


TD 2026/3EC - Compendium

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Taxation Determination compendium – TD 2026/3

📌 Relying on this Compendium

This Compendium of comments summarises and provides responses to submissions received during public consultation on draft Taxation Determination TD 2025/D3 *Income tax: when does a private or public ancillary fund 'provide' a 'benefit'?* It is intended to promote transparency and explain how stakeholder feedback was considered in finalising the document only.

It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Consultation period: 12 November 2025 to 30 January 2026

We thank all submitters for their time and contributions.

Summary of issues raised and responses

All legislative references in this Compendium are to the *Taxation Administration (Private Ancillary Fund) Guidelines 2019* and the *Taxation Administration (Public Ancillary Fund) Guidelines 2022* (Guidelines). All references in this Compendium to a section in the Guidelines refer to the corresponding sections in both Guidelines.

Issue 1 – meaning of 'benefit' in subsections 15(4) and 22(3)

Paragraph or section of draft product

Paragraph 10

Issue raised

The final Guideline should clarify the use of 'benefit' for the purposes of subsection 5(4) so it cannot be read as treating any provision of money or property as a distribution where it is not for the deductible gift recipient's benefit. This could be achieved by refining paragraph 10 of the final Determination so that, in the subsection 15(4) context, a benefit is confined to something for the good of the deductible gift recipient (DGR) (and does not extend to a related entity), by considering whether to capitalise 'Benefit' and state expressly that only money, property or benefits provided for the benefit of the DGR are counted as a distribution.

ATO response

In the final Determination, paragraph 10 clarifies that the general description of a 'benefit' is expressed by reference to the relevant provision, namely that it is something for the good of a DGR in the subsection 15(4) context, or for the good of a related entity in the subsection 22(3) context. Capitalising 'Benefit' and adding an express definition was considered but not adopted, because 'benefit' is used in 3 different contexts in the Determination (ordinary meaning, subsection 15(4) and subsection 22(3)) and capitalisation would add confusion without improving clarity. The meaning of benefit in each context is addressed through separate subheadings and discrete analysis relating to subsections 15(4) and 22(3).

Outcome

Clarified

Issue 2 – capable of having a market value

Paragraph or section of draft product

Paragraph 17

Issue raised

The meaning of paragraph 17 of the draft Determination stating that 'the benefit must be capable of having a market value' is unclear, particularly whether the requirement is theoretical assignability of value or the need for an ascertained, verified market value.

ATO response

In the final Determination, paragraph 17 excludes the sentence 'Moreover, the benefit must be capable of having a market value'.

Outcome

Position amended

Issue 3 – valuation guidance and safe harbours

Paragraph or section of draft product

Not applicable – relevant to document scope

Issue raised

The final Determination should clarify how to ascertain the value of a benefit, particularly in the context of loans where there is no comparable loan from a financial institution at arm's length.

More broadly, submissions sought more detailed valuation guidance (including safe harbour methodologies) to support a wider range of philanthropic arrangements and to address valuation where benefits are contingent or otherwise difficult to benchmark.

ATO response

We recognise that valuation may be complex in some cases. However, given the wide range of possible benefits, prescriptive methodologies risk producing inappropriate outcomes. Existing ATO market valuation guidance continues to provide comprehensive, practical guidance across a wide range of asset classes including in the private and public ancillary fund (PAF) context. We will monitor whether further targeted guidance is warranted.

Outcome

No change

Issue 4 – 'net' and 'gross' terminology and clarification of valuation factors

Paragraph or section of draft product

Paragraphs 20 and 32

Issue raised

The final Determination should remove the 'net' and 'gross' framing in paragraphs 20 and 32 because it is inaccurate and confusing, and the intended point is already expressed more clearly in the first 2 bullet points of paragraph 32. The final Determination should clarify or revise the third bullet point, which is unclear.

ATO response

In the final Determination, the relevant paragraphs (19, 20, and 32) exclude net and gross terminology and provide clearer guidance on the factors to consider when determining the market value of the benefit.

In addition, the wording of the second and third bullet points in paragraph 32 of the final Determination has been reconsidered and improved.

