelines* 2019 which has now replaced the earlier 2009 version, that was amended in 2016.

This Handbook sets out what is required to operate a PAF under the Guidelines and at law. It 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 Third Edition 2016. 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 may not be necessarily comprehensive, complete or up to date at time of reading. Some statements in the booklet are subject to legal uncertainty.

Private Ancillary Fund (PAF)

Trustee Handbook

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Background

Philanthropic trusts have existed in Australia for more than a century. Charitable trusts have been generally income tax exempt and historically had estate planning advantages. However, it was not until 1963 with the introduction of Public Ancillary Funds that a form of charitable trust allowed for income tax deductible donations. These funds require control by a majority of 'responsible persons' and have a public fund-raising obligation. Up until 2001 private or family philanthropy was not as tax efficient as similar structures elsewhere, particularly in the UK and the USA.

Following a 1999 report on how to foster philanthropy, an initiative to create a new form of philanthropic structure, the Prescribed Private Fund (PPF), was announced by the Howard Government in 2001. The then Prime Minister stated that "*This measure will open up a new vehicle for private philanthropy, similar to that existing in the United States, so that families and individuals can donate to a trust of their own, which then disburses funds to a range of other gift- deductible recipients*." (Prime Minister's Press Release 30 March 2001.)

Key features of PPFs included:

- tax deduction for donations and exemption from ongoing income tax;
- family control with no public fundraising requirement (in fact a ban on public solicitation).

To facilitate granting to Government "charity like" entities with DGR status, provision for PAFs to apply to become an Income Tax Exempt Fund (ITEF) was introduced in 2005. State legislation to give effect to this change (albeit slightly differently) was passed in NSW, Victoria, Queensland, WA and SA. ITEFs were removed as a philanthropic structure in 2013 by the Charities Act 2013 but are still relevant as the wider granting provisions for ITEFs in place at the time, have been grandfathered for those PAFs.

Following extensive consultations, new guidelines were introduced for what are now called Private Ancillary Funds (PAFs) came into force from 1 October 2009. The major changes from PPFs to PAFs were:

- the trustees of new PAFs must be corporations (existing individual trustees of PPFs may continue)
- the complicated Accumulation Plans were replaced by a 5% minimum distribution requirement
- PAFs are required to have a formal Investment Strategy
- annual audit of both the Financial Statements **and** compliance with the Guidelines required
- the Commissioner of Taxation was given increased powers to tighten the compliance regime including administrative penalties, and ultimately suspending or removing the trustee.

The Australian Charities and Not for Profits Commission (ACNC) Act 2012 introduced a dedicated regulator for the entire charity sector. Governance standards and reporting obligations apply to the sector, including charitable PAFs. However, recognising the additional reporting requirement to the ATO and the restrictions on seeking donations provisions to protect PAF donor privacy were included as part of the ACNC Regulations.

In May 2016 a number of adjustments were made to the PAF Guidelines 2009 in response to operational issues raised by the sector. The major changes were:

- portability between PAFs and other ancillary funds was introduced
- greater clarity was provided around opportunities for providing benefit to eligible DGRs
- while the 5% minimum distribution retained, discretion was given to ATO Commissioner to approve a lower level in some circumstances.

In September 2019 ahead of the expiry of the PAF Guidelines 2009 on their tenth anniversary, the PAF Guidelines 2019 were issued. As foreshadowed by Government, the 2019 Guidelines were a redrafting with some restructuring and rewording to improve navigation and clarity, rather than a substantive change.

Legislation Relating to Private Ancillary Funds

PAFs are a vehicle for private philanthropy with significant tax concessions so must be open, transparent and accountable to the public through meeting the governance and reporting obligations of the ATO and ACNC.

The Taxation Administration (Private Ancillary Fund) Guidelines 2019 (the Guidelines) made under the Taxation Administration Act 1953 is the primary legislative document for the operation of PAFs. It is the taxation aspects and family control that make PAFs an attractive vehicle for individual, family and corporate philanthropy.

PAFs are (mostly) charities registered with ACNC. Therefore, they are able to access charity Income tax exemptions and the ability to reclaim franking credits attached to dividends received from Australian companies. So, in addition to complying with the Guidelines and related federal income tax law, PAFs must also comply with the ACNC Act, which regulates the entire charitable sector. PAFs must be established as trusts so must also comply with the requirements of the relevant state trust legislation (which is broadly consistent across all states) and common law particularly as it relates to fiduciary responsibilities.

The trust deed is the PAF'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 may need to be approved by the ACNC or ATO. Any amendments must be lodged with the ACNC. Model Deeds for new PAFs and other ATO information can be found on the ATO website, https://www.ato.gov.au/Forms/Private-ancillary-fund-model-trust-deed/

The most important legislation affecting PAFs are:

- Taxation Administration (Private Ancillary Fund) Guidelines 2019;
- 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;
- (No. 2) PAF privacy (this may be updated to improve administration);
- The Income Tax Assessment Acts of 1997 & 1936 and Taxation Administration Act 1953;
- The relevant State Trustee Act; *Trustee Act 1925 (NSW). Trustee Act 1936 (SA). Trustee Act 1958 (Vic). Trustees Act 1962 (WA). Trusts Act 1973 (Qld). Trustee Act 1898 (Tas). Trustee Act 1925 (ACT). Trustee Act 1907 (NT);*
- Charities Act 2013 (Commonwealth definition of charity including for income tax purposes); and
- Charities (Definition of Government Entity) Instrument 2013.

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 PAFs 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 16. Other legislation may also impact on a PAF'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 PAF 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 PAF. The trustee of all new PAFs must be a company, an incorporated association, a Licensed Trustee Company, or (less likely) a combination of the above. Most PAFs have a shelf PTY LTD company set up to be the trustee. This is different to the earlier Prescribed Private Funds (PPFs) and other charitable trusts that allow individuals to be trustees; although PPFs existing in 2009 with individual trustees can continue with individual trustees (including replacing them).

