



# **Taxation Administration (Private Ancillary Fund) Guidelines 2019**

made under section 426-110 in Schedule 1 to the *Taxation Administration Act 1953*

## **Compilation No. 02**

**Compilation date:** 25 February 2022

**Includes amendments up to:** *Taxation Administration (Public Ancillary Fund) Guidelines 2022*

## About this compilation

### This compilation

This is a compilation of the *Taxation Administration (Private Ancillary Fund) Guidelines 2019* that shows the text of the law as amended and in force on 25 February 2022 (the **compilation date**).

The notes at the end of this compilation (the **endnotes**) include information about amending laws and the amendment history of provisions of the compiled law.

### Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Legislation Register ([www.legislation.gov.au](http://www.legislation.gov.au)). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

### Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

### Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

### Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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## Part 1—Preliminary

### 1 Name

This instrument is the *Taxation Administration (Private Ancillary Fund) Guidelines 2019*.

### 3 Authority

This instrument is made under the *Taxation Administration Act 1953*.

### 4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

### 5 Interpretation

- (1) In this instrument:

***distribution*** has the meaning given by subsection 15(4).

***governing rules*** has the same meaning as in the *Australian Charities and Not-for-profits Commission Act 2012*.

***responsible person*** has the meaning given by subsections 12(7) and (8).

***the Act*** means the *Taxation Administration Act 1953*.

***trustee***, if a fund has 2 or more trustees, means all of those trustees jointly, or any of them severally, as the case requires.

- (2) Paragraph 13(1)(b) of the *Legislation Act 2003* has effect in relation to this instrument as if the reference in that paragraph to the enabling legislation was a reference to Schedule 1 to the Act.

Note 1: The effect of modifying paragraph 13(1)(b) of the *Legislation Act 2003* is that expressions have the same meaning in this instrument as in Schedule 1 to the Act as in force from time to time.

Note 2: Under section 3AA of the Act, an expression has the same meaning in Schedule 1 as in the *Income Tax Assessment Act 1997*.

- (3) The interpretation rules in Division 950 of *Income Tax Assessment Act 1997* also apply to this instrument.

Note 1: To find definitions of asterisked terms: see section 995-1 of the *Income Tax Assessment Act 1997*. However, some defined terms may not be asterisked: see section 2-15 of the *Income Tax Assessment Act 1997*.

Note 2: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

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### **6 Penalties**

If a person is liable to an administrative penalty under section 426-120 in Schedule 1 to the Act because of a contravention of a provision of this instrument, the amount of the administrative penalty is the penalty that this instrument sets out, or the penalty worked out in accordance with this instrument, in relation to that provision of this instrument.

Note 1: The Commissioner may remit all or part of an administrative penalty: see section 298-20 in Schedule 1 to the Act.

Note 2: An administrative penalty under section 426-120 in Schedule 1 to the Act cannot be reimbursed from the fund: see subsection 426-120(4) in Schedule 1 to the Act.

## **Part 2—Rules for establishing and maintaining private ancillary funds as deductible gift recipients**

**Note:** This Part sets out the rules, made under section 426-110 in Schedule 1 to the Act, a private ancillary fund and its trustee must comply with in order for the fund to be endorsed, and remain endorsed, as a deductible gift recipient.

### **Division 1—General**

#### **7 Object of this Part**

The object of this Part is to set minimum standards for the governance and conduct of a \*private ancillary fund and its trustee.

#### **8 General principles**

A \*private ancillary fund must be established, maintained and wound up in accordance with the following principles:

- (a) it is an \*ancillary fund; and
- (b) it is philanthropic in character; and
- (c) it is a vehicle for private philanthropy; and
- (d) it is a trust that meets all of the following:
  - (i) it seeks to comply with all relevant laws and obligations; and
  - (ii) it is open, transparent and accountable to the public (through the Commissioner of Taxation, and if it is a \*registered charity, the Commissioner of the Australian Charities and Not-for-profits Commission).

**Note:** This section is not intended to affect either Commissioner's obligations to protect the confidentiality of a private ancillary fund's information under privacy, and secrecy and disclosure laws.

