



PS LA 2014/1 - Administration of penalties for failure to comply with Ancillary Fund Guidelines

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Practice Statement Law Administration

PS LA 2014/1

This law administration practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement [PS LA 1998/1](#). ATO personnel, including non ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.

Taxpayers can rely on this law administration practice statement to provide them with protection from interest and penalties in the way explained below. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this law administration practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

SUBJECT: Administration of penalties for failure to comply with Ancillary Fund Guidelines

PURPOSE: To provide guidance to ATO personnel on:

- how the Commissioner administers penalties for failure to comply with the Ancillary Fund Guidelines
- when directors of a corporate trustee may have a defence to the Administrative Penalties, and
- when the Commissioner will remit such penalties.

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1. All legislative references in this practice statement are to Schedule 1 to the *Taxation Administration Act 1953* (TAA), unless otherwise stated.

BACKGROUND

2. Prior to the introduction of Subdivision 426-D, there were no guidelines enforced through the imposition of administrative penalties for ancillary funds. If prescribed private funds or public funds were in breach of the previous provisions, the only sanction available to the Commissioner of Taxation was the removal of endorsement for tax concessions. The new provisions and guidelines give the Commissioner of Taxation the ability to apply more proportional responses to breaches of the law.
3. Subdivision 426-D deals with types of philanthropic trust funds known as ***public ancillary funds*** and ***private ancillary funds***.

4. Specifically, section 426-120¹ deals with administrative penalties for trustees of these ancillary funds. Where an ancillary fund breaches the public ancillary fund guidelines or the private ancillary fund guidelines, a penalty is payable by the trustee of the fund.
5. Both the *Private Ancillary Fund Guidelines 2009*² and the *Public Ancillary Fund Guidelines 2011*³ (Ancillary Fund Guidelines) provide the rules that ancillary funds and their trustees must comply with if the funds are to be, or are to remain, endorsed as Deductible Gift Recipients (DGR).
6. The Ancillary Fund Guidelines specify the amount of the penalty to be applied in specific circumstances.
7. The Commissioner has the discretion to remit all or a part of the penalty under Division 298.
8. When considering remission of administrative penalties under section 298-20 for penalties imposed under section 426-120, the Commissioner must be satisfied that it is fair and reasonable in all of the circumstances.

SCOPE

9. This practice statement should be used when considering the imposition and remission of administrative penalties relating to breaches of the Ancillary Fund Guidelines.
10. Penalties for breaches of the Ancillary Fund Guidelines are imposed on a strict liability basis. However there are some transitional rules which need to be taken into account when determining if a penalty applies to ancillary funds which were in existence before the applicable Ancillary Fund Guidelines came into force. The transitional rules are intended to help ancillary funds make the transition into the new regime.
11. This practice statement is not intended to provide comprehensive guidance on how the Commissioner's discretion to remit penalties should be exercised under Division 298. The purpose of this practice statement is only to highlight relevant factors to consider when exercising the discretion in view of the intent of ancillary funds and to assist in ensuring ancillary funds receive consistent treatment.

STATEMENT

12. The Ancillary Fund Guidelines set out the rules that an ancillary fund and its trustees must comply with in order to be endorsed, and remain endorsed as a DGR. The appropriate test is whether each trustee of the ancillary fund complied with their obligations as reasonably expected of a competent trustee in the same circumstances. The purpose of the penalty regime is to ensure that trustees are properly accountable and act in the manner expected of a trustee holding philanthropic funds for a broad public benefit.

¹ Section 426-120 was inserted by Act No 88 of 2009 to regulate private ancillary funds, effective 1 October 2009. Act No 147 of 2011 extended the section to include public ancillary funds, effective 1 January 2012.

² The *Private Ancillary Fund Guidelines 2009* commenced on 1 October 2009. Section 426-110 gives the Minister the power to set these guidelines for private ancillary funds and their trustees by legislative instrument.

³ The *Public Ancillary Fund Guidelines 2011* commenced on 1 January 2012. Section 426-103 gives the Minister the power to set these guidelines for public ancillary funds and their trustees by legislative instrument.

13. The following principles should be taken into account throughout the application of the administrative penalty process including any process of review under Part IVC of the TAA or other reviews undertaken:
- The principles underpinning the compliance model, including being fair to those trustees wanting to do the right thing, and being firm but fair with those choosing to disengage and avoid their taxation obligations.
 - The statements and principles in the *Taxpayers' Charter*. This means a trustee should be presumed to have been honest, unless there is information which suggests otherwise.
 - Penalty decisions must be supported by the available facts and evidence. Conclusions about the trustee's actions or behaviour should only be made where they are supported by facts, or where reasonable inferences can be drawn from those facts.
 - The trustee should normally be contacted and given the opportunity to explain their actions before making a penalty decision.

Administrative penalties for trustees of ancillary funds

14. Section 426-120 deals with administrative penalties for trustees of ancillary funds, and directors of a constitutional corporation that is a trustee of ancillary funds. Specifically, subsection 426-120(1) states these persons are jointly and severally liable to an administrative penalty if:
- (a) a trustee of an ancillary fund holds the fund out as being endorsed, entitled to be endorsed, or entitled to remain endorsed, as a deductible gift recipient, and
 - (b) the fund is not so endorsed or entitled.
15. The administrative penalties will result from an ancillary fund failing to comply with the Ancillary Fund Guidelines.⁴ Different penalty amounts will apply depending on which of the Ancillary Fund Guidelines is breached.
16. The administrative penalty is payable by the trustee of the ancillary fund.
17. The administrative penalty can only be imposed on directors of a constitutional corporation that is a trustee of the ancillary fund where the penalties cannot reasonably be recovered from that corporate trustee.
18. In determining whether an administrative penalty can 'reasonably be recovered' from a corporate trustee, regard should be had to the administrative practicality of recovering the penalty from the corporate trustee, and the likelihood of successfully recovering the penalty from the corporate trustee.
19. Joint and several liability for the administrative penalty does not extend to a director of a licensed trustee company, or a director of a Public Trustee of a State or Territory.⁵
20. The administrative penalty must not be reimbursed from the ancillary fund.⁶

⁴ Paragraphs 426-103(b) and 426-110(b).

⁵ Subparagraph 426-120(2)(b)(ii).

⁶ Subsection 426-120(4).

Steps in the administration of Subdivision 426-D penalties

21. The three main steps in applying the administrative penalties are as follows:
- Step 1 – Determine if a penalty is imposed by law:
 - Establish if there is a breach of an Ancillary Fund Guideline.
 - Establish the penalty amount for the breach.
 - Determine whether the liability should be imposed on each trustee and/or each director of the corporate trustee.
 - Step 2 – Determine if the Commissioner should exercise the discretion to remit all or a part of the penalty.
 - Step 3 – Notify each trustee and/or each director of the corporate trustee of the liability to pay the penalty.
22. Once the penalty has been established, if there is a part payment of the penalty, all of the joint and several liabilities will be reduced by that payment. The Commissioner should therefore notify the responsible trustee and directors of the reduction in the penalty.

Imposition of penalty

23. ATO personnel should consider the relevant Ancillary Fund Guidelines, and determine if the activities of the ancillary fund constituted a breach of the Ancillary Fund Guidelines.

Amount of penalty

24. While section 426-120 makes a trustee and/or a director of a constitutional corporation that is a trustee liable to an administrative penalty, the relevant Ancillary Fund Guidelines determine the amount of the penalty. Each of the Ancillary Fund Guidelines tailors the amount of the administrative penalty to correspond to the severity or consequence of the breach.
25. A list of guidelines in each Ancillary Fund Guidelines and the corresponding penalty for the breach are contained in Appendix 1 and Appendix 2.

Imposition against the trustee and directors of the corporate trustee

26. Where an ancillary fund has a corporate trustee, ATO personnel must determine whether, in addition to the corporate trustee, the directors of the corporate trustee are also liable to the administrative penalty.
27. If it is clear that the penalty, or part of it, cannot be recovered from the corporate trustee alone, the Commissioner may seek to recover from the directors of the corporate trustee. The directors are jointly and severally liable to the administrative penalty.