As the majority of PAFs have a single corporate trustee, throughout this Handbook reference to "the trustee" also applies to all trustees if there is more than one. 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 jointly and severally liable for the proper execution of the trustee's duties under law.

Most of the directors of a family PAF trustee company will be family members and/or business associates of the founder. Corporate PAF Directors are mostly senior executives. Directors cannot be minors, mentally incapacitated, undischarged bankrupts, have been convicted of an indictable taxation, fraud or dishonesty offence or who have been disqualified from being a director by ASIC or ACNC. Trustee company shareholders are usually only family members (and who should inherit these shares is an important estate planning issue).

Every PAF must have at least one individual director who has a degree of responsibility to the community as a whole and who is independent from the founder, to be the ***responsible person***[1]. This is often the family lawyer or accountant or family friend who belongs to a professional association with a code of ethics. The full details of who qualifies is set out in on page 19. To be independent the *responsible person* cannot be the founder, a donor of more than $10,000, a family member or associate of the founder or such a donor or, without the approval of the ATO Commissioner, an employee or agent of the founder, major donors or a family member. This does not preclude a person linked to the founder by business (such as the founder's accountant or lawyer) being the '*responsible person'* although someone acting under a Power of Attorney for the Founder is an 'agent' therefore cannot also be the *responsible person*. The reference to 'agent' is to be limited to acting with respect to the PAF. The duties and liabilities of the *responsible person* are the same as other directors of the trustee company. However, the Guidelines do explicitly require him/her to be **active** in the on-going management of the PAF*,* this particularly includes participating in the approval of the annual financial statements and the investment strategy and oversite of the grantmaking. It cannot be a passive "for looks only" role. If the independent *responsible person* resigns, retires or is not able to be actively involved in the PAF, the Guidelines mandate that the trustee cannot exercise any power or discretion, other than on pressing decisions to protect trust assets or make grants to meet the Guidelines, until a new director who qualifies as a *responsible person* is appointed.

Where a PAF has seriously breached the law or the Guidelines, the Commissioners of Taxation and the ACNC each has the power to suspend or remove a corporate trustee and appoint an acting trustee.

Directors of PAFs are generally not paid. ASIC Special (charitable) Purpose Companies, specifically do not allow payment of directors' fees. Directors direct expenses relating to the PAF may be reimbursed but 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' (the explanatory material referencing trustee legislation and the Model Deed suggests a maximum of 1.056% of fund value). Where the deed is silent, **only** Licensed Trustee Companies can be paid trustee fees.

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[1] The ACNC uses the term "responsible person" with a different meaning i.e. applying to **any** director of a charity

The Responsibilities of the Trustee

The trustee has the ultimate responsibility for the governance of the PAF. Directors of the trustee are accountable for directing the affairs of the PAF to ensure it is well run, compliant with its deed, the law and the Guidelines, and supporting the purpose for which it was established. Directors have a fiduciary responsibility to protect and prudently invest trust assets. They must exercise their powers with integrity and good faith. Directors must show care, diligence and skill in managing the affairs of the trust and avoid any personal conflict of interest or real possibility of actual or perceived conflict of interest. PAFs must be run solely for the benefit of eligible DGRs as set out in the deed and must **not provide any personal benefit** to the founder, trustee or any of their associates. 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 except in accordance with the provisions of the trust document; 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, PAF directors are required to meet the five ACNC Governance Standards to ensure:

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

Standard 5 duties of responsible persons (in this ACNC context means **all** directors not just the independent director) are set out in more detail and are 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 summarises these as "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, a detailed consideration of trustee duties can most usefully be achieved using a framework of the three core areas of PAF activity. The following sections set out in detail the legal requirements of trustees of PAFs; what directors **must** do as a minimum.

- **Administration**
  The processes of managing the fund to meet its legal obligations.
- **Investment**
  The investment of fund assets to protect and grow the real value of the fund.
- **Distribution/Grantmaking**
  The distribution or granting by the fund to eligible entities.

The Duties of the Trustee:

Administration

Competent administration is central to the good governance of every PAF. Trustees have a fiduciary responsibility for the stewardship of public money. As such they must ensure both the principles of good governance are met as well as adhering to the detail of the PAF Guidelines, the ACNC governance standards for a registered charity, trust and common law.

Activity

- The PAF must pursue its purpose as a not for profit and only operate in Australia (but can support eligible charities that operate outside Australia)
- Directors are required to avoid **conflicts of interest** and real possibility of actual or perceived conflicts. Any potential conflicts must be disclosed and recorded and the affected director must absent him/herself from that specific decision.
- Any transaction between the PAF and a director of the trustee, the founder or associates thereof, must be at arms' length and on commercial, or more favorable to the PAF, terms. **No benefit can be provided to the related party.**
- PAFs **cannot solicit** funds from the public. Parties not associated with the founder cannot donate to the PAF in aggregate more than 20% of the value of the fund in any one year.
- All related party donations of property (including shares) need to be disclosed in the Financial Statements. (it is the responsibility of the donor to ensure ATO valuation procedures are followed to have assets valued for deductibility purposes, see Glossary).
- All **expenses** charged to the PAF must relate to PAF activity and must be reasonable for the specific activity. Total expenses must be reasonable relative to the size of the PAF. Investment expenses must also be reasonable relative to the funds under management. In particular care must be taken over related party expenses to ensure no benefit is provided to the founder, family or associates.
- Where the PAF is charitable, **franking credits** with Australian company dividends can be claimed in cash from the ATO after the end of each financial year. This adds substantially to a PAF's income.
- Deeds generally can be amended by the Trustee by deed. Some amendments need to be approved by the ATO Commissioner and any deed amendment needs to be reported to the ACNC.
- The **resignation or appointment** of directors requires advising the ACNC and ASIC.
- When registered for **GST** a PAF can claim reduced input tax credit for GST on investment management and administration activity but not on tax and audit services or some other non-financial services. If in doubt get specialist advice.