## **Division 2—Establishing a private ancillary fund**

### **9 Purpose and objects of the fund**

- (1) A \*private ancillary fund must be established and maintained, under a will or an instrument of trust, as a valid trust.
- (2) A \*private ancillary fund must be established and maintained solely as described in item 2 of the table in section 30-15 of the *Income Tax Assessment Act 1997*.
- (3) A \*private ancillary fund's governing rules must:
  - (a) include objects that clearly set out the purposes of the fund; and
  - (b) require that, on the fund winding up or ceasing to be a private ancillary fund, its net assets must be provided to a recipient described in paragraph (a) of item 2 of the table in section 30-15 of the *Income Tax Assessment Act 1997*.

**Note:** Paragraph (a) of item 2 of the table in section 30-15 provides that the sole purpose of an ancillary fund must be to provide money, property or benefits to a fund, authority or institution, gifts to which are deductible under item 1 of that table.

### **10 Not-for-profit**

- (1) A \*private ancillary fund must be established and operated as a not-for-profit entity.
- (2) A \*private ancillary fund's governing rules must clearly set out that it is established and operated as a not-for-profit entity.

### **11 Operated only in Australia**

- (1) A \*private ancillary fund must be established and operated only in Australia.
- (2) However, subsection (1) does not prevent a \*private ancillary fund from making a distribution to an eligible \*deductible gift recipient that operates outside Australia.

### **12 Trustees**

- (1) The trustee of a \*private ancillary fund must exercise the same degree of care, diligence and skill that a prudent individual would exercise in managing the affairs of others.
- (2) At all times, at least one of the individuals involved in the decision-making of a \*private ancillary fund must be a responsible person.

**Note:** This requirement is similar to (but less strict than) the requirement applying to public ancillary funds (see *Bray v Federal Commissioner of Taxation* (1978) 140 CLR 560).

- (3) A responsible person must be an active director of the trustee and a member of any other controlling body of the fund.



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- (4) The trustee, or any other controlling body of the fund, must not exercise any discretion or power while subsections (2) and (3) are not being complied with, except:
- (a) to appoint a new trustee; or
  - (b) to protect the property of the fund; or
  - (c) to deal with an urgent matter that cannot be postponed.
- (5) Subsections (2), (3) and (4) do not apply to a \*private ancillary fund that has the public trustee of a State or Territory as its trustee.
- (6) An individual must not be a director of a trustee, or a member of any other controlling body of the fund, if the individual has been convicted of a taxation offence (within the meaning of Part III of the Act) that is an indictable offence. If an existing director or member is convicted of such an offence, the individual must cease to be a director within 1 month after the conviction.
- (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).

### 13 Change to governing rules

- (1) The trustee must notify the Commissioner, in the \*approved form, of any change to \*private ancillary fund governing rules within 21 days of the change being made.

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**Note:** Significant changes to a fund's governing rules may affect the fund's entitlement to remain endorsed as a deductible gift recipient.

**Penalty:** 5 penalty units.

- (2) However, the trustee does not need to notify the Commissioner under subsection (1) if the trustee is required to notify the Commissioner of the Australian Charities and Not-for-profits Commission of the same information under Division 65 of the *Australian Charities and Not-for-profits Commission Act 2012*.

### 14 Trustee liability

The governing rules of a \*private ancillary fund must prohibit the fund from indemnifying the trustee, or an employee, officer or \*agent of the trustee, for a loss or liability attributable to:

- (a) a deliberate act or omission known by the trustee, employee, officer or agent to be a breach of trust; or
- (b) dishonesty of the trustee, employee, officer or agent; or
- (c) gross negligence or recklessness of the trustee, employee, officer or agent.

**Note:** An administrative penalty under section 426-120 in Schedule 1 to the Act cannot be reimbursed from the fund, see subsection 426-120(4) in Schedule 1 to the Act.