Recovery action

28. The Commissioner may commence action against any or all of the trustees and, if applicable, any or all of the directors of the corporate trustee.

29. In considering whether to commence action against a director, the Commissioner will take into account any potential defences available to the directors, the director's capacity to pay and other relevant factors including the director's history with other entities by reference to the risk management policies in the ATO.⁷
30. If the Commissioner has information regarding the financial position of the directors, action will usually be taken against those directors from which, in combination, recovery would be expected to be achieved in the most timely way. However, where the Commissioner's knowledge of the directors is limited, it may be necessary to initiate action against all directors.

Defences

31. There is a statutory defence available to directors who breach paragraph 426-120(1)(a) where:
- (a) the director was not aware of the breach, and it would not have been reasonable to expect them to have been aware of the breach,⁸ or
 - (b) the director took all reasonable steps to ensure that the breach did not occur,⁹ or
 - (c) there were no such steps that the director could have taken.¹⁰
32. Whether a director is able to meet the terms of a statutory defence will depend on the facts of each case. The director bears the onus of proving that one or more of the exclusions apply to them.¹¹
33. The power of the court under section 1318 of the *Corporations Act 2001* to grant relief in case of breach of director's duty does not apply to a liability of a director for this administrative penalty.¹²
34. As a general principle, it is expected that the directors should be aware of the decisions being made by the corporation, as governed by the *Corporations Act 2001*.
35. The defence of whether, in any particular case, it is not 'reasonable to expect' the director to have been aware of the breach, is to be decided by the application of an objective test. The facts should be viewed as they would be by a reasonable and prudent director of reasonable ability, who in the proper discharge of duties as a director had reasonable grounds for expecting the breach. In the same circumstances, a director of the corporate trustee who is a 'responsible person' would also need to comply with the same degree of responsibility in the proper discharge of his or her duties. The meaning of the word 'expect'¹³ is to be understood according to its usage in ordinary parlance, namely, 'to regard as likely to happen' or 'to expect to find'. Principally, the director must act in a manner consistent with a director of a constitutional corporation that is a trustee of a trust holding philanthropic funds for broad public benefit. The effort required is one commensurate with all the director's circumstances, including the director's knowledge, education, experience and skill.

⁷ Refer to Law Administration Practice Statement PS LA 2011/6 *Risk management in the enforcement of lodgment obligations and debt collection activities*.

⁸ Paragraph 426-120(5)(a).

⁹ Paragraph 426-120(5)(b).

¹⁰ Paragraph 426-120(5)(c).

¹¹ Subsection 426-120(7).

¹² Subsection 426-120(8).

¹³ 'Expect' in paragraph 426-120(5)(a).

36. Taking 'reasonable steps'¹⁴ means acting with care and diligence in complying with the guidelines. In deciding what is 'reasonable' the Commissioner is to have regard to all relevant circumstances.¹⁵ For instance, regard should be had to when and for how long the person was a director, what the director did in the context of his or her knowledge of the options available to the director, and the director's continuing efforts to achieve compliance with his statutory obligations.

Transitional rules

37. Transitional rules apply to both the private and public ancillary funds. Generally, the rules allow time for the ancillary funds to bring their existing affairs into compliance with the new regime.
38. The dates relating to the operation of the transitional rules are different for the private ancillary funds and the public ancillary funds. These rules are described in Appendix 3.
39. Where there is a potential breach of the Ancillary Fund Guidelines, the ATO personnel must consider these transitional rules to determine if the Ancillary Fund Guidelines apply.

Remission decisions

40. Under section 298-20, the Commissioner has the discretion to remit all or part of the penalty imposed under section 426-120.¹⁶ Section 298-20 is expressed as an unfettered discretion.
41. The Commissioner needs to consider whether to exercise his discretion to remit separately for each trustee or director liable to an administrative penalty.
42. The discretion to remit penalties is to be exercised in a fair and reasonable way, including ensuring that the prescribed amount of penalty does not cause unintended or unjust results. The decision to exercise the discretion should be made after an objective analysis of all the relevant factors in a case has been undertaken.
43. As a starting point, the quantum of penalties prescribed is considered appropriate for the breaches of the Ancillary Fund Guidelines.
44. ATO personnel must consider the question of remission having regard to the purpose of the provision. Relevant matters to consider in approaching the issue of remission of penalty include:
- a high level of care is expected of trustees of philanthropic funds – they are required to act with care, skill and diligence.
 - a major objective of the penalty regime is to promote consistent treatment by specifying the amount of penalty for the breach of each guideline. That objective would be compromised if the amount of penalties specified in the law were remitted without just cause, arbitrarily or as a matter of course.
45. Generally, in determining whether to exercise the discretion, ATO personnel should consider if the trustee has acted as would reasonably be expected of a competent trustee in the same circumstances.

¹⁴ 'Reasonable steps' in paragraph 426-120(5)(b).

¹⁵ Subsection 426-120(6).

¹⁶ Paragraph 298-5(c).

46. The test for determining the trustee's conduct and culpability should be objective. The fact that the trustee genuinely tried to act with care and diligence is not the test – what is relevant is whether, on an objective analysis, a trustee in the same position and circumstances would have acted in the same way as the trustee in question.
47. There will be cases where the penalties imposed may not provide a just result to the trustee and/or director of the corporate trustee. When considering situations in which unjust results could arise, the Commissioner should have regard to all the relevant acts or omissions leading to the breach of the guideline.
48. An unjust result may also occur in situations where multiple administrative penalties from various breaches of the Ancillary Fund Guidelines could arise. Where the possibility of multiple penalties arises, the Commissioner should consider whether the cumulative penalty applied is defensible, proper and just having regard to the overall circumstances of the case. Regard should be had to the extent the penalties arise from the circumstances which are connected, and the extent to which the penalties arise from a single course of conduct, or from a single error. For instance, it is considered unjust to apply multiple penalties if they arise from the same course of action. Under these circumstances, the administrative penalty that applies should be the one that is the most specific to the situation.
49. Guidelines 34 to 37 and Guidelines 41 to 42 are significant integrity assurance measures. They put appropriate practices and processes in place firstly, to safeguard moneys donated to the ancillary fund, and secondly, to ensure tax deductible donations are used for an appropriate approved purpose. The guidelines are significant in demonstrating that the trustee is operating in a fiduciary capacity for a fund with a broad public benefit. It would be exceptional that remission would be given in respect of these breaches.
50. No one factor alone will determine if remission should be given or the quantum of any remission. The individual circumstances need to be considered on a case by case basis.
51. Although a remission decision must be made, this does not imply that remission will be given. A remission decision may result in no remission, partial remission or full remission of the penalty.
52. The considerations listed in this practice statement are not exhaustive and are not intended to prescribe the only factors. Rather, they are intended to encourage an analytical approach to each case and the application of sound judgment in making the remission decision.

Notification of penalty and objection rights

53. The Commissioner must give a written notice to the trustee and/or director informing them of their liability to pay the penalty, and of the reason why they are liable to pay the penalty. Under subsection 298-20(2), where a penalty applies and has not been remitted in full, the Commissioner must provide the trustee and/or the director with a written explanation of why the penalty has not been remitted in full.
54. The law does not specify when the explanation must be supplied. However, ATO personnel should ensure the reasons are supplied prior to or at the same time as the trustee or director are given the notice of liability.
55. A trustee or director who is dissatisfied with a decision to refuse to remit, in full or in part, an amount of penalty may object in the manner set out in Part IVC of the TAA if the amount of penalty remaining after the decision is more than two penalty units.

Remit liability to the extent of a payment

56. The Commissioner may receive full payment, or part payment, from one trustee or a director of the corporate trustee in respect of the administrative penalty. The amount of payment will reduce the amount that the other trustees and/or directors are liable to pay by the same extent.
57. The Commissioner will need to notify the remaining trustees or directors that their liabilities have been reduced to the extent of the payment.