Outcome

Clarified

Issue 5 – objective circumstances versus subjective intentions

Paragraph or section of draft product

Paragraph 30

Issue raised

Paragraph 30 of the draft Determination states that market value is to be assessed ‘having regard to objective circumstances’. It is unclear what ‘having regard’ or ‘objective circumstances’ means in this context. Such assessments inevitably involve making subjective judgments.

ATO response

The phrase ‘having regard to objective circumstances’ is to be given its plain English meaning. The examples contained in subsection 15(4), each determine market value by reference to objective circumstances rather than the subjective value attributed to the benefit by those controlling the DGR or the ancillary fund. This has been clarified in paragraph 30 of the final Determination.

Outcome

Clarified

Issue 6 – whether consideration reduces the value of a prohibited subsection 22(3) benefit

Paragraph or section of draft product

Provision of benefits under subsection 22(3)

Issue raised

The draft Determination emphasises valuing benefits on a net (not gross) basis under subsection 15(4), but does not explain whether the same net approach applies under subsection 22(3) beyond stating that ‘all relevant circumstances’ will be considered and provides no examples of what those circumstances are.

ATO response

The final Determination no longer frames the subsection 15(4) discussion in net versus gross terms.

The final Determination addresses these issues through the subsection 22(3) analysis and the worked examples, which illustrate how corresponding consideration may be relevant to identifying whether, and to what extent, a benefit is provided or whether it is negated by corresponding consideration (particularly at paragraph 39 of the final Determination).

Outcome

Clarified

Issue 7 – binding versus non-binding multi-year grants

Paragraph or section of draft product

Non-binding promises of future payment

Issue raised

Paragraphs 22 to 29 of the draft Determination do not provide sufficient clarity about whether ancillary funds can provide binding agreements, and it does not explain how to determine the market value of a benefit if it is a binding agreement. The differentiation between binding and non-binding agreement is not required, and is confusing, and distributions under multi-year grants should be recorded when the payment is made. Further, the uncertainty in the area could discourage ancillary funds entering multi-year grants.

ATO response

In the final Determination:

- Some of the more technical explanation regarding binding and non-binding grants of future payment has been moved into the Appendix to the Determination.

- Paragraph 23 and Example 2 have been added to provide greater certainty around treatment of non-binding multi-year grants.

Outcome

Clarified

Issue 8 – proposed ‘record only when paid’ approach for difficult valuations

Paragraph or section of draft product

Not applicable – relevant to document usability

Issue raised

The final Determination should address multi-year funding by stating that where the market value of any benefit from entering a multi-year funding arrangement cannot be clearly identified, the ancillary fund should record distributions only as amounts are actually paid (for example, in the year each instalment is made), without turning on a binding versus non-binding analysis that is fact-dependent and likely to add confusion.

ATO response

We do not consider this approach to be consistent with the legal framework. We do not agree with the proposition that a benefit has no market value merely because it is difficult to value. Case law supports this position. As Estcourt J observed in *Director of Public Prosecutions (Cth) v Gay* [2015] TASSC 15:

It is wrong to suggest that, because it might be thought desirable to avoid a complex valuation exercise, the Act should be construed and applied so as to always avoid that necessity.

Outcome

No change

Issue 9 – trust law discussion on enforceability of future payment commitments

Paragraph or section of draft product

Paragraphs 24 and 25

Issue raised

Paragraphs 24 and 25 of the draft Determination imply that committing to fund a multi-year grant (and paying by instalments rather than upfront) constitutes an improper fetter of trustee discretion, so the agreement is not binding and no benefit arises; that is said to misstate the law (including in the model deed context), and it is also queried as hard to reconcile with the subsection 15(4) example that treats a guarantee (a binding future commitment) as capable of being a benefit.

ATO response

The discussion included in the Appendix to the final Determination sets out relevant trust law principles for assessing whether a future payment commitment is legally binding. It does not proceed on the basis that all promises of future payment fetter a trustee's discretion or are necessarily unenforceable. Rather, it identifies considerations that may be relevant depending on the terms of the deed and the surrounding facts. The principles are stated at an appropriate level of generality and are supported by the authorities cited in footnote 30 of the final Determination. These principles are not displaced by the guarantee example under subsection 15(4).