## Division 3—Operation of a private ancillary fund

### 15 Minimum annual distribution

- (1) During each \*financial year, a \*private ancillary fund must make distributions of amounts that are in total equal to at least 5 per cent (***minimum annual distribution rate***) of the \*market value of the fund's net assets (as at the end of the previous \*financial year) in accordance with this section.

Note 1: While net assets are used to determine the fund's minimum distribution, the total distribution that must be made is not net of any amount (for example, expenses of the fund).

Note 2: The minimum annual distribution rate, for a financial year, may be lowered under subsections (3) and (7).

Penalty: 30 penalty units if the shortfall is greater than \$1,000.

- (2) Further to subsection (1), a \*private ancillary fund must distribute at least \$11,000 (or the remainder of the fund if that is worth less than \$11,000) during a \*financial year if any expenses of the fund in relation to that financial year are paid directly or indirectly from the fund's assets or income.

Note: This means that if a fund's expenses are met from outside the fund, its minimum annual distribution is the amount calculated under subsection (1). If any of a fund's expenses are paid out of the fund's assets or income, its minimum distribution is \$11,000 or the amount calculated under subsection (1), whichever is greater.

- (3) However, no distribution is required during the \*financial year in which a \*private ancillary fund is established.

- (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 grants a lease of 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 that is 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.

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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 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*.

- (5) If the Commissioner requests the trustee to rectify a shortfall in the distribution for a \*financial year, the trustee must comply with the request within 60 days.

Penalty: 10 per cent of the shortfall as at the end of the 60 days reduced, but not below nil, by any penalty under subsection (1).

- (6) A distribution made to rectify a contravention of subsection (1) does not count towards compliance with that subsection for a later year in which the rectification occurs.

### *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 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.

- (11) A \*private ancillary fund that is dissatisfied with a decision of the Commissioner covered by subsection (12) may object against the decision in the manner set out in Part IVC of the Act.
- (12) This subsection covers the following decisions of the Commissioner:
  - (a) a decision not to reduce the annual distribution rate under subsection (7) (after receiving an application as described in that subsection);
  - (b) a decision not to reduce the annual distribution rate under subsection (7) to extent requested in an application (as described in that subsection);
  - (c) a decision to impose a condition on access to a reduced annual distribution rate under subsection (7).

## 16 Valuations

- (1) The \*market value of a \*private ancillary fund's assets (other than land) must be estimated at least annually.

Note: See section 2B of the *Acts Interpretation Act 1901* for the meaning of 'land'.

- (2) The \*market value of land must be estimated at intervals of no more than 3 \*financial years. Except as otherwise provided by this section, each estimate of the market value of land is to be used until a new estimate is obtained.
- (3) Subject to subsections (4) and (7), the trustee may itself estimate the \*market value or arrange for a qualified valuer or another appropriate entity to make an estimate.
  - Note 1: It is not intended that making or arranging for an estimate of market value be onerous or expensive. However, it may be prudent for a trustee to consider using a qualified valuer if the value of an asset represents a significant proportion of the fund's value or if the nature of the asset means that a valuation is likely to be difficult or complex.
  - Note 2: The trustee may ask the Commissioner to undertake a valuation. The Commissioner may charge the trustee for undertaking a valuation, see section 359-40 in Schedule 1 to the Act.
- (4) However, the \*market value of land must be estimated by a qualified valuer or by the Commissioner.
- (5) An estimate must be of the \*market value as at the end of the relevant \*financial year.
- (6) An estimate must be conducted within 2 months before or after the end of the relevant \*financial year for each asset unless to do so would be unnecessarily

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onerous and expensive. All estimates must be completed no later than before the fund is required to give to the Commissioner its \*income tax return for the relevant \*financial year.

**Note:** A private ancillary fund is required to lodge an income tax return even if it is exempt from income tax. The Commissioner will approve an appropriate income tax return form for private ancillary funds.

- (7) If the Commissioner considers an estimate of the \*market value of any asset to be unreasonable, the Commissioner may request the trustee to arrange for another estimate to be obtained in the manner the Commissioner stipulates. The trustee must comply with the request.