Examples

58. As stated in paragraph 42 of this practice statement, a remission decision is based on an objective analysis of all relevant factors in a case, and it needs to be fair and reasonable. Each penalty decision needs to be supported by the available facts and evidence. Examples are provided below to illustrate how different factors may impact on a decision to remit the administrative penalties in full or in part. The examples assume the transitional rules do not apply to the relevant ancillary fund. The examples also assume that the trustee of the ancillary fund is a constitutional corporation that is neither a licensed trustee company nor a Public Trustee of a State or Territory. The examples provided are merely indicative rather than conclusive or exhaustive.

Example 1

59. Guideline 19¹⁷ requires a private ancillary fund to distribute at least 5 per cent of the market value of the fund's net assets (as at the end of the previous financial year).
60. A private ancillary fund, prior to the commencement of a taxation audit, disclosed that they had failed to comply with Guideline 19 in their second year of operation.
61. The trustee had distributed 5 per cent of the fund's net assets, including a large distribution to a Children's Hospital Foundation in a major city. However, the trustee subsequently discovered that the Children's Hospital Foundation was a public ancillary fund, and was therefore not an organisation which was eligible to receive a distribution from the private ancillary fund. When the mistake was identified, the trustee rectified it immediately by making a matching distribution to an eligible deductible gift recipient. The trustee also arranged for training and education for the persons responsible for making grants on behalf of the private ancillary fund to understand the legal requirements for distributions so that the same mistake would not occur in the future.
62. Under these circumstances, a full penalty remission is warranted. The trust was in its second year of operation, and the trustee's actions in this case were in accordance with what is reasonably expected of a competent trustee in the same circumstances. Once the discrepancy was discovered, the trustee took immediate steps to rectify the problem (that is, the shortfall amount was distributed to an eligible deductible gift recipient as soon as possible), and took steps to ensure that the same mistake would not occur again. The trustee also voluntarily disclosed the occurrence of this breach to the ATO auditor prior to the start of the audit process.¹⁸

¹⁷ Guideline 19 of the *Private Ancillary Funds Guidelines* 2009.

¹⁸ Refer to Miscellaneous Taxation Ruling MT 2012/3 for the Commissioner's view as to when a voluntary disclosure is made.

Example 2

63. Guideline 24 requires the maintenance of proper accounts in respect of all receipts and payments of the fund and all financial dealings connected with the fund, and must retain those accounts for a period of at least 5 years after the completion of the transactions.
64. The trustee did not maintain proper accounts for the public ancillary fund. For instance, the trustee did not always record the payments. Where receipts for a deductible contribution were issued, the trustee left out relevant details or issued receipts with incorrect details. The trustee admitted that several donors had queried the incomplete information in their receipts. The trustee has promised to re-issue the receipts. However, the trustee has been continually engaged in various big fund raising events, and has not found time to correct the errors and re-issue the receipts.
65. The trustee had greatly neglected the accounting and financial administration of the ancillary fund. It was not inadvertent book-keeping errors only.
66. It was also clear from the evidence gathered that the trustee was aware of the contravention, or should have been aware, and did not take steps to remedy the breach.
67. There was no specific reason for the trustee not to pay attention to its proper record keeping. Although the trustee had a busy professional role, it would not justify the application of a lower standard of care in meeting its obligations. These circumstances would not impair or compromise the trustee's capacity to comply with Guideline 24. A reasonable trustee in the same circumstances would be expected to devote sufficient time to maintaining the public ancillary fund's proper accounts of receipts and payments.
68. Under these circumstances, no remission of penalty was warranted.

Example 3

69. For one financial year subject to a review, a trustee of a private ancillary fund was found not to have kept proper accounts in respect of all receipts and payments of the fund and all financial dealings connected with the fund. This was a contravention of Guideline 24. The private ancillary fund's net assets were not a sizeable amount.
70. A director of the corporate trustee advised he had a serious illness. He provided documentary evidence to support that he had two major surgeries in that relevant financial year. The director's illness to a great extent affected his abilities to complete his normal duties. While recovering from both surgeries, the director depended on a part-time book keeper instead to manage payments and receipts of the ancillary fund. The book keeper retained all documentation but did not use a proper accounting system to record all the transactions.
71. The director provided all the receipts and invoices gathered during that financial year to an ATO auditor. However, the accounting of all the dealings of the ancillary fund was not completed. During the audit period, the director had to reconcile the records once more to provide an accurate financial accounting of the fund for that financial year. Further evidence also showed the director had properly administered the moneys in the ancillary fund (that is, consistent with its current investment strategy and in accordance with other guidelines).

72. Under these circumstances, the Commissioner was satisfied that the statutory defence was available to the director. The following matters were relevant to support his defence:
- It is a reasonable conclusion that the director's illness contributed to his failure to correctly record and manage the financial dealings of the private ancillary fund. Similarly, an appropriate conclusion is that a trustee in the same circumstances might not be as thorough or as organised in keeping records as a trustee who was not dealing with significant health issues.
 - Given his ill health and the size of the private ancillary fund, it is also reasonable for the trustee to rely on a part-time book-keeper to manage the transactions. Therefore, based on his action taken, it was reasonable to form the view that the director took all reasonable steps to ensure that the breach did not occur.
73. The same statutory defence, however, would not apply to the other directors of the corporate trustee. Therefore, the other directors may still be liable for the penalty under Guideline 24. The imposition and remission of a penalty for the remaining directors requires consideration of the facts and circumstances in respect of each of the directors individually.

Example 4

74. Guideline 27 requires ancillary funds to make financial statements available to the Commissioner upon request.
75. An ancillary fund became the subject of review, and the ATO requested various details including its last financial statement. The size of the ancillary fund was substantial, and the funds at risk were sizeable.
76. The ancillary fund did not supply the requested financial statement. No responses were forthcoming after three requests for information were sent.
77. A decision was made not to remit the penalty imposed for breach of Guideline 27, as the notices had not been complied with and there was no evidence to suggest that the trustee was unable to provide the information requested. It is reasonable to expect that a competent trustee in the same circumstances would have made those financial statements available to the Commissioner.
78. A penalty for not preparing the financial statement under Guideline 26 could also apply. If the evidence supported this conclusion, then the trustee would be liable for both penalties under Guideline 27 and 26. Consideration should be given to whether maintaining both penalties would produce an unjust result. In this case, the penalties relating to the two breaches of Ancillary Fund Guidelines are from two separate actions (that is, failure to prepare a financial statement, and failure to comply with the Commissioner request). Therefore, there is no unjust result justifying some remission.

Example 5

79. Following on from example 4 of this practice statement, it was clear from the facts that the corporate trustee had no available funds. The ATO personnel, therefore, should seek to recover the penalty from the directors of the corporate trustee who are also jointly and severally liable for the penalty.

80. The facts showed the three directors of the corporate trustee had different roles and responsibilities. One director concentrated on organising fund-raising activities and dealing with charitable institutions. The other two directors were responsible for the financial management of the ancillary fund.
81. Six months before the ancillary fund was under review, the fund-raising director (that is, the director with the fund-raising and charitable activities role) became concerned about the two other directors not performing their duties proficiently. The fund-raising director reviewed the accounting records of the fund. He engaged an external professional accountant to assist with his endeavours. However, the two other directors were uncooperative and recalcitrant. They did not provide relevant information to allow the accountant to review the accounting records.
82. When considering whether to commence action against some or all of the directors, the ATO personnel should take into account the potential defences available to the directors, the director's capacity to pay and any other relevant factors.
83. In this case, based on the action taken, it was reasonable to form the view that the fund-raising director took all reasonable steps, albeit those steps were ultimately ineffective. Similarly, to the extent that he did not take steps, there were no more effective steps available to him. He was faced with non-cooperative co-directors. These facts strongly suggest that the statutory defence is available to the fund-raising director.
84. Based on the available facts, the Commissioner considered it appropriate to commence actions against the two other directors only.