Outcome

Clarified

Issue 10 – eligible deductible gift recipients that are also related entities (model deed interaction)

Paragraph or section of draft product

Provision of benefits under subsection 22(3)

Issue raised

The draft Determination's interpretation of 'benefit' under subsection 22(3) would prevent benefits being provided to eligible DGRs that are also related entities (including those described in paragraphs 22(3)(a) to (e)), which is inconsistent with the ATO Private ancillary fund model trust deeds and Public ancillary fund model trust deeds (model deeds) because clause 5.2 of the model deeds contemplates a benefit being given to a DGR that is a related entity and being treated as a distribution under clause 4.1 of the model deeds.

ATO response

The Determination does not adopt this interpretation. Paragraph 22(3)(f) excludes eligible DGRs from the definition of 'associate', but that exclusion does not limit or modify the entities described in paragraphs 22(3)(a) to (e). Subsection 22(3) therefore continues to prevent distributions to entities that are trustees of the ancillary fund, members of the trustee, or donors to the fund, even if they are also eligible DGRs. While model deeds are an important practical tool, they cannot override or qualify the requirements imposed by the Guidelines. The general information accompanying each deed explains the interaction between clauses 5.2 and 4.1 of the model deeds, including that earlier guidelines produced an anomalous outcome where a distribution to a DGR could render the DGR an associate to whom further distributions were prohibited. It is clear from that explanation that the exception in clause 5.2 of the model deeds was intended to ensure that distributions to DGRs are not prohibited merely because the DGR consequently becomes an associate. The current Guidelines address that anomaly through the carve-out in paragraph 22(3)(f).

Outcome

No change

Issue 11 – prospective application or transitional approaches**Paragraph or section of draft product**

Not applicable – relevant to document usability

Issue raised

The final view should apply prospectively, or transitional or administrative approaches should be adopted, given reliance on ATO model deeds and established sector practices. Relatedly, updated model deeds or revised model deed wording and transitional guidance should be provided if the ATO view differs from stakeholder assumptions.

ATO response

The Determination explains our view of the law as it applies. Issues concerning reliance on model deeds, transitional arrangements, or prospective compliance approaches are matters of administration that depend on the particular circumstances and are not resolved by the Determination itself.

We are not proposing to adopt a prospective compliance approach with respect to the views outlined in the Determination. We consider that the Determination does not represent a change in ATO position or depart from industry practice. It responds to stakeholder requests for transparency and reflects positions already applied in compliance activity.

Outcome

No change

Issue 12 – breadth of subsection 22(3) and an ‘incidental benefit’ carve-out

Paragraph or section of draft product

Not applicable – relevant to document usability

Issue raised

The draft Determination’s subsection 22(3) analysis is overly broad because it may capture indirect or incidental advantages to related entities arising from legitimate payments to eligible entities. The final Determination should provide clarification of whether subsection 22(3) requires a meaningful connection to the provision of a benefit (including whether intention or a purposive distinction between incidental and deliberate benefits is relevant), and seek practical guidance or safe harbours to distinguish low-risk philanthropic arrangements from integrity concerns, including where payments are mediated through eligible entities or involve uncommercial dealings.

ATO response

Subsection 22(3) is expressed in broad terms and applies where a fund provides any benefit, directly or indirectly, to a related entity. The Determination applies the text as enacted and does not read in an intention requirement or a general ‘incidental benefit’ carve-out. Whether a benefit is provided turns on the practical effect of the arrangement and the facts in context. The Determination is not intended to provide prescriptive compliance safe harbours or governance checklists but sets out principles for identifying when a benefit is provided, including where benefits flow through intermediaries.

Outcome

No change

Issue 13 – informal arrangements and absence of direct authority

Paragraph or section of draft product

Not applicable – relevant to interpretation of law

Issue raised

The draft Determination states that benefits may be provided under informal arrangements but provides no authority for that proposition.