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. PAF assets must be kept separate from other 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, they should insist on getting legal advice, and recording their dissenting vote. If the issue goes beyond a single matter of judgement, a director should reconsider their position. The **Responsible Person** must attend most meetings, specifically those approving the Financial Statements, reviewing the investment portfolio and to ensure compliant grantmaking; their attendance needs to be recorded in meeting minutes.
- **Key documents**; the PAF Deed (including the declaration relating to Government Entities where applicable), trustee company Constitution, Investment Strategy, ATO and ACNC Returns, Minutes, etc. should be kept safely. Financial Statements must be kept for at least 5 years.

- Proper **receipts** need to be issued for all donations to PAFs (see Glossary).
- 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 both <$1m when a review is enough, but only if the Deed allows review. Any related party transactions (other than gifts of **money** into the PAF) must be disclosed in the Financial Statements.
- The audit/review must confirm compliance with the Guidelines by the PAF.

Reporting

- PAFs are required to lodge an annual ancillary fund return to the ATO by 31/1. For most PAFs being registered charities this is done as part of the Annual Information Statement to the ACNC.
- From 2017 **Common Reporting Standard** (CRS) the single global standard for the collection, reporting and exchange of financial account information on foreign tax residents, applies in Australia. Under it, banks and other financial institutions will collect and **report** to the ATO financial account information on non-residents. PAFs are captured. PAF Directors need to apply themselves each year to the CRS and decide whether their PAF is required to report. There are several elements of the decision tree but importantly as a PAF can only make grant payments to Australian DGR1 entities these are not Reportable Accounts under the CRS, so no report is required. https://www.ato.gov.au/Non-profit/Statements-and-returns/Not-for-profits-and-the-Common-Reporting-Standard/
- The trustee company (separate from the PAF Trust) is required by ASIC to make an annual solvency statement and confirm the Annual Statement details, and pay the fee.

The Duties of the Trustee:

Investment

The trustee of any trust must manage trust assets for the purpose of the trust (in a PAF's case to benefit eligible DGRs). 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 PAF 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. Directors can take outside **advice** on investment matters and may appoint an investment manager to execute the investment strategy, which can be paid for by the fund. A review of the investment strategy and investment portfolio is required at least annually, examining performance of the entire portfolio and individual assets, including:

- Performance relative to fund Investment Strategy,
- Ensuring compliance with Investment provisions of Guidelines (see below), and
- Documenting action taken to implement the Investment Strategy and Review.

Prudent Person Obligations

State trust law and the Guidelines require the trustee to act prudently having regard to inter alia:

- The benefits of **diversification** of trust investments
- Investing not speculating
- The **purpose/objectives** of the fund, including the minimum required distribution
- 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 status of PAFs enables the refund of franking credits which enhances returns from Australian shares
- The **liquidity** of the investments having regard to cash flow including the timing of imminent and future distributions
- The **costs** of investment alternatives and transactions, and
- The terms of any gift to a fund
- Any **directions** or **restrictions** in the deed, or investment strategy or any Court Orders

Investment Limitations

- PAFs **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
- 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 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 any investment, in particular those connected with founders, donors, directors or their associates.
- **Collectables** cannot be purchased and any donated must be sold within 12 months.
- The fund can only **borrow limited amounts in very limited circumstances** (e.g. to fund distributions or to settle certain transactions) for short terms.
- The trustee cannot give **security** over fund assets and must not give a guarantee other than for the benefit of eligible DGRs, such as a guarantee of a loan to Public Benevolent Institution.

Distribution/Grantmaking

Providing grants to eligible DGRs to achieve a positive social impact is the core activity of a PAF. Grantmaking can range from funding organisations providing immediate relief to those afflicted by poverty, sickness or disadvantage, to advancing education or the fine arts, or 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. Part of the joy of having a PAF is working with family members to decide how, for what and to whom grants should be made.

Quantum

- Under Guideline 15 PAFs must distribute at least 5% of the net value of the fund at 30 June during the following financial year with a minimum annual distribution of $11,000. The only exception is where expenses of the fund are being met from outside the fund in which case the 5% minimum applies. The ATO Commissioner has authority to approve a lower minimum distribution amount for a particular year in certain restricted circumstances for instance when a low yielding illiquid asset is donated to a PAF as a testamentary gift. The matters the Commissioner must consider are set out on page 20.
- Distributions are what is **paid out** each year to eligible entities. 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. Creating a provision for future grants does not meet the distribution requirement.
- Distributions are what is paid to eligible entities as grants and do not include expenses of the PAF.
- While most distributions are of money, PAFs 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 PAF's distribution. This type of support is further explained on page 10.

Recipients

- **PAFs** can only distribute to **eligible entities** as defined in each Deed. Ensuring only eligible organisations receive distributions is one of the trustee's key compliance duties.
- Only **DGRs Item 1** are eligible entities to receive a grant from a PAF. As a tax deduction has been given on donations to PAFs they can only grant to organisations that can receive deductible donations i.e are also **DGRs.** In effect, PAFs 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).
- The DGR Item 1 must also be **charitable** or, if the PAF has an extended definition of eligible entities in its Deed and/or has made the necessary declaration, eligible entities include government DGR Item 1s which would be charitable if not a government entity (and some NSW, WA or Qld PAFs established before 2014 can support any income tax exempt DGR Item 1 – this provision has been grandfathered).
- In **no** circumstances can PAFs distribute to other PAFs or Public Ancillary Funds (even though they are DGRs). This is because if they did the money would be circulating from one fund to another (and potentially back again the following year) and therefore not having the intended beneficial impact on the community. Ancillary Funds can be recognized as they are listed on ABN Lookup as **DGR Item 2**.
- From 2014 all new PAFs have two choices for eligible entities:
  - **Option 1:** DGR Item 1s that are charities
  - **Option 2**: DGR Item 1s that are charities **or** DGR Item 1 government entities that would be charities but for their connection to government.
- There are three tools to assist establishing whether an organisation is an eligible entity.
  - **ABN Lookup:** Potential recipient organisations can be searched for by name on the Australian