Example 6

85. Guideline 40¹⁹ states that the ancillary fund must not carry on a business.
86. A private ancillary fund was originally established for philanthropic purposes. It held a small number of shares and rental properties for the purpose of deriving income to be distributed to deductible gift recipients. This was not considered to be carrying on a business at that time.
87. However, a couple of years after formation the ancillary fund achieved notably good results from its investment activities. Consequently, it started to undertake more substantial investigation and investment activities to take advantage of the potential. The activities undertaken were planned, organised and carried out in a similar manner to those of other investment companies.
88. For instance, it did not only manage rental properties to maximise returns, it also engaged in property development. The activities were of reasonable size and scale. The ancillary fund engaged consultants and employed specialised staff to manage its investment function.
89. After considering all the factors, it was determined that Guideline 40 was breached and a penalty of 25% of the net profits for each financial year was imposed. Although the ancillary fund was not set up to breach Guideline 40 intentionally, given the sizeable activities and the change in the nature of trade, it was concluded that the ancillary fund was no longer merely holding investments. At a point in time, the ancillary fund started carrying on a business.

¹⁹ Guideline 40 of the *Private Ancillary Funds Guidelines 2009*.

90. There were no grounds for remission of the penalty, as the trustees did not act with care regarding Guideline 40. It was considered that in the same circumstances, the trustees could be expected to have known that the activities undertaken by the fund constituted the carrying on of a business and that the fund was therefore in breach of Guideline 40.

Example 7

91. A private ancillary fund provided interest free loans to family members of the founder and paid an excessive salary to the founder that was not commensurate to the minimal activities undertaken by him on behalf of the fund. The trustee of the private ancillary fund also failed to make any payments in pursuit of its charitable purposes, and advised it did not have any immediate plans to do so.
92. There was also evidence indicating the private ancillary fund has been set up to provide material tax and other benefits to the founder, and was not being maintained solely for charitable purposes.
93. The ancillary fund had been in existence for some years. They had access to advice and had funds that were not trivial. Given the level and sophistication of technical resources available to the fund, it was clear the trustee was or should have been aware of the contraventions but chose to deliberately disregard its obligations.
94. Under these circumstances, the trustee was potentially liable for penalties relating to breaches of: Guideline 36 (loans and financial assistance); Guideline 41 (uncommercial transactions); and Guideline 42 (benefits to founder/donor). Following further investigation the trustee was also considered likely to have contravened: Guideline 19 (not meeting minimum annual distributions); Guideline 28 (not auditing the financial statements of the fund); Guideline 31 (failure to implement and follow the investment strategy); and Guideline 32 (investment strategy and decision-making processes not in writing).
95. The ATO personnel followed the three main steps in paragraph 21 when assessing the administrative penalties for the trustee of this ancillary fund. The following factors were relevant in establishing the various breaches of the Ancillary Fund Guidelines:
- a high level of care is expected of a trustee of a philanthropic fund. There was no evidence showing the trustee made any attempt to comply with the obligations imposed by the guidelines. It is a reasonable conclusion that a trustee in the same circumstances was expected to have known it should not have provided these loans and financial assistance.
 - the related parties (that is, founder and its family members) gained a real benefit from the breaches of these guidelines. The evidence supported the conclusion that the trustee intended to provide a benefit to those parties, and chose to deliberately disregard its obligations.
 - the trustee's actions were contrary to a philanthropic fund's intent which is providing for a broad public benefit.
96. Each of these are serious breaches and all relevant administrative penalties would be imposed without remission in respect of each breach. The Commissioner would also consider the suspension of the trustee under section 426-125. In addition, ATO personnel should consider whether a referral to the State Attorney General for action under State Trust law is appropriate.

Example 8

97. Following on from Example 7 of this practice statement, the Commissioner also sought to initiate action against all three directors of the corporate trustee. The Commissioner's knowledge about the directors was limited (for example, information regarding the financial position of the directors), however, the evidence showed the corporate trustee had limited funds.
98. One director raised a defence after he was issued a notice to pay. He argued he was unaware of the breach, and it would not have been reasonable to expect him to have been aware of the breach.
99. The director presented evidence to the Commissioner that the two co-directors acted fraudulently and kept their actions from him. He was a newly appointed director. He was not a director when the co-directors made the pertinent decisions which resulted in the breaches. Furthermore, the co-directors made false representations and provided bogus financial statements to him. The director reviewed the financial statements and relied on them to be true and accurate.
100. The facts pointed towards the director taking a proper responsible role in the management of the ancillary fund. It was found that the director had not been negligent, or failed to make inquiries, or otherwise participate in the decision-making processes of the fund, because he was not a director at the time and he later relied on the information provided by the co-directors. The director had no access to legitimate financial information, which could have otherwise led him to make further inquiry or seek clarification of the fund's activities.
101. The Commissioner accepted the director's defence. Based on the available facts of this case, the director was not aware of the breaches and it is not reasonable to expect a prudent director of reasonable ability to have been aware of these breaches. The Commissioner therefore agreed that the defence applies to the director, and the penalty was not therefore imposed on this director.

Example 9

102. A private ancillary fund was established without a written investment strategy because the trustees thought it was obvious that the fund should have its assets in cash in the first year. The founder had an investment strategy in the first year of term deposits in Australian financial institutions.
103. The following year the Trustees produced a written investment strategy that the composition of the fund's investment as a whole could only be blue-chip shares in Australian companies and term deposits in Australian financial institutions.
104. However, at the urging of the founder of the fund, the trustees purchased speculative shares in a little known company overseas. The evidence showed that there was no change in the fund's written investment strategy. The trustee failed to document any associated decision making processes used in acquiring the international shares.
105. Under these circumstances, the trustee was potentially liable for penalties relating to breaches of: Guideline 31 (Implement the investment strategy) and Guideline 32 (Written form).
106. It was ultimately determined that the trustee was liable for the penalties relating to breaches of Guideline 32 in the first year of operation and Guideline 31 in the subsequent year. The breaches arose from separate courses of conduct.

GLOSSARY

Constitutional corporation

107. The term 'constitutional corporation' is defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) as a corporation to which paragraph 51(xx) of the Constitution applies or a body corporate that is incorporated in a territory.

Deductible Gift Recipients

108. The term 'deductible gift recipient' is defined in subsection 995-1(1) of the ITAA 1997 as having the meaning given by section 30-227 of the ITAA 1997.

Jointly and severally liable

109. It means that two or more persons (including companies) are each liable for the full amount of a debt. They may be sued jointly in a single action or severally in separate actions.

Penalty Unit

110. Subsection 4AA(1) of the *Crimes Act 1914* prescribes that the value of one penalty unit is \$110 for contraventions occurring prior to 28 December 2012, and \$170 for contraventions on or after this date.

Private ancillary fund

111. A 'private ancillary fund' is defined in subsection 426-105(1). Guidelines 8 to 12 of the *Private Ancillary Fund Guidelines 2009* also describe its meaning and requirements in further detail.
112. In general, it must be philanthropic in character and a vehicle for private philanthropy. It is established and operated only in Australia and as a not-for-profit entity. It must also be a trust that seeks to comply with all relevant laws and obligations.
113. A trust fund that meets the definition is entitled to be endorsed as a DGR, subject to the general requirements that apply to all entities seeking endorsement as a DGR in the table in subsection 30-15(2) of the ITAA 1997.
114. A trust is a private ancillary fund if:
- each of the trustees of the trust is a 'constitutional corporation', and
 - each of the trustees has agreed, in the approved form given to the Commissioner, to comply with the rules in the Private Ancillary Guidelines as in force from time to time, and
 - none of the trustees has revoked that agreement.

Public ancillary fund

115. A 'public ancillary fund' is defined in subsection 426-102(1). Guidelines 8 to 12 of the *Public Ancillary Fund Guidelines 2011* also describe its meaning and requirements in further detail.

116. In general, a public ancillary fund must be philanthropic in character, a vehicle for philanthropy, and seek to comply with all relevant laws and obligations. It must also be established and operated only in Australia, and as a not-for-profit entity.
117. A trust is a public ancillary fund if:
- each of the trustees of the trust is a 'constitutional corporation', or the only trustee of the trust is the Public Trustee of a State or Territory, or each trustee is prescribed by the *Taxation Administration Regulations 1976*, and
 - each of the trustees has agreed, in the approved form given to the Commissioner, to comply with the rules in the Public Ancillary Fund Guidelines as in force from time to time, and
 - none of the trustees has revoked that agreement.