**Note:** The Commissioner may seek the trustee's agreement to undertake the valuation or the trustee may ask the Commissioner to undertake the valuation. Where the Commissioner undertakes a valuation, the Commissioner may charge the trustee for undertaking that valuation, see section 359-40 in Schedule 1 to the Act.

- (8) Whoever makes the estimate must base it on reasonably objective and supportable data. The methodology and data used for an estimate must be documented in the fund's records. Where an estimate is obtained from a qualified valuer, the trustee must also obtain from the valuer a written estimate which also sets out the valuation methodology and refers to any supporting materials used in making the estimate.

## 17 Keeping accounts

- (1) The trustee of a \*private ancillary fund must keep, or cause to be kept, proper accounts in respect of all of the fund's receipts and payments and all financial dealings connected with the fund, and must retain those accounts for at least 5 years after the completion of the transactions or acts to which they relate.

**Note:** See also Subdivision 382-B in Schedule 1 to the Act for rules about record-keeping obligations of deductible gift recipients.

**Penalty:** 10 penalty units.

- (2) The trustee must make the accounts available to the Commissioner on request.

**Penalty:** 10 penalty units.

## 18 Financial statements

- (1) The trustee of a \*private ancillary fund must prepare, or cause to be prepared, a financial report showing the fund's financial position for each \*financial year. The financial report must be prepared in accordance with this section.

**Penalty:** 10 penalty units.

- (2) The financial report must be prepared in accordance with the \*accounting standards.

**Note:** If a fund is required to prepare, and does prepare, a financial report in accordance with Subdivision 60-C of the *Australian Charities and Not-for-profits Commission Act 2012*, it will have satisfied this section.

- (3) All transactions (other than gifts of money) between a \*private ancillary fund and a founder of the fund, a \*relative of the founder, a donor to the fund, a \*relative of the donor, the trustee, a director, officer, \*agent, \*member or employee of the trustee, or an \*associate of any of these entities must be disclosed in the financial report.
- (4) The financial statements must be prepared before the trustee is required to give to the Commissioner the fund's \*income tax return for the relevant \*financial year.
- (5) The trustee must make the financial report available to the Commissioner of Taxation on request, unless the financial report has already been given to the Commissioner of the Australian Charities and Not-for-profits Commission.

Penalty: 10 penalty units.

## 19 Audits

- (1) In relation to each \*financial year, the trustee of a \*private ancillary fund must arrange for a registered company auditor (within the meaning of the *Corporations Act 2001*) to audit (in accordance with this section):
  - (a) the financial report of the fund; and
  - (b) compliance with this instrument by the fund and the trustee.

Penalty: 10 penalty units.

- (2) Despite subsection (1), if the trustee is the public trustee of a State or Territory, it may have the Auditor-General of that State or Territory undertake the audit.
- (3) Despite subsection (1) and unless the Commissioner, by written notice, provides otherwise in relation to a particular \*private ancillary fund, a fund that meets both of the following:
  - (a) revenue of less than \$1 million for a financial year; and
  - (b) assets of less than \$1 million for a financial year;may instead have its financial report, and compliance with this instrument, for that year reviewed rather than audited.
- (4) A reviewer must also be a registered company auditor (within the meaning of the *Corporations Act 2001*). However, an individual who is taken to be a registered company auditor under section 324BE of the *Corporations Act 2001* is also taken to be a registered company auditor for the purpose of this subsection.

Note: Section 324BE has the effect of widening the class of individuals who can undertake a review to all members of a professional accounting body.

- (5) The auditor or reviewer must undertake the audit or review, and provide the fund with a report, in accordance with the \*auditing standards.
- (6) The audit or review must be finalised before the fund is required to give to the Commissioner the fund's \*income tax return for the relevant \*financial year.
- (7) The trustee must make the report available to the Commissioner of Taxation on request, unless the report has already been given to the Commissioner of the Australian Charities and Not-for-profits Commission.

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Penalty: 10 penalty units.

### 20 Investment strategy

- (1) The trustee of a \*private ancillary fund must prepare and maintain a current investment strategy for the fund in accordance with this section.