ATO response

The Determination provides guidance on the operation of subsection 22(3), a provision which has not been the subject of judicial consideration, directly addressing its scope. In that context, the Determination proceeds by construing the language of the instrument according to its ordinary meaning, read as a whole.

The conclusion that a benefit may be provided under informal arrangements follows from the text of subsection 22(3), which applies where a fund ‘... provides any benefit ... directly or indirectly ...’. That construction is explained in the subsection 22(3) analysis and is broadly consistent with the case law cited there.

Outcome

No change

Issue 14 – omission-based benefits under subsection 15(4) and debt forgiveness

Paragraph or section of draft product

Not applicable – relevant to document usability

Issue raised

The draft Determination explains that benefits may be provided by omission for subsection 22(3) but does not clearly address omission-based benefits for subsection 15(4) (for example, foregone rent or foregone interest) beyond passing references in the valuation discussion and does not expressly deal with debt forgiveness owed by a DGR as a subsection 15(4) benefit.

ATO response

Paragraph 18 of the final Determination states expressly that a benefit for subsection 15(4) may be provided by omission, including by foregoing rent or interest, or by forgiving a debt owed by the DGR to the ancillary fund.

Outcome

Position amended

Issue 15 – ‘same words, same meaning’ argument across subsections 15(4) and 22(3)

Paragraph or section of draft product

Paragraph 12

Issue raised

Subsection 15(4) and subsection 22(3) use substantially the same terms ('provision', 'provide' and 'benefit'). The position is that those words should carry the same meaning in both subsections. Any intentional broadening in subsection 22(3) should arise from the words 'any' and 'directly or indirectly', not from adopting a different concept of what counts as a benefit compared to subsection 15(4).

The draft Determination adopts a materially broader conception of benefit for subsection 22(3) than for subsection 15(4), including informal arrangements, uncertain opportunities and omissions, which is said to be inconsistent with the certainty and enforceability emphasised for subsection 15(4).

An unexplained divergence in approach may be perceived as signalling distrust of ancillary funds and could discourage sector maturation and long-term philanthropic giving.

ATO response

Paragraph 12 of the Determination addresses the issue raised on 'same words, same meaning'. While there is a general presumption that the same words used in related provisions bear the same meaning, that presumption is only an interpretative aid and does not displace the meaning that emerges from the statutory text read as a whole, in context and in light of purpose.

On that basis, subsection 22(3) turns on the composite expression 'provide any benefit, directly or indirectly', including the broadening work done by the words 'any' and 'directly or indirectly'. Any differences in interpretation between the 2 provisions arise from the text and function of each provision within the Guidelines.

Subsection 22(3) operates as an integrity rule within the ancillary fund framework, and the Determination applies the provision as enacted, without making broader policy judgments about the sector.

Outcome

No change

Issue 16 – waiver of penalties and whether omission can be a benefit

Paragraph or section of draft product

Paragraph 46

Issue raised

The benefit described in paragraph 46 in the draft Determination (Example 4) may not be a benefit because there are many examples in commercial dealings where the penalty is agreed not to be imposed or a new deadline is negotiated. For example, the cost of pursuing the \$10,000 penalty through the courts may cost the PAF more than \$10,000.

ATO response

The Determination explains that a benefit can be provided by omission, including where an ancillary fund does not require a related entity to meet an obligation.

Subsection 22(3) does not incorporate a commerciality or materiality threshold. It does not provide an exception because enforcement is uneconomic or because the fund has chosen to enter an ongoing related party arrangement that makes enforcement unattractive. If the fund chooses not to enforce its contractual rights and that forbearance advantages the related entity, that omission can itself be the prohibited benefit, including in a penalty clause scenario.

Outcome

No change

Issue 17 – fundraising event tickets

Paragraph or section of draft product

Not applicable – relevant to document scope

Issue raised

The final Determination should address the treatment of fundraising event tickets purchased by ancillary funds, including whether the purchase can constitute the provision of a benefit to the DGR under subsection 15(4) and, if so, the appropriate approach to valuation. Further, the final Determination should address whether a subsection 22(3) benefit can arise where a ticket is provided to a related entity and used to attend the event and receive what is included with it (for example, food, drink or other enjoyment).