Responsible Person

118. A responsible person is an individual with a degree of responsibility to the Australian community as a whole. That individual cannot be a founder, a major donor to the fund, or an associate of the founder or major donor. For public Ancillary Funds, there is an expanded definition of 'responsible person' to also include those before whom a statutory declaration can be made.

Appendix 1: Private Ancillary Fund Guidelines and Penalty Units

Private Ancillary Fund Guidelines	Description	Penalty Units
Guideline 17 Change to governing rules	<p>17. The trustee must notify the Commissioner in the *approved form (within 21 days) of any change to the fund's governing rules.</p> <p><i>Note: Certain changes to the governing rules may require the fund to seek re-endorsement as a deductible gift recipient</i></p>	5 penalty units
Guideline 19 Minimum annual distribution	<p>19. During each *financial year, a *private ancillary fund must distribute at least 5 per cent of the *market value of the fund's net assets (as at the end of the previous *financial year).</p> <p><i>Note: While net assets are used to determine the fund's minimum distribution, the amount of the distribution itself is not net of any amount (for example, expenses of the fund).</i></p> <p>19.1 The fund must distribute at least \$11,000 (or the remainder of the fund if that is worth less than \$11,000) during that *financial year if:</p> <ul style="list-style-type: none"> the 5 per cent is less than \$11,000; and any of the expenses of the fund in relation to that financial year are paid directly or indirectly from the fund's assets or income. <p><i>Note: This means that if a fund's expenses are met from outside the fund, its minimum annual distribution is 5 per cent of the market value of the fund's net assets. If a fund's expenses are paid out of the fund's assets or income, its minimum distribution is \$11,000 or 5 per cent, whichever is greater.</i></p> <p>19.2 No distribution is required during the *financial year in which the fund is established.</p> <p>19.3 A distribution includes the provision of money, property or benefits. If the fund provides property or benefits, the *market value of the property or benefit provided is to be used in determining whether the fund has complied with this guideline.</p> <p><i>Example 1: If 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.</i></p> <p><i>Example 2: If a private ancillary fund leases office space to a deductible gift recipient at a discount to the market price, the fund is providing a benefit whose market value is equal to the discount.</i></p>	30 penalty units if the shortfall is greater than \$1,000

Private Ancillary Fund Guidelines	Description	Penalty Units
	19.4 The penalty for a contravention of this guideline is 30 penalty units if the shortfall is greater than \$1,000.	
	<p>19.5 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. If the trustee does not, the penalty is 10 per cent of the shortfall as at the end of the 60 days reduced by any penalty (but not below nil) under guideline 19.4.</p> <p>19.6 A distribution made to rectify a contravention of this guideline does not count towards compliance with this guideline for the year of the rectification.</p>	10% of shortfall reduced by penalty under Guideline 19.4
Guideline 24 Accounts	<p>24. The trustee must keep, or cause to be kept, proper accounts in respect of all receipts and payments of the fund and all financial dealings connected with the fund, and must retain those accounts for a period of at least 5 years after the completion of the transactions or acts to which they relate.</p> <p><i>Note: See also Subdivision 382-B in Schedule 1 to the Taxation Administration Act 1953 for rules about record keeping obligations of deductible gift recipients.</i></p>	10 penalty units
Guideline 25	25. The trustee must make the accounts available to the Commissioner upon request.	10 penalty units
Guideline 26 Financial statements	<p>26. The trustee must prepare, or cause to be prepared, financial statements showing the financial position of the fund at the end of each *financial year.</p> <p>26.1 The financial statements must be prepared in accordance with the *accounting standards.</p> <p>26.2 All transactions between the fund and a founder of the fund, a donor to the fund, 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 statements.</p> <p>26.3 The financial statements must be prepared before the fund is required to give to the Commissioner its *income tax return for the relevant *financial year.</p>	10 penalty units
Guideline 27 Request for financial statements	27. The trustee must make the financial statements available to the Commissioner upon request.	10 penalty units

Private Ancillary Fund Guidelines	Description	Penalty Units
Guideline 28 Audit	<p>28. Each *financial year the trustee must arrange for an auditor to audit:</p> <ul style="list-style-type: none"> the financial statements of the fund; and compliance with these Guidelines by the fund and the trustee. <p>28.1 The auditor must be registered under Part 9.2 of the <i>Corporations Act 2001</i>.</p> <p>28.2 The auditor must provide the fund with an audit report in accordance with the *auditing standards.</p> <p>28.3 The audit must be finalised before the fund is required to give to the Commissioner its *income tax return for the relevant *financial year.</p>	10 penalty units
Guideline 29 Request for audit report	29. The trustee must make the audit report available to the Commissioner upon request.	10 penalty units
Guideline 30 Investment strategy	<p>30. The trustee must prepare and maintain a current investment strategy for the fund.</p> <p>30.1 An appropriate investment strategy should set out the investment objectives of the fund and detail the investment methods the trustee will adopt to achieve those objectives.</p> <p>30.2 The strategy must reflect the purpose and circumstances of the fund and have particular regard to (but not be limited to):</p> <ul style="list-style-type: none"> the risk involved in making, holding and realising, and the likely return from, the fund's investments, having regard to the fund's objectives and its expected cash flow requirements (including distribution requirements); and the composition of the fund's investments as a whole, including the extent to which the investments are diverse or involve the fund being exposed to risks from inadequate diversification; and the liquidity of the fund's investments, having regard to its expected cash flow requirements (including distribution requirements); and the ability of the fund to discharge its existing and prospective liabilities; and the investment requirements imposed by *State laws or *Territory laws. 	10 penalty units
Guideline 31 Implement the investment strategy	31. The trustee must implement the investment strategy, and must ensure that all investment decisions are made in accordance with it.	10 penalty units

Private Ancillary Fund Guidelines	Description	Penalty Units
Guideline 32 Written form	32. 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 or the Commissioner can determine whether the fund has complied with these Guidelines and other *Australian laws.	10 penalty units
Guideline 33 Investment limitations - borrowings	<p>33. The trustee must not *borrow money or maintain an existing borrowing of money.</p> <p>33.1 However, this guideline does not prohibit a trustee from *borrowing money if:</p> <ul style="list-style-type: none"> the purpose of the borrowing is to enable the trustee to make a distribution to a *deductible gift recipient, which the trustee must make under these guidelines and which, apart from the borrowing, the trustee would be unable to make; and the period of the borrowing does not exceed 90 days; and the borrowing, when made, would not result in total borrowings exceeding 10 per cent of the *market value of the fund's assets. <p>33.2 This guideline also does not prohibit a trustee from *borrowing money if:</p> <ul style="list-style-type: none"> the purpose of the borrowing is to enable the trustee to cover settlement of a transaction for the acquisition of a financial instrument; and at the time the relevant investment decision was made, it was likely that the borrowing would not be needed; and the period of the borrowing does not exceed 14 days; and the borrowing, when made, would not result in total borrowings exceeding 10 per cent of the *market value of the fund's assets. <p>33.3 Guideline 33 also does not apply to the acquisition of a financial instrument excluded by the Commissioner from that guideline.</p>	30 penalty units
Guideline 34 Investment limitations - arms length	34. The fund's investments must be made and maintained on an *arm's length basis.	30 penalty units
Guideline 35 Investment limitations - assets not to be offered as security	<p>35. The trustee must not give a security over, or in relation to, an asset of the fund.</p> <p>35.1 However, this guideline does not apply to the acquisition of a financial instrument excluded by the Commissioner from that guideline.</p>	30 penalty units