Penalty: 10 penalty units.

- (2) An investment strategy must set out the investment objectives of the fund and detail the investment methods the trustee will adopt to achieve those objectives.
- (3) An investment strategy must also reflect the purpose and circumstances of the fund and have particular regard to:
- (a) the risk involved in making, holding and realising, and the likely return from, the fund's investments, having regard to the fund's objects and its expected cash flow requirements (including distribution requirements); and
  - (b) the composition of the fund's investments as a whole, including the extent to which the investments are diverse or expose the fund to risks from inadequate diversification; and
  - (c) the liquidity of the fund's investments, having regard to its expected cash flow requirements (including distribution requirements); and
  - (d) the ability of the fund to discharge its existing and prospective liabilities; and
  - (e) the investment restrictions imposed by \*Australian laws; and
  - (f) the status of the fund as a \*registered charity (if relevant); and
  - (g) material conflicts of interest (whether actual or perceived) in holding particular investments (including conflicts affecting individuals involved in the decision-making of the fund); and
  - (h) the terms and other circumstances relating to any gift to the fund under a will.
- (4) The trustee must implement the investment strategy, and must ensure that all investment decisions are made in accordance with it.

Penalty: 15 penalty units.

- (5) The investment strategy (and a record of the associated decision-making processes) must be available in a written form so that the trustee, an auditor, a reviewer or the Commissioner can determine whether the fund has complied with this instrument and other \*Australian laws.

Penalty: 10 penalty units.

### 21 Investment limitations

- (1) The trustee of a \*private ancillary fund must not \*borrow money or maintain an existing borrowing of money.

Penalty: 30 penalty units.



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- (2) However, subsection (1) does not prohibit a trustee from \*borrowing money if:
- (a) the purpose of the borrowing is to enable the trustee to make a distribution, to a \*deductible gift recipient, to comply with this instrument; and apart from the borrowing, the trustee would be unable to make the distribution; and
  - (b) the period of the borrowing does not exceed 90 days; and
  - (c) the borrowing, when made, would not result in total borrowings by the fund exceeding 10 per cent of the \*market value of the fund's assets.
- (3) Subsection (1) also does not apply to the acquisition of a financial instrument excluded by the Commissioner, by written notice, from that subsection in relation to a fund.
- (4) The trustee of a \*private ancillary fund must ensure the fund's investments are made and maintained on an \*arm's length basis, unless another provision of this instrument allows otherwise.

Penalty: 30 penalty units.

- (5) The trustee of a \*private ancillary fund must not give a security over, or in relation to, an asset of the fund.

Penalty: 30 penalty units.

- (6) However, subsection (5) does not apply to:
- (a) a financial instrument excluded by the Commissioner from that subsection in relation to a fund; or
  - (b) an agreement to guarantee the repayment of any money lent by an arm's length creditor (including any related unpaid interest or fees) for the sole benefit of one or more \*deductible gift recipients to which the fund may make a distribution.
- (7) The trustee of a \*private ancillary fund:
- (a) must ensure the fund does not acquire an asset (except by way of gift) from; and
  - (b) must not make a loan or provide any other kind of financial assistance to; a founder of the fund, a \*relative of the founder, a donor to the fund, a \*relative of the donor, the trustee, a director, officer, agent, \*member or employee of the trustee, or an \*associate of any of these entities except:
    - (c) by way of an arms' length commercial transaction; or
    - (d) on terms each of which is more favourable to the fund than would otherwise be expected under an arms' length transaction.

Penalty: 30 penalty units.

- (8) The trustee of a \*private ancillary fund must keep the assets of the fund separate from all other assets.

Penalty: 30 penalty units.

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(9) However, subsection (8) does not prevent a licensed trustee company (within the meaning of the *Corporations Act 2001*) or the public trustee of a State or Territory from operating common funds for investment purposes.

(10) The trustee of a \*private ancillary fund must ensure that the fund does not acquire an asset (except by way of gift) if the asset is a \*collectable (or would be a collectable but for the asset not being used or kept mainly for an entity's personal use or enjoyment). If the fund acquires such an asset by way of gift, it must sell or distribute the asset within 12 months after acquiring it.