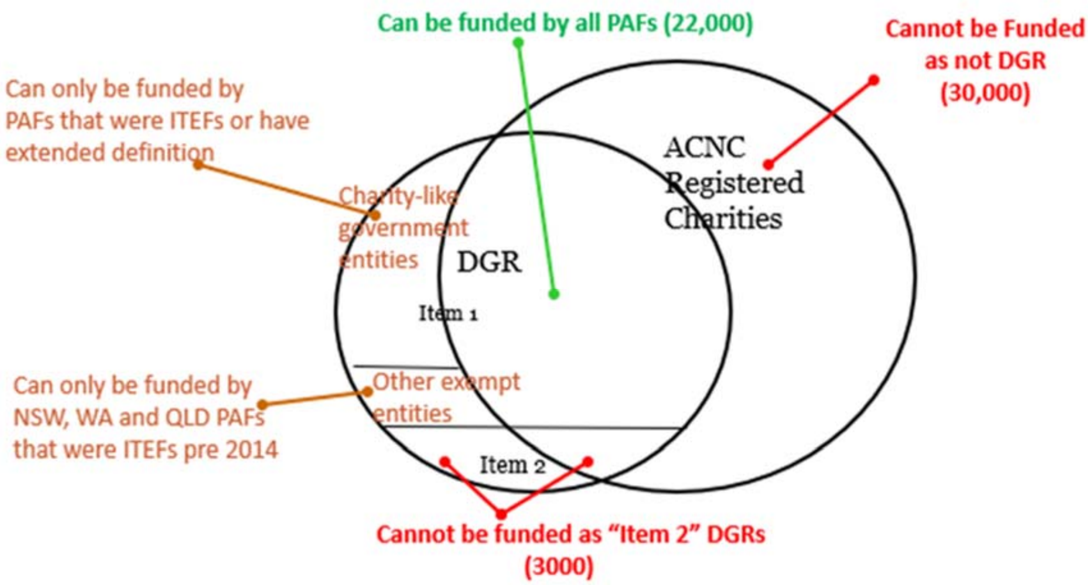
Business Register (ABR) using the ABN Lookup website: www.abn.business.gov.au (although there can be delays in updating information). This will indicate whether it is a DGR Item 1 or it manages a fund or institution that is DGR Item 1 (note all distributions from PAFs must go to the entity or fund that is the DGR Item 1 i.e. A school Building Fund and not to the controlling entity being the school). ABN Lookup will often indicate whether it is a charity or Government entity.

- **ACNC Register** will confirm those DGRs that are also registered charities.
- **ATO DGR Endorsement Notice issued to the charity** which is reassuring for larger or multi-year grants and for those where details on ABN Lookup are unclear.

Government entities may also have a letter from the ATO or ACNC confirming their "would be charitable but for government connection" status. If not sure, seek expert advice.

The discussion on the previous page on eligible entities can be summarised in this diagram.

PAF Eligible Entities



Or in Table form (assuming no other restriction in deeds)

Type of PAF	Eligible Recipients
Deed restricted to benefiting DGR charities only, all dates where no declaration has been made	DGR Item 1 and Charity registered with ACNC
Extended definition of eligible entity in deed post 1 January 2014 in NSW, WA, SA and Qld or Vic where declaration has been made – this option not possible for Tas, NT or ACT PAFs	DGR Item 1 and Charity registered with ACNC and DGR Item 1 Government entities that would be charitable but for being a government entity
Was an ITEF before 31/12/2013 governed by Victorian law	DGR Item 1 and Charity registered with ACNC and DGR Item 1 Government entities that would be charitable but for connection to government
Was an ITEF before 31/12/2013 governed by NSW, QLD or WA law	Any DGR Item 1 which is income tax exempt whether a charity, government entity or other

Directors should be able to confirm what type of PAF they are by reviewing their PAF's deed and whether or not the trustee has made the necessary declaration. If needed a declaration and deed amendment can generally be made to include government entities with DGR Item 1 as eligible entities. Legal advice should be taken. Amending deeds may need ATO consent and they and declarations will need to be lodged with ACNC.

Grant Management

- Checking a potential recipient charity is up to date with their ACNC obligations and not subject to any discipline measures can be easily done on the ACNC website https://www.acnc.gov.au/. For charities sending money or operating programs outside Australia, PAFs should also confirm that the additional control and reporting requirements under the ACNC External Conduct Standards, to protect vulnerable individuals, guard against money laundering and financing of terrorism, are in place. https://www.acnc.gov.au/tools/topic-guides/external-conduct-standards
- **Standard Grant Conditions**. Where a PAF is making a gift and no material benefit is provided to the PAF or its associates, the ATO accepts the recipient will not be subject to GST in respect of the gift. 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 what is a gift, and it is generally accepted that the inclusion of the following terms in a grant agreement means it is still a gift and GST is not payable
    - Identifying the project for which the grantee will use the grant funds (the recipient can only apply funds received because of its DGR status to the purposes for which DGR was given)
    - Setting a date for completion of the project funded by the grant
    - Acknowledgement of the assistance of the grant maker in any published or displayed material
    - Provision of a report on the use of the grant
    - Requiring separate management accounts to be set up for the grant

  Any additional terms beyond these could make GST payable depending on the circumstances
- **Receipts** need to be obtained from grant recipient as evidence of distribution to eligible entity and will be required by the PAF's Auditor.
- For larger grants and multi-year grants **reports** should be sort from the recipient to ensure the funds are being applied to the intended use for community benefit.

Providing non-cash benefit to eligible DGRs

PAFs exist to support eligible entities. This is primarily done through providing monetary grants directly to eligible DGRs for general purposes or to support specific projects or programs.