Private Ancillary Fund Guidelines	Description	Penalty Units
Guideline 36 Investment limitations - assets acquired at arms length	<p>36. The fund must not acquire an asset (except by way of gift) from, and must not make a loan or provide any other kind of financial assistance to, a founder of the fund, a donor to the fund, the trustee, a director, officer, agent, *member or employee of the trustee, or an *associate of any of these entities except:</p> <ul style="list-style-type: none"> • by way of an arms' length commercial transaction; or • on terms more favourable to the fund than would otherwise be expected under an arms' length transaction. 	30 penalty units
Guideline 37 Investment limitations - assets kept separate	37. The trustee must keep the assets of the fund separate from all other assets.	30 penalty units
Guideline 38 Investment limitations - Collectables	<p>38. The fund must not acquire an asset (except by way of gift) if the asset is capable of being a *collectable.</p> <p>38.1 If the fund acquires such an asset by way of gift, it must sell or distribute the asset within 12 months after acquiring it.</p>	30 penalty units
Guideline 40 Investment limitations - carrying on a business	<p>40. The fund must not *carry on a *business.</p> <p><i>Note: The holding of investments, such as shares or rental properties, for the purpose of deriving income that can be distributed to deductible gift recipients is not considered to be carrying on a business.</i></p> <p>40.1 The penalty for a contravention of this guideline is an amount equal to 25 per cent of the net profits of the business for each *financial year during all or part of which the contravention continues.</p>	25% of the net profits of the business
Guideline 41 Uncommercial transactions	<p>41. The fund must not enter into any transaction that is uncommercial when entered into, unless the transaction is:</p> <ul style="list-style-type: none"> • with a *deductible gift recipient covered by item 1 in the table in section 30-15 of the ITAA 1997; and • in the course or furtherance of the fund's purpose. <p>41.1 However, the fund may enter into an uncommercial transaction if it is on terms more favourable to the fund than would otherwise be expected under an arms' length transaction.</p>	30 penalty units

Private Ancillary Fund Guidelines	Description	Penalty Units
Guideline 42 Benefits to founder/donor or associates	<p>42. The fund must not *provide any benefit (except as set out in guideline 43), directly or indirectly, to:</p> <ul style="list-style-type: none"> • the trustee; or • a *member, director, employee, *agent or officer of the trustee; or • a donor to the fund; or • a founder of the fund; or • an *associate of any of those entities. 	Penalty amount equal to the amount or value of the benefit provided
Guideline 45 Donors - public appeals	45. The fund must not solicit donations from the public.	30 penalty units
Guideline 46 Donors - sources of donations	<p>46. In any *financial year, the fund must not accept donations totalling more than 20 per cent (in total) of the *market value of its assets (determined at the end of the previous financial year) from entities other than:</p> <ul style="list-style-type: none"> • a founder of the fund; or • *associates of the founder; or • employees of the founder; or • a deceased estate of any of those entities. 	10 penalty units

Appendix 2: Public Ancillary Fund Guidelines and Penalty Units

Public Ancillary Fund Guidelines	Description	Penalty Units
Guideline 17 Changes to governing rules	<p>17. The trustee must notify the Commissioner in the *approved form (within 21 days) of any change to the fund's governing rules.</p> <p><i>Note: Certain changes to the governing rules may require the fund to seek re-endorsement as a deductible gift recipient.</i></p>	5 penalty units
Guideline 19 Minimum annual distribution	<p>19. During each *financial year, a *public ancillary fund must distribute at least 4 per cent of the *market value of the fund's net assets (as at the end of the previous *financial year).</p> <p><i>Note: While net assets are used to determine the fund's minimum distribution, the amount of the distribution itself is not net of any amount (for example, expenses of the fund).</i></p> <p>19.1 The fund must distribute at least \$8,800 (or the remainder of the fund if that is worth less than \$8,800) during that *financial year if:</p> <ul style="list-style-type: none"> the 4 per cent is less than \$8,800; and any of the expenses of the fund in relation to that financial year are paid directly or indirectly from the fund's assets or income. <p><i>Note: This means that if a fund's expenses are met from outside the fund, its minimum annual distribution is 4 per cent of the market value of the fund's net assets. If a fund's expenses are paid out of the fund's assets or income, its minimum distribution is \$8,800 or 4 per cent, whichever is greater.</i></p> <p>19.2 No distribution is required during the *financial year in which the fund is established or during the next 4 financial years.</p> <p><i>Note: While these guidelines do not set a minimum annual distribution for the first four financial years, the trustee should consider making an appropriate distribution each year in accordance with the purpose of the fund.</i></p> <p>19.3 A distribution includes the provision of money, property or benefits. If the fund provides property or benefits, the *market value of the property or benefit provided is to be used in determining whether the fund has complied with this guideline.</p> <p><i>Example 1: If a public 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.</i></p>	30 penalty units if the shortfall is greater than \$1,000

Public Ancillary Fund Guidelines	Description	Penalty Units
	<p><i>Example 2: If a public ancillary fund leases office space to a deductible gift recipient at a discount to the market price, the fund is providing a benefit whose market value is equal to the discount.</i></p> <p><i>Example 3: If a public ancillary fund invests in a social impact bond issued by a deductible gift recipient with a return that is less than the market rate of return on a similar corporate bond issue, the fund is providing a benefit whose market value is equal to the interest saved by the deductible gift recipient from issuing the bond at a discounted rate of return.</i></p> <p>19.4 The penalty for a contravention of this guideline is 30 penalty units if the shortfall is greater than \$1,000.</p>	
Guideline 19 Failure to comply with a request under Guideline 19	<p>19.5 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. If the trustee does not, the penalty is 10 per cent of the shortfall as at the end of the 60 days reduced by any penalty (but not below nil) under guideline 19.4.</p> <p>19.6 A distribution made to rectify a contravention of this guideline does not count towards compliance with this guideline for the year of the rectification.</p>	10% of shortfall reduced by penalty under Guideline 19.4
Guideline 24 Accounts	<p>24. The trustee must keep, or cause to be kept, proper accounts in respect of all receipts and payments of the fund and all financial dealings connected with the fund, and must retain those accounts for a period of at least 5 years after the completion of the transactions or acts to which they relate.</p> <p><i>Note: See also Subdivision 382-B in Schedule 1 to the Taxation Administration Act 1953 for rules about record-keeping obligations of deductible gift recipients.</i></p>	10 penalty units
Guideline 25 Request for accounts	<p>25 The trustee must make the accounts available to the Commissioner upon request.</p>	10 penalty units
Guideline 26 Financial statements	<p>26. The trustee must prepare, or cause to be prepared, financial statements showing the financial position of the fund at the end of each *financial year.</p> <p>26.1 The financial statements must be prepared in accordance with the *accounting standards.</p>	10 penalty units

Public Ancillary Fund Guidelines	Description	Penalty Units
	<p>26.2 All transactions (except for gifts) between the fund and a founder of the fund, a donor to the fund, 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 statements.</p> <p>26.3 The financial statements must be prepared before the fund is required to give to the Commissioner its *income tax return for the relevant *financial year.</p>	
Guideline 27 Request for financial statements	27. The trustee must make the financial statements available to the Commissioner upon request.	10 penalty units
Guideline 28 Audit	<p>28. Except as set out below, each *financial year the trustee must arrange for an auditor to audit:</p> <ul style="list-style-type: none"> the financial statements of the fund; and compliance with these Guidelines by the fund and the trustee. <p>28.1 The auditor must be a registered company auditor (within the meaning of the <i>Corporations Act 2001</i>).</p> <p>28.1.1 The Public Trustee of a state or territory may have the Auditor-General of that state or territory undertake the audit.</p> <p>28.2 Unless the Commissioner, by written notice, provides otherwise, a public ancillary fund with revenue and assets of less than \$1 million in relation to a particular financial year, may instead have its financial statements and compliance with these guidelines reviewed rather than audited.</p> <p>28.2.1 A reviewer must be a registered company auditor (within the meaning of the <i>Corporations Act 2001</i>). However, an individual who is taken to be a registered company auditor under section 324BE of the <i>Corporations Act 2001</i> is taken to be a registered company auditor for the purpose of this guideline.</p> <p>Note: This has the effect of widening the class of individuals who can undertake a review.</p> <p>28.3 The auditor or reviewer must undertake the review or audit, and provide the fund with a report, in accordance with the *auditing standards.</p> <p>28.4 The audit or review must be finalised before the fund is required to give to the Commissioner its *income tax return for the relevant *financial year.</p>	10 penalty units