Penalty: 30 penalty units.

(11) The trustee of a \*private ancillary fund must ensure the fund does not \*carry on a \*business.

Penalty: An amount equal to 25 per cent of the net profit (if any) of the business for each \*financial year during all or part of which the contravention continues.

(12) However, a trustee does not contravene subsection (11) merely because the fund's passive investment activities, because of repetition, volume and regularity, mean that it is \*carrying on a \*business.

Note: This subsection has the effect that the mere holding of, or dealing in, investments, such as shares or rental properties, for the purpose of deriving income that can be distributed to eligible deductible gift recipients, does not contravene subsection (11).

## 22 Uncommercial transactions and benefits to founders and donors

(1) The trustee of \*private ancillary fund must ensure the fund does not enter into any transaction that is uncommercial when entered into, unless the transaction is:

- (a) with a \*deductible gift recipient covered by item 1 in the table in section 30-15 of the *Income Tax Assessment Act 1997*; and
- (b) in the course or furtherance of the fund's purpose.

Penalty: 30 penalty units.

(2) However, subsection (1) does not prevent the fund from entering into an uncommercial transaction on terms each of which is more favourable to the fund than would otherwise be expected under an arms' length transaction.

(3) The trustee of a \*private ancillary fund must ensure the fund does not \*provide any benefit (except as set out in section 23), directly or indirectly, to:

- (a) the trustee; or
- (b) a \*member, director, employee, \*agent or officer of the trustee; or
- (c) a donor to the fund; or
- (d) a founder of the fund; or
- (e) a \*relative of an individual covered by paragraph (c) or (d); or
- (f) an \*associate of any of those entities (other than a \*deductible gift recipient).

Penalty: An amount equal to the amount or value of the benefit provided.

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## 23 Fees and expenses

The trustee of a \*private ancillary fund may apply income or capital of the fund:

- (a) to pay or reimburse the trustee for reasonable expenses incurred on behalf of the fund; and
- (b) to pay fair and reasonable remuneration for the trustee's services in administering the fund.

## 24 Donors

Note: A private ancillary fund is private in nature. This characteristic implies that there is a close relationship between those who establish the fund, those who donate to it and those that operate the fund. This feature of a private ancillary fund can be contrasted with those of a public ancillary fund, which can collect donations from the public and has an independent group of individuals involved in its governance.

- (1) The trustee of a \*private ancillary fund must not solicit donations from the public.

Penalty: 30 penalty units.

- (2) In any \*financial year, a \*private ancillary fund must not accept donations totalling more than 20 per cent (in total) of the \*market value of the fund's assets (determined at the end of the previous financial year) from entities other than:
  - (a) a founder of the fund; or
  - (b) \*associates of the founder; or
  - (c) if the founder has died—an entity who was an associate of the founder immediately prior to the founder's death; or
  - (d) a \*relative of the founder; or
  - (e) employees of the founder; or
  - (f) a deceased estate of an individual covered by (a), (b), (c), (d) or (e).

Penalty: 10 penalty units.

- (3) The fund must:
  - (a) issue a receipt for every gift it receives; and
  - (b) include on the receipt the name and \*ABN of the fund, the name of the donor and a statement that the receipt is for a gift received by the fund.

## 25 Compliance with all relevant laws

The trustee of a \*private ancillary fund must ensure the trustee and the fund comply with all relevant \*Australian laws, all legally binding directions given to the trustee by the Commissioner and all the requirements contained in this instrument.

Section 26

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## **Division 4—Winding up, or ceasing to be, a private ancillary fund**

### **26 Winding up, or ceasing to be, a private ancillary fund**

If a fund is wound up, or ceases to be a \*private ancillary fund, all of the fund's net assets must be provided as described in paragraph (a) of item 2 of the table in section 30-15 of the *Income Tax Assessment Act 1997*.

Note: see also subsection 9(3).