PAF Trustees are also permitted to further the purpose of the PAF through providing no or low interest loans to **eligible entities**, investing in social bonds issued by **eligible entities** and/or providing guarantees to reduce the cost of commercial lending for the benefit of **eligible entities**. All such activity falls within the fulfillment of the PAF's purpose, but also is within the concept often referred to as "Impact Investing". However, this term has a much wider scope covering all investments that provide both a social return and financial return to an investor. Impact Investing therefore is much broader than just ancillary funds and general information can be found at Impact Investing Australia, http://impactinvestingaustralia.com/.

Where the counterparty is an **eligible entity**, the "benefit" provided can be taken as a contribution towards the PAF's 5% minimum distribution. The Guidelines 15.4 contains examples of how PAFs can provide such benefits to eligible DGRs, and the contribution to meeting the PAF's minimum distribution.

15.4*. A distribution is the provision of money, property or benefits. Where a fund distributes property or benefits, the *market value of the property or benefit provided is to be used in determining whether the fund has complied* *with subsection (1)*

> *Example 1:* *Where a private 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:* *Where a private ancillary fund leases office space to an eligible deductible gift recipient at a discount to the market price, the fund is providing a benefit the market value of which is used in calculating how much it has distributed. The fund may determine the market value as an amount equal to the discount.*
>
> *Example 3:* *Where a private ancillary fund invests in a social impact bond issued by an eligible deductible gift recipient and has a return that is less than the market rate of return on a similar corporate bond issue, the fund is providing a benefit the market value of which is used in calculating how much it has distributed. The fund may determine the market value as an amount equal to the interest saved in the financial year by the deductible gift recipient from issuing the bond at a discounted rate of return.*
>
> *Example 4:* *Where a private ancillary fund lends money to an eligible 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 the borrower with a benefit equal to the market value of the interest forgone in the financial year by the lender because the borrower was not charged an arm's length rate of interest.*
>
> *Example 5:* *Where a private ancillary fund guarantees a loan provided by a financial institution to an eligible deductible gift recipient, the fund is providing a benefit the market value of which the market value of which is used in calculating how much it has distributed. The fund may determine market value as an amount equal to the discount to the interest rate which would otherwise 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 also a distribution (being the provision of money, property or benefits).*
>
> *Note:* *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.*

Where the counterparty is **not** an eligible entity, investments with an expected social return can only be considered for inclusion in a PAF's investment portfolio, if they are consistent with the PAF's Investment Strategy **and** there is an acceptable **market risk/reward financial** return. In such circumstances, there is no benefit to be included in calculating meeting the 5% distribution requirement.

Issues for Further Consideration

In addition to meeting the legal requirements, directors may also consider additional ways to enhance the PAF'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; in particular the identification of a replacement for the *responsible person* will be necessary at some stage
- Develop a **Trustee Dossier** (see page18) to remind directors of their duties and responsibilities and a base for an induction program for new directors
- Formalise a Grantmaking Strategy to focus grantmaking activity for greater impact and consider making public so potential recipients knows whether to apply for a grant (or not)
- Due to public concern about charity expenses generally, have policies and procedures about what type of expenses are fair and reasonable and therefore permissible

Investment

All investors face investment **risks,** PAFs are no exception. However, because of their long-term time frame. tax-exempt status, and mandated annual distribution minimum, PAFs investment profiles are different from superannuation or personal monies.

An **Investment Strategy** linked to the fund's objectives is required. PAFs 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 further the objects of the trust, being supporting eligible entities. The long-term horizons of perpetual foundations may warrant including an assessment of environmental, sustainability and governance (ESG) 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. Investments that have a social return as well as **acceptable risk/reward financial returns**, and are consistent with the PAF's Investment Strategy, may be considered.

Distribution

Directors are encouraged to apply a similar degree of diligence, skill and care to grantmaking as they do to investment matters. To paraphrase Aristotle 2300 years ago, giving money away is easy, but giving it away effectively and having impact is a very different matter. Effective grant making includes background research and understanding what interventions have been tried previously. Conducting due diligence on potential grant recipients includes assessment of the entity's structure, mission, the experience and capacity of key staff and directors, and financial strength including diversity of income streams. Tapping the experience of other philanthropists interested in the issue is often a good start.

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.

Collaboration with other funders on major projects can enhance effectiveness by increasing the funding, experience and resources available. PAF directors can also apply their **expertise, knowledge, influence and voice** for the benefit of recipient organisations**.**

Annual Governance Check List

The trustee has ultimate responsibility for governance of each PAF; "the buck stops" with the trustee directors. They are responsible, accountable and potentially personally liable for the good management of the PAF. Good internal processes obviously reduce the risk of compliance breaches. The following check list is provided for annual review, but of course Directors must not limit their vigilance to only the following.

Administration

- **No misappropriation** of trust income or assets for personal benefit of the Founder, Directors or donors
- The independent **responsible person** remains qualified and is actively engaged
- ACNC/ASIC have been advised of any changes; Deed, Directors or residential addresses
- No donations have been **solicited** from the public; non-associate donations <20% of net equity
- All donations of **property** by Founder and associates have been disclosed in Financial Statements
- PAF **expenses** are fair and reasonable in detail and in aggregate
- Any **related party** transaction has been at arms-length and is disclosed in the Financial Statements
- The Financial statements and compliance with Guidelines have been audited/reviewed
- The Director's Declaration in Financial Statements includes meeting ACNC requirements
- Directors have considered the Common Reporting Standards
- The **AIS**, including extra PAF information, and Financial Statements is lodged with ACNC by 31 January
- **Conflicts of interest** are being properly managed and recorded
- The franking credit refund (on Australian company dividends) is claimed from the ATO

Investment

- A written **Investment Strategy**, that includes consideration of the benefits of diversification and importance of liquidity etc. is in place and has been reviewed
- All investments are consistent with the Investment Strategy
- There are **no related party** transactions providing a benefit to Founder, family member or Director
- PAF assets have not been used to support related parties or business's thereof
- No collectibles purchased, no borrowing and no pledging of assets (other than to support eligible entities)
- The PAF is not running a **business** (portfolio investment management is allowed)
- Any "Impact Investment" at below market rates is with a **counter party** that is an **eligible entity**.
  Not achieving the desired outcomes from the PAF's investments does not necessarily mean a governance failure. There may be times when a PAF's investments decline. The test is not whether, in hindsight, investment choices were ideal or not, but whether a prudent investment strategy and processes were in place and were followed.