Public Ancillary Fund Guidelines	Description	Penalty Units
Guideline 29 Request for audit report	29. The trustee must make the report available to the Commissioner upon request.	10 penalty units
Guideline 30 Investment strategy	<p>30. The trustee must prepare and maintain a current investment strategy for the fund.</p> <p>30.1 An appropriate investment strategy should set out the investment objectives of the fund and detail the investment methods the trustee will adopt to achieve those objectives.</p> <p>30.2 The strategy must reflect the purpose and circumstances of the fund and have particular regard to (but not be limited to):</p> <ul style="list-style-type: none"> • the risk involved in making, holding and realising, and the likely return from, the fund's investments, having regard to the fund's objectives and its expected cash flow requirements (including distribution requirements); and • the composition of the fund's investments as a whole, including the extent to which the investments are diverse or involve the fund being exposed to risks from inadequate diversification; and • the liquidity of the fund's investments, having regard to its expected cash flow requirements (including distribution requirements); and • the ability of the fund to discharge its existing and prospective liabilities; and • the investment requirements imposed by *State laws or *Territory laws. 	10 penalty units
Guideline 31 Implement investment strategy	31. The trustee must implement the investment strategy, and must ensure that all investment decisions are made in accordance with it.	10 penalty units
Guideline 32 Written form	32. 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 or the Commissioner can determine whether the fund has complied with these Guidelines and other *Australian laws.	10 penalty units

Public Ancillary Fund Guidelines	Description	Penalty Units
Guideline 33 Investment limitations - Borrowings	<p>33. The trustee must not *borrow money or maintain an existing borrowing of money.</p> <p>33.1 However, this guideline does not prohibit a trustee from *borrowing money if:</p> <ul style="list-style-type: none"> the purpose of the borrowing is to enable the trustee to make a distribution to a *deductible gift recipient, which the trustee must make under these guidelines and which, apart from the borrowing, the trustee would be unable to make; and the period of the borrowing does not exceed 90 days; and the borrowing, when made, would not result in total borrowings exceeding 10 per cent of the *market value of the fund's assets. <p>33.2 This guideline also does not prohibit a trustee from *borrowing money if:</p> <ul style="list-style-type: none"> the purpose of the borrowing is to enable the trustee to cover settlement of a transaction for the acquisition of a financial instrument; and at the time the relevant investment decision was made, it was likely that the borrowing would not be needed; and the period of the borrowing does not exceed 14 days; and the borrowing, when made, would not result in total borrowings exceeding 10 per cent of the *market value of the fund's assets. <p>33.3 Guideline 33 also does not apply to the acquisition of a financial instrument excluded by the Commissioner from that guideline.</p>	30 penalty units
Guideline 34 Investment limitations - arms length	34. The fund's investments must be made and maintained on an *arm's length basis.	30 penalty units
Guideline 35 Investment limitations - security over funds assets	<p>35. The trustee must not give a security over, or in relation to, an asset of the fund.</p> <p>35.1 However, this guideline does not apply to the acquisition of a financial instrument excluded by the Commissioner from that guideline.</p>	30 penalty units

Public Ancillary Fund Guidelines	Description	Penalty Units
Guideline 36 Investment limitations - assets acquired at arms length	<p>36. The fund must not acquire an asset (except by way of gift) from, and must not make a loan or provide any other kind of financial assistance to, a founder of the fund, a donor to the fund, the trustee, a director, officer, agent, *member or employee of the trustee, or an *associate of any of these entities except:</p> <ul style="list-style-type: none"> • by way of an arm's length commercial transaction; • on terms more favourable to the fund than would otherwise be expected under an arm's length transaction. 	30 penalty units
Guideline 37 Investment limitations - assets kept separate	<p>37. The trustee must keep the assets of the fund separate from all other assets.</p> <p>37.1 However, this guideline does not prevent a licensed trustee company or the Public Trustee of a state or territory from operating common funds for investment purposes.</p>	30 penalty units
Guideline 38 Investment limitations – collectable	<p>38. The fund must not acquire an asset (except by way of gift) if the asset is capable of being a *collectable.</p> <p>38.1 If the fund acquires such an asset by way of gift, it must sell or distribute the asset within 12 months after acquiring it.</p>	30 penalty units
Guideline 40 Investment limitations - not carrying on a business	<p>40. The fund must not *carry on a *business.</p> <p>40.1 However, a fund does not contravene this guideline merely because its investment activities, because of repetition, volume and regularity, mean that it is *carrying on a *business.</p> <p>40.2 A fund also does not contravene this guideline if it undertakes public fundraising appeals.</p> <p><i>Note 1: The holding of investments, such as bonds, shares or rental properties, for the purpose of deriving income that can be distributed to deductible gift recipients is not subject to the carrying on a business restrictions.</i></p> <p><i>Note 2: Fundraising appeals, such as public donation appeals, lamington drives, raffles, and charity balls, are not subject to the carrying on a business restrictions.</i></p> <p>40.3 The penalty for a contravention of this guideline is an amount equal to 25 per cent of the net profits of the business for each *financial year during all or part of which the contravention continues.</p>	25% of the net profits of the business for each *financial year during all or part of which the contravention continues.

Public Ancillary Fund Guidelines	Description	Penalty Units
Guideline 41 Uncommercial transactions	<p>41 The fund must not enter into any transaction that is uncommercial when entered into, unless the transaction is:</p> <ul style="list-style-type: none"> • with a *deductible gift recipient covered by item 1 in the table in section 30-15 of the ITAA 1997; and • in the course or furtherance of the fund's purpose. <p>41.1 However, the fund may enter into an uncommercial transaction if it is on terms more favourable to the fund than would otherwise be expected under an arm's length transaction.</p>	30 penalty units
Guideline 42 Material benefits	<p>42 The fund must not *provide any material benefit (except as set out in guideline 43) directly or indirectly, to:</p> <ul style="list-style-type: none"> • the trustee; or • a *member, director, employee, *agent or officer of the trustee; or • a donor to the fund; or • a founder of the fund; or • an *associate of any of those entities (other than a *deductible gift recipient). 	Penalty amount equal to the amount or value of the benefit provided
Guideline 43 Fees and Expenses	<p>The trustee may apply income or capital of a *public ancillary fund:</p> <ul style="list-style-type: none"> • to reimburse the trustee for reasonable expenses incurred on behalf of the fund; and • to pay fair and reasonable remuneration for the trustee's services in administering the fund. <p><i>Note: A trustee incurs reasonable expenses on behalf of a fund when providing reasonable remuneration benefits to some if the individuals listed in guideline 42 (including providing benefits of a minor or incidental nature to an employee).</i></p>	

Appendix 3: Transitional Rules for Ancillary Funds

Private Ancillary Fund Guidelines 2009	Description
Guideline 52 Transitional Rules For Former Prescribed Private Funds	<p>52. These transitional rules apply to a *private ancillary fund that was a prescribed private fund (within the meaning of the ITAA 1997 (as in force immediately before the commencement of Schedule 2 to the <i>Tax Laws Amendment (2009 Measures No. 4) Act 2009</i>)) on 30 September 2009.</p> <p>52.1. These transitional rules are intended to help a prescribed private fund make the transition into the new regime.</p>
Guideline 53 Accumulation Plans	<p>53. If the fund is subject to a continuing agreed accumulation plan, it may continue to act in accordance with that plan until the earliest of these times:</p> <ul style="list-style-type: none"> • when the plan expires; or • when the fund meets its target capital amount; or • the end of the 2013-14 *financial year; or • the start of a financial year for which the fund chooses not to apply this transitional rule. <p>53.1. A choice by a fund not to apply this transitional rule must be made before the day the fund is required to give to the Commissioner its *income tax return for the relevant *financial year.</p> <p>Example: If a fund wishes to adopt the new distribution rules in relation to the 2009-10 financial year, it must make the minimum distribution in accordance with guideline 19 during the 2009-10 year and make the choice not to apply this transitional rule before lodging its 2009-10 income tax return.</p>
Guideline 54 Accumulation Plans	<p>54. So long as the fund continues to act in accordance with the plan as permitted by guideline 53, it is not subject to the distribution rules set out in guideline 19 but will instead apply the transitional distribution rules in guideline 55.</p>
Guideline 55 Transitional Distribution Rules	<p>55. The fund must (at a minimum):</p> <ul style="list-style-type: none"> • distribute during a *financial year 5 per cent of each gift it received in the previous financial year; and • distribute its trust income within the financial year in which it is derived, unless otherwise allowed by the Commissioner. <p>55.1. However, an amount of trust income may be retained to maintain the capital of the fund calculated at the start of a *financial year to reflect movements in the All Groups Consumer Price Index published by the Australian Statistician for the previous financial year.</p>
Guideline 56 Governing Rules Inconsistent With These Guidelines	<p>56. If the fund's governing rules prevent compliance with a requirement of Part 2 to these Guidelines, the fund is exempt from that requirement until 1 October 2012.</p> <p>56.1. However, the trustee must comply with the requirement as far as is possible without breaching the governing rules.</p> <p>56.2. This rule does not apply to the extent that an inconsistency between the governing rules of the fund and Part 2 to these Guidelines results from a change made to the governing rules after 25 June 2009.</p>