### **27 Converting a private ancillary fund into a public ancillary fund**

With the agreement of the Commissioner, a \*private ancillary fund may amend its governing rules to convert the fund into a \*public ancillary fund, despite anything in this instrument.

Note 1: This means that after receiving the agreement of the Commissioner, the trustee may ignore any provision of this instrument to the extent that it would prevent the conversion of the private ancillary fund into a public ancillary fund.

Note 2: After the conversion, the rules applying to public ancillary funds apply to the converted fund (see Subdivision 426-D in Schedule 1 to the Act and the *Taxation Administration (Public Ancillary Fund) Guidelines 2022*).

### **28 Portability**

With the agreement of the Commissioner, a \*private ancillary fund may transfer assets to another \*ancillary fund if:

- (a) the private ancillary fund transfers all of its net assets to that ancillary fund; and
- (b) the private ancillary fund has already complied with section 15 for that financial year (about minimum annual distributions); and
- (c) none of the assets of the private ancillary fund have been received from another ancillary fund during the 2 previous financial years.

## **Part 3—Application and transitional provisions**

### **Division 1—Transitional rules for former prescribed private funds**

Note: This Division sets out transitional rules modifying how Part 2 applies to a private ancillary fund that was a prescribed private fund at the end of 30 September 2009.

#### **29 Governing rules inconsistent with these guidelines**

- (1) If:
  - (a) a \*private ancillary fund does *not* have a sole trustee that is a \*constitutional corporation; and
  - (b) the fund was a prescribed private fund at the end of 30 September 2009;then subsection 12(3) does not apply to the fund. Instead, at least one responsible person must be a trustee of the fund and a member of any other controlling body of the fund.
- (2) If a \*private ancillary fund had an existing borrowing on 30 September 2009, the fund may maintain that borrowing despite subsection 21(1). However, the fund may not alter the terms of the borrowing without the prior agreement of the Commissioner.

Section 30

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## Division 2—Things done under the Private Ancillary Fund Guidelines 2009

Note: This Division sets out transitional rules modifying how Part 2 applies to a private ancillary fund to ensure a seamless transition between the *Private Ancillary Fund Guidelines 2009* and this instrument.

### 30 Things done under the *Private Ancillary Fund Guidelines 2009*

- (1) If:
  - (a) a thing was done for a particular purpose under the *Private Ancillary Fund Guidelines 2009* as in force immediately before that instrument was repealed; and
  - (b) the thing could be done for that purpose under this instrument;the thing has effect for the purposes of this instrument as if it had been done for that purpose under this instrument.
- (2) Without limiting subsection (1), a reference in that subsection to a thing being done includes a reference to a notice, application or other instrument being given or made.

## Division 3—Transitional rule: coronavirus economic response

### 31 Carry forward credit for distributions in excess of minimum

- (1) This section applies to a \*private ancillary fund if the fund exceeds its annual minimum distribution for the \*financial years 2019-20 to 2020-21, as calculated under subsection (2), by more than 4.
- (2) Work out how much a \*private ancillary fund exceeds its annual minimum distribution for the \*financial years 2019-20 to 2020-21 as follows:

*Method statement*

- Step 1. Work out the fund's actual distribution for the 2019-20 financial year by dividing the fund's distributions made in that financial year by the \*market value of the fund's net assets (as at the end of the previous financial year). The result should be expressed as a percentage and rounded to the nearest whole number.
- Step 2. Work out the fund's actual distribution for the 2020-21 financial year by dividing the fund's distributions made in that financial year by the market value of the fund's net assets (as at the end of the previous financial year). The result should be expressed as a percentage and rounded to the nearest whole number.
- Step 3. Add the result of step 1 with the result of step 2.

Section 30

Step 4. Reduce the result of step 3 by 10, but not so as to reduce the result to an amount less than nil. The result is how much a \*private ancillary fund exceeds its annual minimum distribution for the financial years 2019-20 to 2020-21.

