

Bulletin, Monday 5 October 2009

Changes effective 1 October 2009 to Private Ancillary Funds (formerly known as Prescribed Private Funds)

Taxation

A Private Prescribed Fund (PPF) will now officially be known as a Private Ancillary Fund (PAF).

In the May 2008 Federal Budget, the Treasurer announced that the government will legislate guidelines to improve the integrity of PPFs and provide the trustees of PPFs with greater certainty as to their philanthropic obligations, with effect from 1 July 2009.

In late November 2008, Treasury released a Discussion Paper entitled *Improving the integrity of Prescribed Private Funds* and invited the public to comment on the proposed measures.

The proposals in the Discussion Paper went much further than necessary to achieve the government's stated aims.

Given Arnold Bloch Leibler's involvement in establishing and providing ongoing advice to the trustees of PPFs, out of a sense of genuine concern for the future of PPFs, the firm lodged a 21-page submission with Treasury on 13 January 2009 responding to the Discussion Paper. Treasury received 137 submissions in response to the Discussion Paper.

The volume of submissions obviously had an impact, as the nature and extent of the changes foreshadowed in the November 2008 Discussion Paper were considerably diluted. On 25 June 2009, the draft Bill was tabled in Parliament and the draft PAF Guidelines were released by Treasury for public consultation.

Revised and final Guidelines made by Treasury and the ATO were released last week on 29 September 2009, but are not yet approved by Parliament. The legislation has passed through Parliament and received Royal Assent on 18 September 2009.

All changes are effective on and from 1 October 2009.

What must I do now?

Nothing! PAF trustees will be taken to have agreed as at 1 October 2009 to comply with the new PAF Guidelines and the trustees will not be required to sign any documents to agree to be bound by the Guidelines.

New PAF Guidelines distribution requirements

A PAF must distribute at least 5 per cent of the market value of the PAF assets at the end of the previous financial year (minimum \$11,000). There are no longer separate income and capital distribution requirements.

Transitional distribution requirements

A PAF may continue to act in accordance with its agreed accumulation plan until 30 June 2014 (or earlier if the plan expires or if the target capital base is reached) as long as you distribute at least:

- annual income less CPI; and
- 5 per cent of each gift received in the previous financial year.

All current PAFs will distribute under this common strategy irrespective of their own agreed accumulation plan.

In many cases, the new transitional distribution requirements will result in smaller distributions than under the former distribution regime.

Accumulation Plans

- PAFs are still permitted to accumulate gifts to create a capital base. However, accumulation plans are no longer relevant except that a current continuing agreed accumulation plan is required to ensure that transitional distribution rules apply up to 30 June 2014.
- There are no caps or restrictions on accumulation plans and no ATO or Treasury approval is required to change an accumulation plan.

Other PAF changes

Some of the PAF changes include:

- The market value of PAF assets must be estimated annually by the trustees and land must be valued by an independent certified valuer or the Commissioner every 3 financial years.
- Trustees must prepare and maintain a written investment strategy.
- An annual audit of compliance with the Guidelines by the PAF and the trustees is required as well as an audit of financial statements.
- A PAF must not acquire any 'collectables' (artwork, jewellery, antiques, coins, rare books, etc) except as a gift. Any collectables held must be sold within 12 months of acquisition or by 1 October 2010 for collectables currently held by a PAF.
- A PAF must be private in nature. In any financial year, the PAF must not accept donations from unrelated parties totalling more than 20 per cent of the market value of the PAF assets at the end of the previous financial year.
- An annual income tax return will be required similar to the current annual PAF information statement. Financial statements must be prepared—but not lodged with the income tax return—and must be made available to the Commissioner on request.
- The Australian Business Register will now identify PAFs as PAFs and from 1 January 2010 will also identify the Deductible Gift Recipient (DGR) endorsement category of all DGRs.
- PAF Deeds must be amended to comply with the Guidelines by 1 October 2012, but only if the Deed operates contrary to the Guidelines. Many Deeds may not require change.
- Trustees are jointly and severally liable for administrative penalties imposed by the ATO.



Other transitional rules

- You automatically opt in to the transitional distribution rules unless you chose not to apply the transitional distribution rules before lodging the PAF income tax return for that financial year.
- If the PAF Trust Deed prevents compliance with a requirement in the Guidelines, the PAF is not required to comply until 1 October 2012, except for the collectables requirements. In most instances, it is unlikely that the PAF Trust Deed will prevent compliance with the required changes other than the accumulation plan.
- Trustees must comply with the Guidelines to the maximum extent possible without breaching the PAF Trust Deed.

Proposed changes not implemented

- No corporate trustee requirement for existing PAFs—only required for new PAFs.
- No minimum fund size.
- No need to make PAF contact details available to the general public.
- No 'fit and proper person' test for trustees.
- PAFs will not be restricted to only investing in liquid assets.
- No requirement to prepare and maintain a written distribution strategy as proposed in the draft Guidelines released for consultation.

Contacts

If you would like further details about the information contained in this bulletin or assistance with any philanthropy or tax-related issues, please contact:

Joey Borensztajn, Partner
Telephone 61 3 9229 9639
jborensztajn@abl.com.au

Further information

The firm's practice areas cover a range of commercial and corporate advice, including:

- banking & finance;
- commercial & corporate;
- litigation & dispute resolution;
- native title & public interest law;
- property & development;
- public companies;
- reconstruction & insolvency;
- taxation;
- technology & intellectual property;
- trade practices;
- wealth management; and
- workplace advisory.

For copies of recent publications, or for further information about the firm, please visit the Arnold Bloch Leibler web site at www.abl.com.au.

This publication is intended to provide a general outline and is not intended to be a complete or definitive statement of the law on the subject matter covered. Further professional advice should be sought before any action is taken in relation to the matters described in this publication.

Privacy

If you no longer wish to receive this, or future, marketing publications, please contact us by email, facsimile or mail at the following addresses:

E-mail: privacy@abl.com.au
Facsimile: (03) 9229 9900
Post: Privacy Officer
Arnold Bloch Leibler
Level 21
333 Collins Street
Melbourne VIC 3000