ATO response

The purchase of a fundraising event ticket may raise questions under subsection 15(4) about whether any benefit is provided to the DGR and, if so, how it should be valued. Any valuation is likely to be highly fact dependent and would need to take into account the value provided by the DGR under the same arrangement.

Relatedly, the same arrangement can raise questions under subsection 22(3) where a ticket is provided to a related entity and then used to attend the event and enjoy what is provided with it. This issue is not addressed expressly in the Determination because it has not been identified as a common compliance question warranting specific discussion. However, the analysis in Examples 42, 44 and 45 of Taxation Ruling TR 2005/13 *Income tax: tax deductible gifts – what is a gift*, which considers benefits received by attendees of DGR fundraising events, can be read alongside the principles in the Determination to inform whether, and to what extent, a benefit is provided on the particular facts.

Outcome

No change

Issue 18 – patron programs and incentives linked to distributions**Paragraph or section of draft product**

Not applicable – relevant to document scope

Issue raised

The final Determination should address the implications of a DGR running a patron program where incentives are provided to related entities of ancillary funds for making distributions. This scenario parallels Example 52 of TR 2005/13. Consider a DGR that advertises tiered donations where higher amounts bring correspondingly greater benefits such as tickets to shows, valet parking, backstage tours or other similar privileges.

Do these incentives reduce the value of the benefit provided by the ancillary fund to the DGR?

Do these incentives amount to a prohibited subsection 22(3) benefit to a related entity?

ATO response

The principles already set out in the Determination can be readily applied to patron programs and similar incentive arrangements.

First, for subsection 15(4), the approach in the Determination to identifying and valuing a benefit looks at the arrangement as a whole and takes into account any value provided by the DGR in return. That framework can be applied to patron program 'incentives' where they form part of the analysis of the market value of the benefit provided by the ancillary fund.

Second, for subsection 22(3), the Determination's approach already asks whether a benefit is provided 'directly or indirectly', including where benefits flow through another party, and it does so by reference to the overall impact of the fund's dealings. That is the framework that can be applied to incentives offered to related entities under patron programs, and it accommodates the distinction between incentives that flow under (or are contemplated by) an arrangement connected with the distribution and incentives that are offered on a gratuitous or unsolicited basis without the fund being involved in securing or assigning them.

Outcome

No change

Issue 19 – promotional events and hospitality offered by deductible gift recipients

Paragraph or section of draft product

Not applicable – relevant to document scope

Issue raised

The final Determination should address how subsection 22(3) applies where a DGR offers promotional events or incentives, such as entertainment or hospitality at functions intended to encourage distributions from ancillary funds, including whether those offerings constitute benefits to related entities who attend.

ATO response

The Determination does not include a separate discussion of promotional events or incentives offered by DGRs (such as entertainment or hospitality at functions designed to encourage distributions), because the principles already set out in the Determination can be readily applied to these arrangements.

In particular, the Determination's approach focuses on whether the ancillary fund has provided a benefit to a related entity directly or indirectly, having regard to the overall effect of the fund's dealings and whether any benefit has flowed through another party as part of the arrangement.

Similar promotional scenarios are also discussed in TR 2005/13 (Examples 54 and 55), which may be read alongside the Determination to offer some indication as to how the ATO sees such arrangements.

Outcome

No change

Issue 20 – relationship between 'distribution', 'gift', and TR 2005/13

Paragraph or section of draft product

Not applicable – relevant to document scope

Issue raised

The final Determination should clarify the relationship between 'distribution' and 'gift', and whether distributions may be made subject to conditions, including how the Determination's discussion of 'benefit' interacts with gift principles in TR 2005/13.

ATO response

The Determination is directed to the meaning and operation of benefit in subsection 15(4) and subsection 22(3). It is not intended to restate gift principles or provide a general exposition of distribution beyond what is necessary to explain how benefit operates within the Guidelines. However, distributions need not be gifts and may be conditional in some circumstances, though any conditions will affect the market value of the distribution. Where relevant, existing ATO guidance on gifts (including TR 2005/13) can be consulted.