Distribution/Grants

- At least **5%** of preceding 30 June value has been paid out to or used to benefit **eligible DGR Item 1s** unless lower level approved by the ATO, $11,000 usually required for PAF's smaller than $220,000.
- No grants paid to another **PAF** or **Public Ancillary Fund** (both being DGR Item 2s)
- Grants have been paid to correct entity/ fund i.e. a grant may go to a school Building or Scholarship Fund (that are DGR Item 1 entities) but not to the school itself (which is not)
- For PAFs without the extended definition all grants paid to DGR Item 1s that are also **charities**
- All charity recipients were up to date with their ACNC reporting requirements
- Any "catch up grants" from a previous year's shortfall are not counted towards current year's 5%

- **No redirection** of grants through eligible DGR's recipients to others pursuing different purposes
- Receipts or other evidence of payments to eligible entities has been received

If Directors think a breach of the Guidelines may have occurred, they should immediately move to rectify the situation, put procedures in place to prevent a repeat and disclose to the ATO (see next page).

Administrative Penalties

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)). Currently penalties are $210 per penalty unit as defined under Schedule 1 of the Taxation Administration Act 1953 and Crimes Act 1914. For inadvertent first-time mistakes, immediate rectification, self-reporting (rather than ATO discovery at Audit) and taking steps to prevent a reoccurrence generally will often be favorably taken into account by the ATO. The ATO has issued guidance how it will apply the penalty regime, PSLA 2014/1. http://law.ato.gov.au/atolaw/view.htm?docid=%22PSR%2FPS20141%2FNAT%2FATO%2F00001%22

In addition to the Administrative Penalties, the ATO and ACNC Commissioners 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 PAF 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).

Issue	Guidelines	Penalty
Failure to notify change of Deed	Section 13	5 Units
Failure to distribute meet minimum distribution Failure to rectify shortfall in distribution	Section 15.1 Section 15.5	30 Units* if>$1000 10% shortfall
Failure to keep proper accounts Failure to provide accounts to ATO on request	Section 17.1 Section 17.2	10 Units 10 Units
Failure to prepare financial statements Failure to lodge ACNC AIS Failure to provide financial statements to ATO	Section 18.1 ACNC Act 60.5 Section 18.5	10 Units Loss of charity status 10 Units
Failure to have accounts and compliance audited Failure to provide audit to the Commissioner	Section 19.1 Section 19.7	10 Units 10 Units
Failure to have an Investment Strategy Investments outside the Investment Strategy Failure to maintain proper investment records	Section 20.1 Section 20.4 Section 20.5	10 Units 15 Units 10 Units
Breach of Investment limitations ▪ Not borrow ▪ All at arm's length ▪ No pledging of assets ▪ No benefit to founder donors or associates ▪ Separation of assets ▪ No collectibles ▪ Not run a business	 Sections 21.1 Sections 21.4 Sections 21.5 Sections 21.7 Sections 21.8 Sections 21.10 Sections 21.11	 30 Units 30 Units 30 Units 30 Units 30 Units 30 Units 25% of profit pa
Uncommercial transactions Provision of benefit to founder, trustee, donor, director or associates thereof	Section 22.1 Section 22.3	30 Units Value of benefit
Soliciting donations from public Accepting donations > 20% of fund value in any year from those not the founder or associates thereof	Section 24.1 Section 24.2	30 Units 10 Units
Acting trustee not following ATO instruction	TAA 426-160	100 Units
Former trustee failing to provide books to ATO Former trustee failing to act as instructed by ATO	TAA 426-165.1 TAA 426-165.5	50 Units 50 Units

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

Winding up a PAF and Portability

Should the directors decide they no longer want to continue managing the PAF, for instance if the administration effort is too burdensome or there is no one to continue on as directors once the current directors pass away, there are four options available:

1. Make large grants to eligible DGRs to spend out the PAF over (usually) several years, depending on the size of the assets, and wind up the PAF
2. Gift shares and control of the Trustee company to a distant relative, friend or business associate to enable them to manage the PAF how they see best
3. Apply to the ATO to transfer the full net assets of the PAF to become a sub-fund of an existing Public Ancillary Fund (there are several with different attributes available). The PuAF Trustee takes on the administration, investment and compliance responsibilities while still allowing donors to provide recommendations on grantmaking and succession (see portability rules below and PuAF Handbook)
4. Apply to the ATO Commissioner to transfer the full net assets of the PAF to an existing PAF; this might be a PAF of a relative or family friend (see portability rules below).

Portability

Portability has been introduced to increase donor flexibility and reduce red tape by allowing the transfer of ancillary fund assets between ancillary funds. There is no change in the fact that donations have been irrevocably given to the community, but trustees now have the flexibility of seeking a change in structure as their own and their family's circumstances and capacities change.

If a transfer to an existing Private or Public ancillary fund is desired, the PAF Trustee must apply to the ATO Commissioner for approval. Under Section 28 of the Guidelines, prior to applying, directors need to ensure:

1. The PAF has a Portability clause as per Clause 4.6 in ATO Model Deed 2014 https://www.ato.gov.au/Forms/Private-ancillary-fund-model-trust-deed/ . If this clause is not in the Deed (more than likely for deeds before 2014) 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 PAF has met the minimum grant distribution (5%) for the financial year in which the transfer is being applied for so is compliant with Section 15 of the Guidelines.
3. The PAF assets have not been received by way of transfer from another ancillary fund in the previous two financial years.
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 Commissioner for a transfer and setting out compliance with 1-4 above. All assets must be transferred to the receiving Ancillary Fund.