- (3) Where this section applies, the minimum annual distribution rate for a \*private ancillary fund the purposes of subsection 15(1) for a \*financial year covered by subsection (4) of this section is 4 per cent.
- (4) The following are the \*financial years covered by this subsection for a \*private ancillary fund:
- (a) the 2021-22 financial year; and
  - (b) the 2022-23 financial year; and
  - (c) a subsequent financial year or years for each amount of 2 the result of the method statement in subsection (2) exceeds 4.

Example: If the result of the method statement in subsection (2) is 7 for a private ancillary fund, the 2023-24 financial year is also covered by subsection (4).

## Endnotes

### Endnote 1—About the endnotes

The endnotes provide information about this compilation and the compiled law.

The following endnotes are included in every compilation:

Endnote 1—About the endnotes

Endnote 2—Abbreviation key

Endnote 3—Legislation history

Endnote 4—Amendment history

### Abbreviation key—Endnote 2

The abbreviation key sets out abbreviations that may be used in the endnotes.

### Legislation history and amendment history—Endnotes 3 and 4

Amending laws are annotated in the legislation history and amendment history.

The legislation history in endnote 3 provides information about each law that has amended (or will amend) the compiled law. The information includes commencement details for amending laws and details of any application, saving or transitional provisions that are not included in this compilation.

The amendment history in endnote 4 provides information about amendments at the provision (generally section or equivalent) level. It also includes information about any provision of the compiled law that has been repealed in accordance with a provision of the law.

### Misdescribed amendments

A misdescribed amendment is an amendment that does not accurately describe the amendment to be made. If, despite the misdescription, the amendment can be given effect as intended, the amendment is incorporated into the compiled law and the abbreviation “(md)” added to the details of the amendment included in the amendment history.

If a misdescribed amendment cannot be given effect as intended, the abbreviation “(md not incorp)” is added to the details of the amendment included in the amendment history.



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## Endnote 2—Abbreviation key

ad = added or inserted	o = order(s)
am = amended	Ord = Ordinance
amdt = amendment	orig = original
c = clause(s)	par = paragraph(s)/subparagraph(s) /sub-subparagraph(s)
C[x] = Compilation No. x	pres = present
Ch = Chapter(s)	prev = previous
def = definition(s)	(prev...) = previously
Dict = Dictionary	Pt = Part(s)
disallowed = disallowed by Parliament	r = regulation(s)/rule(s)
Div = Division(s)	
exp = expires/expired or ceases/ceased to have effect	reloc = relocated
F = Federal Register of Legislation	renum = renumbered
gaz = gazette	rep = repealed
LA = <i>Legislation Act 2003</i>	rs = repealed and substituted
LIA = <i>Legislative Instruments Act 2003</i>	s = section(s)/subsection(s)
(md) = misdescribed amendment can be given effect	Sch = Schedule(s)
(md not incorp) = misdescribed amendment cannot be given effect	Sdiv = Subdivision(s)
mod = modified/modification	SLI = Select Legislative Instrument
No. = Number(s)	SR = Statutory Rules
	Sub-Ch = Sub-Chapter(s)
	SubPt = Subpart(s)
	<u>underlining</u> = whole or part not commenced or to be commenced

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**Endnote 3—Legislation history**

<b>Name</b>	<b>Registration</b>	<b>Commencement</b>	<b>Application, saving and transitional provisions</b>
<i>Taxation Administration (Private Ancillary Fund) Guidelines 2019</i>	20 September 2019 (F2019L01227)	21 September 2019	—
<i>Taxation Administration (Coronavirus Economic Response Package— Ancillary Funds) Amendment Guidelines 2020</i>	11 June 2020 (F2020L00684)	12 June 2020	—
<i>Taxation Administration (Public Ancillary Fund) Guidelines 2022</i>	24 February 2022 (F2022L00184)	25 February 2022	—

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**Endnote 4—Amendment history**

<b>Provision affected</b>	<b>How affected</b>
section 2	rep LA s48D
section 15	am F2022L00184
section 27	am F2022L00184
<b>Part 3</b>	
section 29	am F2022L00184
<b>Division 3</b>	ad F2020L00684
<b>Schedule 1</b>	rep LA s48C