Outcome

No change

Issue 21 – value movements within a private and public ancillary fund structure and ‘commerciality’ concerns

Paragraph or section of draft product

Not applicable – relevant to document interpretation

Issue raised

The draft Determination is said to treat movements of value *within* a PAF’s own investment structure as though they were private benefits, even when the fund’s overall economic position does not change. Because ‘value’ is left undefined, the Determination produces outcomes where penalties could apply despite no loss to the PAF and no advantage to any external party. This approach is seen as misaligned with the intent of the Guidelines, which were designed to prevent extraction of charitable assets, not to penalise commercial transactions that keep all value within the PAF.

ATO response

In considering whether a benefit is provided under subsection 22(3), it is relevant to examine the consequences of the arrangement, including any consideration flowing back to the fund. However, subsection 22(3) turns on whether the related entity is placed in an improved position, not on whether the fund’s overall position is unchanged.

The Determination explains that a benefit may include relieving a related entity from an obligation, including by not requiring it to fulfil a financial obligation. The Determination also notes that the amount or value of any benefit is determined on the facts and having regard to all relevant circumstances.

Concerns about identifying the quantum of any benefit are acknowledged. Consistently with the text of subsection 22(3), the Determination does not introduce a separate ‘commerciality’ gloss.

Outcome

No change

Issue 22 – parallel co-investing alongside founders

Paragraph or section of draft product

Not applicable – relevant to document usability

Issue raised

The final Determination should clarify how subsection 22(3) applies where an ancillary fund makes an investment alongside a founder on identical commercial terms. In particular, it should confirm whether such parallel investing does not provide a benefit to the founder.

ATO response

A separate example on parallel co-investing is not necessary in the Determination, because the subsection 22(3) principles already set out can be applied to investment arrangements in the same way as any other dealing. The relevant question is whether, having regard to the overall impact of the fund's dealings, the founder is placed in an improved position directly or indirectly. Depending on the facts, this could amount to providing a benefit to the founder.

Outcome

No change

Issue 23 – example revised to emphasise connection between grant and repayment

Paragraph or section of draft product

Example 5

Issue raised

Example 5 of the draft Determination should be reviewed. There seems little chance that Pascal will make enough profit from the construction to repay Adele \$300,000 and may have numerous creditors. There seems no requirement for Pascal to provide any of these funds to Adele.

ATO response

This example (now Example 6 of the final Determination) has been rewritten to emphasise the connection between the grant to the DGR and the repayment of the debt owed to the related entity of the ancillary fund (Adele).

Outcome

Position amended

Issue 24 – Example 6 commercial realism, governance, and valuation concerns

Paragraph or section of draft product

Example 6

Issue raised

Example 6 should be replaced, as Snowy DGR could not agree to such a condition. Snowy DGR would need to ensure it made an independent decision to engage a construction company based on the usual due diligence and assessment of relevant matters including fair and reasonable arm's length terms in the best interests of furthering Snowy DGR's purposes. Even if this did occur, it is unclear whether the benefit would be the amount of profit or some other amount that placed Burra Creek Constructions in a position to earn a profit.

ATO response

The ATO has observed conduct by ancillary funds consistent with the scenario in this example. We agree that, on these facts, the ancillary fund would also have failed to meet its governance obligations, including appropriate due diligence and the management of conflicts of interest. However, this behaviour also contravenes subsection 22(3), such that the fund may be exposed to penalties under that provision.

The valuation of benefits under subsection 22(3) can be complex and will depend on the facts and evidence in the particular case. The Determination is not intended to provide guidance on how penalties are to be quantified, but rather to explain when particular conduct gives rise to a prohibited benefit. Example 6 is retained in the final Determination (now as Example 7) because it illustrates the breadth of subsection 22(3) in circumstances where the value of the benefit is not straightforward, which may not be apparent from simplified examples.

Outcome

No change

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