Winding up or transfer to another ancillary fund needs to be carefully managed to ensure continued compliance with the Guidelines for the current year (including final audit and reporting), payment of all liabilities and full capture of all assets (including accrued franking credits which are not available until after year end). If considering porting, expert advice should be taken.

On the other-hand if there is a desire to become more active and take on fundraising from the general public to support the community causes (which is not allowed under the PAF structure), the Trustee can apply to the ATO Commissioner to convert the PAF into a Public Ancillary Fund which will require amending the deed and appointing new directors beyond family members and commencement of fundraising (see PuAF Handbook).

Trustee Dossier

To assist directors, particularly new directors, understand and remind themselves of their duties and responsibilities, it is recommended that each PAF Director has access to a paper or online **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 Private Ancillary Fund Guidelines 2019
3. A copy of the ACNC Governance for Good https://www.acnc.gov.au/tools/guides/governance-good-acncs-guide-charity-board-members
4. A copy of the contents pages of the appropriate Trustee Act (for example for Victorian PAFs the Victoria Trustee Act 1958) and the Investment section (Part 1 SS4-8 in Victoria's case) www.austlii.edu.au/au/legis/vic/consol_act/ta1958122/
5. A copy of all policy documents endorsed by the trustee – particularly the Investment Strategy, and if they exist the Mission Statement or Grantmaking Strategy, trustee Code of Conduct, expenses policy, conflict of interest policy and any delegation authorities
6. 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
7. 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 conflict of interest
8. A copy of the Directors and Officers Insurance Certificate (if applicable). (For most small and medium sized PAFs with good compliance orientated administrators D&O insurance is often not taken out as risks are limited to PAF Guideline breaches which being Administrative penalties may not be covered)
9. 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 PAF. Philanthropy Australia has some online training programs which complement the material provided in this handbook.

Attachment 1: Qualification to be the "Responsible Person"

Each PAF must have at least one *responsible person* as a director or member of the controlling body. The qualification requirements are set out in Guideline Section 12 below. Importantly *responsible person* must not only meet the professional or civic qualification but must be independent of the founder by not being a family member or other associate of the founder. The responsible person must take an active role in the management of the PAF.

Section 12.7

(7) A ***responsible person*** is an individual with a degree of responsibility to the Australian community as a whole, and includes an individual before whom a statutory declaration may be made.

Note: 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 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. For further information see Taxation Ruling TR 95/27 which can be viewed on the Australian Taxation Office's website (http://www.ato.gov.au).

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.

(8) The ***responsible person*** cannot be:

(a) a donor to the fund who has contributed more than $10,000 (in total); or

(b) a founder of the fund; or

(c) a *relative of an individual covered by paragraph (a) or (b); or

(d) an *associate of an individual covered by paragraph (a) or (b); or

(e) except with the consent of the Commissioner, by written notice, an employee or *agent of an individual covered paragraph (a) or (b).

Attachment 2: Accessing a lower minimum distribution rate

The Guideline amendments in 2016 introduced a degree of flexibility to allow the ATO Commissioner to approve a distribution level lower than the 5% for a PAF for one year. The conditions suggest the Commissioner will apply this guideline sparingly. This was maintained in the 2019 Guidelines Section 15.7 - 15.10.

Accessing a lower minimum distribution rate for a financial year

(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.

(8) The Commissioner may reduce the minimum annual distribution rate only if the Commissioner is satisfied that there are circumstances that warrant the Commissioner reducing the rate, having regard to the matters listed in subsection (10).

(9) The Commissioner may reduce the minimum annual distribution rate at any time, including after the relevant financial year has ended.

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

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

Note : 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 (year on year), and the performance of approved stock exchanges. It could also include examining changes in conditions over time.

Attachment 3: Glossary of Terms

Acquittal
In grant making circles an acquittal is a report by a grant recipient detailing how a grant was spent. It will include detail of the expenditure (inputs) of the grant as well as information on what happened as a result of the grant (outputs) and whether it achieved its objectives (outcomes).

ACNC
Australian Charities and Not-for-Profits Commission

Associate
Associates of the founder or major donors or directors of a trustee company of a PAF are ineligible to be the "Responsible Person" for that PAF. Also only associates of the founder are able to make unrestricted donations to a PAF. Associates of the founder include family members and controlled entities. Section 78A Income Tax Assessment Act 36 provides detail.

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. While estates do not get income tax deductions for transfers to DGRs including PAFs, there is CGT relief for testamentary gifts to DGR entities including PAFs.

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.

Corpus
For testamentary charitable trusts the term corpus means the original and following gifts and ongoing capital appreciation that forms the asset base from which the trust generates income to be given away in grants.

Declaration

A deed of declaration by the trustee to utilize the powers under the relevant State legislation applying to charitable trusts to extend the definition of eligible entities to benefit DGR Item 1s that are not charitable.

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. Private Ancillary Funds can only distribute to DGR Item 1s (but not all DGR Item 1s are eligible for all PAFs to support, see page 9)
>
> **DGR Item 2** –Private Ancillary Funds and Public Ancillary Funds are DGR Item 2s. Ancillary Funds cannot

distribute to another DGR Item 2.

Donation Receipt
To ensure donations to a PAF qualify for donor tax deductibility under ITAA 1997, the PAF's receipt must include:

- the name of the donor
- the name and ABN of the PAF
- 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 the $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

Any donation of property by the Founder and his/her associates needs to be disclosed in the Financial Statements

Eligible Entity
This term is used throughout to describe organisations that are able to receive distributions from a PAF, remembering it varies depending on the individual PAF deed, refer Page 9, **but is always a DGR Item 1.**

Extended definition of eligible entity
An option (not available where governing law is ACT, NT or TAS) to allow a PAF to support not only DGR Item 1 charities, but also DGR Item 1s that are government entities, that would be charities but for connection to government, i.e. State Museums, State Libraries, State Art Galleries, Public Hospitals etc.

