

Public Ancillary Funds:

In July we advised that the Government was in the process of making changes to the requirements relating to Ancillary Funds. Boards operating Ancillary Funds need to take note of these changes. The key points to note are: -

1. The changes are effective from 1 January 2012.
2. The Federal Treasurer has issued binding guidelines.
3. All new Public Ancillary Funds (PAF) will be required to have a corporate Trustee.
4. A PAF will be required to lodge an income tax return with ATO for the 2011-12 financial year and future years. The income tax return is primarily an information return but will have similar lodgement obligations to other income tax returns.
5. The fund will need to be audited each year by a Registered Company Auditor (RCA), appointed under Corporations Act. The Trustees of many PAFs are incorporated associations under State Law. However under these new provisions the Trustee entity must ensure the PAF is audited by an RCA.
6. Each PAF needs to establish their own investment strategy as a written policy document. Where the PAF is passing funds to other Deductible Gift Recipient (DGR) entities reasonably promptly, such investment strategy would in all probability represent a cash management account with a recognized financial institution. Where, however, the PAF holds other types of investments, the investment strategy would need to be more detailed.
7. The Trustee entity is required to be a constitutional corporation. This would appear to include an incorporated association under State Law, but we would encourage Trustees to obtain specific legal advice on this point regarding their own entity. The wording of the Act in other areas is inferring they anticipate the Trustee would be a Company Limited by Guarantee under Corporations Act, as commonly happens in NSW and Victoria. However there appear to be other entities that qualify as constitutional corporations under the Constitution of Australia, and this seems to have been tested under the employment laws in recent times.

8. There are transitional rules for PAFs established and endorsed by ATO prior to 1 January 2012. In such instances where a PAF has natural persons as Trustees, they will not be obligated to change to corporate trustees. There is no time limit nominated in the Act on this point.

As a number of these new provisions will not be reflected in the present Trust Deed, Trustees would be encouraged to have their Trust Deeds upgraded to ensure the new requirements are readily available for the guidance of the Board of Trustees and other relevant parties. ATO have made a model Trust Deed available for a PAF on their website. More information is on our web-site.

Commercial activities of charities:

ATO have now issued a new Ruling – TR2011/4 – to replace their earlier Ruling TR2005/21. The Ruling relates to the commercial activities of charities and issues as a result of ATO losing the High Court cases in Word Investments and Aid Watch.

Key parts of the Ruling identify: -

1. Advocacy and lobbying activities will not, of themselves, prejudice charitable status. This confirms the High Court decision in Aid Watch. The charity needs to be able to demonstrate that its advocacy or lobbying activities are ancillary to the Objects of the charity as stated in its Constitution.
2. Commercial activities, following the High Court judgement in Word Investments, need to be considered in the context of the organisation's activities. As a result of the emphasis in the new Ruling, commercial activities that are compatible with the charitable Objects of the charity, support its charitable purpose or are incidental to those activities are now acceptable, without risking the charitable status of the entity. ATO seem to be saying that if a surplus from the commercial activities is not applied for the benefit of the Objects of the charity, then that would be deemed to be assessable income.

The Ruling also includes a provision that the advancement of education, the relief of poverty and the advancement of religion are presumed to be for the public benefit, unless shown otherwise. As this Ruling is issued around the same time as Government have been seeking comment on a Public Benefit Test, and it is clear they intend to emphasise a Public Benefit Test in the legislation for the Charities Commission, this is important – but will in all probability be of an interim nature only.

Board Members' Responsibilities:

Members of Boards and Committees have certain core responsibilities to the organisation which they serve. They can be summarised as being: -

- Duty of care and diligence;
- A duty to act in good faith in the best interest of the entity;
- Duty not to misuse their position;
- A duty to not misuse information, and
- A duty to disclose material personal interest.

These would be considered to be the minimum obligations imposed.

In the recent Centro case, the Court held that a number of directors did not exercise appropriate care and diligence as directors of a public listed company. These are issues which may flow on to Board members of Not-for-Profit entities. In the Centro case the directors had relied on the auditors' work in auditing and reviewing the financial statements and accounts, "*and did not form an independent judgement for themselves.*" The Court held that while delegation is acceptable it does not absolve a director from a responsibility to take a diligent and intelligent interest in the information available. For those Board Members who have difficulty in understanding financial reports, and there would be many, this is not good news.

Charities Commission:

The Australian Charities and Not-For-Profit Commission (ACNC) will be operative from 1 July

2012. Our Government is rushing to finalise the necessary laws for this to be established. Regretfully “rushing” is the case and in some of the public documents issued to date there is a lack of clarity – particularly in respect to the reporting and auditing obligations.

Entities will be classified under a three-tier system:

- Tier 1 – revenue < \$250,000;
- Tier 2 – revenue \$250,000 - \$1M;
- Tier 3 - > \$1M

The reporting obligations for Tier 1 are modest. Tier 1 entities will be given the option of preparing financial reports on either the cash or accruals basis of accounting.

Audit will be obligatory for Tier 3, an audit or review obligatory for Tier 2 and also for Tier 1, if it is endorsed as a DGR. The audit or review requirements require a Registered Company Auditor.

Each charity, regardless of size, will be required to lodge an annual information return. The requirements for lodgement vary dependent on the Tier.

The accounting reporting format requires further clarification as the terminology used in the Draft ACNC Bill and related documents are inconsistent with Australian Accounting and Auditing Standards.

ACNC will be the deciding body for Tax Concession Charity (TCC) and Deductible Gift Recipient (DGR) endorsement in future, but ATO will continue to monitor compliance with Tax Law requirements for such entities.

Initially the current Common Law definition of “Charity” will continue to apply. The intention is to introduce a new definition of Charity to be operative from 1 July 2013. Public consultation regarding this definition is currently being undertaken.

Government aims to include the introduction of a Public Benefit Test as essential for TCC endorsement for both new and existing charities. Currently, the

Common Law presumes public benefit in respect to poverty, education and religion and only requires establishment of public benefit with other types of charities. This proposed additional test has been the subject of much political comment in our Parliament, so it is likely to happen. It will, however, mean additional information needs to be provided to prove charitable activities.

The ACNC will be establishing a Portal on the web to enable charities to readily access information and forms. The public will also be able to access core information about each registered charity through the Portal.

Churches Submission re ACNC:

The combined Christian Churches of WA have joined with Add-Ministry Inc. in lodging a series of joint submissions in respect to the range of draft documents issued by Government. While the Churches affirm the overall objectives of ACNC and therefore give support in general, they are expressing concern about much of the detail. This is because it appears that the result will be a significant increase in compliance with regulations, with a particular impact on small charities and churches, and also because of the lack of clarity in some areas.

These submissions will all be available on the Add-Ministry website at www.addministry.org.au.

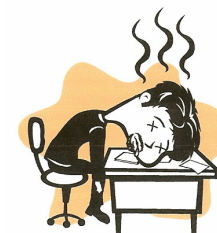
National Business Name Registration:

The current Business Names Registration system operating in all States and Territories will be replaced by a new, national system from 28 May 2012. This is one of the COAG simplification measures.

Present Business Names will be transferred automatically to the new system. Where an identical name exists in another jurisdiction, the new Register will provide an appropriate identification. There will be no need to change existing names. ASIC will be controlling the new system.



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Newsletter

January 2012

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Visit our Website at:
www.addministry.org.au

Previous copies of this newsletter are also available on the website.

Publications available:

Voluntary Treasurers' Handbook —
Hard copy — 59 pages\$50.00

Missionary Tax Guide—2010
Hard copy— 47 pages \$50.00
E-mail copy \$30.00

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