Fiduciary Duty
Common law duty of trustees to exercise rights and powers to a manage a trust in good faith for the benefit of beneficiaries of any 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 after the end of each financial year.

Grant
For PAFs 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, when committed by a natural person, is an indictable offence. *Taxation Administration Act 1953 - Sect 8ZA*

ITAA97 and ITAA36
Income Tax Assessment Act 1997 and Income Tax Assessment Act 1936.

Income Tax Exempt Fund (ITEF)
A type of Ancillary Fund created between 1 July 2005 and 31 December 2013 to enable PAFs to 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 9.

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 PAF Deed can be found here: https://www.ato.gov.au/Forms/Private-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 $210 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 it are not tax deductible.

Responsible Person
An individual with broad community responsibilities as defined by the ATO. At least one responsible person is required to be on the board or controlling body for each PAF. For qualification details see page 19. Note: the ACNC use the term "responsible person" to mean all members of the board or controlling body of any charity so is different.

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.

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 endeavors.

Tax Concession Charity (TCC) or ACNC Registered charity
A Tax Concession Charity (TCC) is a fund or institution which has been registered by the ACNC as having charitable purposes and entitled to income tax exemptions from the ATO. It is important to note that not all organisations which are tax exempt are actually Tax Concession Charities. Also, not all DGRs are Tax Concession Charities. An

organisation which has been endorsed as a TCC will be in possession of a certificate from the ATO which states that it has been endorsed as a Tax Concession Charity (or under the previous terminology of Income Tax Exempt Charity). 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). At times there can be differences between these two registers which may only be a matter of timing of updates or could reflect that the ACNC has revoked the organisations charitable status, so ongoing vigilance is needed.

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.

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 PAF settled since 1 October 2009 must be a company or incorporated association.

Trustee Company
A company acting as Trustee for a Trust. Most PAF trustees are simple Pty Ltd companies while some use a Licensed Trustee Company.

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

Attachment 4: Legislation

Private Ancillary Guidelines 2019
https://www.legislation.gov.au/Details/F2019L01227P

PS LA 2014/1: Administration of penalties for failure to comply with Ancillary Fund Guidelines
http://law.ato.gov.au/atolaw/view.htm?docid=%22PSR%2FPS20141%2FNAT%2FATO%2F00001%22

Australian Charities and Not for Profit Commission Act 2012
www.austlii.edu.au/au/legis/cth/num_act/acanca2012523/

- *Australian Charities and Not-for-profits Commission Amendment Regulation 2013*
- *(No.1) Governance and Reporting Requirements*
- *Australian Charities and Not-for-profits Commission Amendment Regulation 2013*
- *(No. 2) PAF privacy*

The Charities Act 2013
www.austlii.edu.au/au/legis/cth/num_act/ca2013104/

Charities (Definition of Government Entity) Instrument 2013
https://www.legislation.gov.au/Details/F2013L02173

Income Tax Assessment Act 1997 Section 30
www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

State Trustee Acts

- Trustee Act 1958 Victoria
  www.austlii.edu.au/au/legis/vic/consol_act/ta1958122/
- Trustee Act 1925 NSW
  www.austlii.edu.au/au/legis/nsw/consol_act/ta1925122/
- Trusts Act 1973 Queensland
  www.austlii.edu.au/au/legis/qld/consol_act/ta1973132/
- Trustee Act 1936 SA
  www.austlii.edu.au/au/legis/sa/consol_act/ta1936122/
- Trustee Act 1962 WA
  www.austlii.edu.au/au/legis/wa/consol_act/ta1962140/
- Trustee Act 1898 Tas
  www.austlii.edu.au/au/legis/tas/consol_act/ta1898122/
- Trustee Act 1925 ACT
  http://www.austlii.edu.au/au/legis/nsw/consol_act/ta1925122/
- Trustee Act 1907 NT
  http://www.austlii.edu.au/au/legis/nt/consol_act/ta122/

Are you on the Map?

Foundation Maps: Australia is a joint initiative of Philanthropy Australia and US-based Candid. *Foundation Maps: Australia* is a highly interactive and searchable mapping platform, boosting the availability of rich grants data - for, and about, funders in Australia. The platform empowers the sector to collect, analyse and share good quality, timely data about who's doing what, where.

Since its launch in 2018, *Foundation Maps: Australia* has brought greater transparency to philanthropic giving. The strategic intent behind its launch was to facilitate greater collaboration, reduce duplication of effort and build a community of shared learning. We are really pleased that it is starting to achieve these goals.

However, *Foundation Maps: Australia* is only as good as the data it contains. Please continue providing your data – we are building participation and *Foundation Maps: Australia* remains a key priority for us to support the sector.

Why share your data?

It's good for you - the more data we have, the more you can interrogate it and use it to help inform your work: who else if funding in the same areas or places? Who might you like to connect or collaborate with? You can share these insights with your family, Board, Trustees, and colleagues.

It's good for the sector - effective philanthropy requires access to good quality, timely data about who is doing what and where. By sharing your data, you're ensuring the field has the best information to act on for collaboration, co-funding and grant strategy development.

It's easy - 'Updater' makes it easy to share your grants data. Some software providers like SmartyGrants & Gifts make it easier with a pre-formatted export report function that pulls all the data you need into one Excel file.

Take control of your story - People understand foundations by the grants they make. And no one knows your grant making better than you. Don't leave things to interpretation - share your data to make sure your story is told in the right way.

We have also launched the Foundations Map Dashboard. This publicly accessible dashboard displays high level data from *Foundation Maps: Australia* in a dynamic and easily consumable format. The dashboard will enable Philanthropy Australia's members to contribute to building an accurate picture of the nation's giving.

You can access FMA by logging in to the Better Giving Hub at philanthropy.org.au. For support, email **fma@support@philanthropy.org.au** or your State Manager.

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