Private Ancillary Fund Guidelines 2009	Description
Guideline 57 Governing Rules Inconsistent With These Guidelines	<p>57. The trustee must seek to have the governing rules of the fund amended to comply with Part 2 to these Guidelines by 1 October 2012.</p> <p>Note: The fund's governing rules only need to be amended where they operate in a manner contrary to these Guidelines. Governing rules may incorporate these Guidelines by reference, but this is not required. No changes are required to the governing rules of the fund if the fund can already comply with these Guidelines under its existing governing rules.</p>
Guideline 58 Governing Rules Inconsistent With These Guidelines	58. If at 30 September 2009 the fund holds investments that are prohibited by guideline 38, the fund is exempt from complying with that guideline in respect of those investments until 1 October 2010.
Guideline 59 Governing Rules Inconsistent With These Guidelines	59. If a fund does not have a trustee that is a *constitutional corporation, then guideline 14.1 does not apply to the fund. Instead, at least one individual with a degree of responsibility to the Australian community as a whole must be a trustee of the fund.
Guideline 60 Governing Rules Inconsistent With These Guidelines	60. If a fund has an existing borrowing as at 30 September 2009, the fund may maintain that borrowing despite guideline 33. However, the fund may not alter the terms of the borrowing without the prior agreement of the Commissioner.

Public Ancillary Fund Guidelines 2011	Description
Guideline 51 Transitional Rules for Public Ancillary Funds	<p>51. These transitional rules apply to a *public ancillary fund that was a public fund endorsed as a *deductible gift recipient in item 2 in the table in section 30-15 of the ITAA 1997 at the end of 31 December 2011.</p> <p>51.1. These transitional rules are intended to help a public ancillary fund make the transition into the new regime.</p>
Guideline 52 Transitional Distribution Rules	<p>52. For the 2011-12 income year, a fund may choose either to apply guidelines 19 to 19.6 or the law that applied prior to the commencement of Schedule 8 to the <i>Tax Laws Amendment (2011 Measures No. 7) Act 2011</i>.</p> <p>52.1. For all future income years a fund must apply guidelines 19 to 19.6 unless guideline 53 provides otherwise.</p>
Guideline 53 Transitional Distribution Rules	<p>53. A fund with a corpus of less than \$220,000 on 31 December 2011 will not be required to make a minimum distribution until the earliest of these times:</p> <ul style="list-style-type: none"> • the end of the 2014-15 financial year; or • from the end of the financial year in which the market value of the net assets of the fund at the end of the financial year reaches \$220,000.
Guideline 54 Governing Rules Inconsistent With These Guidelines	<p>54. If the fund's governing rules prevent compliance with a requirement of Part 2 to these Guidelines, the fund is exempt from that requirement until 1 July 2015.</p> <p>54.1. However, the trustee must comply with the requirement as far as is possible without breaching the governing rules.</p>

Public Ancillary Fund Guidelines 2011	Description
	<p>54.2. This guideline does not apply to the extent that an inconsistency between the governing rules of the fund and Part 2 to these Guidelines results from a change made to the governing rules after 14 July 2011.</p> <p>54.3. The trustee must seek to have the governing rules of the fund amended to comply with Part 2 to these Guidelines by 1 July 2015.</p> <p>Note: The fund's governing rules only need to be amended where they operate in a manner contrary to these Guidelines. Governing rules may incorporate these Guidelines by reference, but this is not required. No changes are required to the governing rules of the fund if the fund can already comply with these Guidelines under its existing governing rules.</p>
Guideline 55 Governing Rules Inconsistent With These Guidelines	55. If at 31 December 2011 the fund holds investments that are prohibited by guideline 38, the fund is exempt from complying with that guideline in respect of those investments until 1 July 2015.
Guideline 56 Governing Rules Inconsistent With These Guidelines	56. If a fund does not have a trustee that is a *constitutional corporation, then guideline 14 does not apply to the fund. Instead, at least a majority of individuals who are trustees of the fund must have a degree of responsibility to the Australian community as a whole.
Guideline 57 Governing Rules Inconsistent With These Guidelines	57. If a fund has an existing borrowing as at 31 December 2011, the fund may maintain that borrowing despite guideline 33. However, the fund may not alter the terms of the borrowing without the prior agreement of the Commissioner.

Subject references	<p>Failure to follow public and private ancillary fund guidelines</p> <p>Ancillary funds</p> <p>Public ancillary funds</p> <p>Private ancillary funds</p> <p>Private ancillary fund guidelines enforcement</p> <p>Public ancillary fund guidelines enforcement</p> <p>Remission of penalties</p> <p>Remission of penalties for failure to follow private ancillary fund guidelines</p> <p>Remission of penalties for failure to follow public ancillary fund guidelines</p>
Legislative references	<p>Corporations Act 2001 324BE</p> <p>Corporations Act 2001 1318</p> <p>Corporations Act 2001 Pt 9.2</p> <p>ITAA 1997 30-15</p> <p>ITAA 1997 30-15(2)</p> <p>ITAA 1997 30-227</p> <p>ITAA 1997 995-1(1)</p> <p>TAA 1953 Pt IVC</p> <p>TAA 1953 Sch 1 Div 298</p> <p>TAA 1953 Sch 1 298-5(c)</p> <p>TAA 1953 Sch 1 298-20</p> <p>TAA 1953 Sch 1 298-20(2)</p> <p>TAA 1953 Sch 1 Subdiv 382-B</p> <p>TAA 1953 Sch 1 Subdiv 426-D</p> <p>TAA 1953 Sch 1 426-102(1)</p> <p>TAA 1953 Sch 1 426-103</p> <p>TAA 1953 Sch 1 426-103(b)</p> <p>TAA 1953 Sch 1 426-105(1)</p> <p>TAA 1953 Sch 1 426-110</p> <p>TAA 1953 Sch 1 426-110(b)</p> <p>TAA 1953 Sch 1 426-120</p> <p>TAA 1953 Sch 1 426-120(1)</p> <p>TAA 1953 Sch 1 426-120(1)(a)</p> <p>TAA 1953 Sch 1 426-120(2)(b)(ii)</p> <p>TAA 1953 Sch 1 426-120(4)</p> <p>TAA 1953 Sch 1 426-120(5)(a)</p> <p>TAA 1953 Sch 1 426-120(5)(b)</p> <p>TAA 1953 Sch 1 426-120(5)(c)</p> <p>TAA 1953 Sch 1 426-120(6)</p> <p>TAA 1953 Sch 1 426-120(7)</p> <p>TAA 1953 Sch 1 426-120(8)</p> <p>TAA 1953 Sch 1 426-125</p> <p>Tax Laws Amendment (2009 Measures No. 4) Act 2009 Sch 2</p> <p>Tax Laws Amendment (2011 Measures No. 7) Act 2011 Sch 8</p> <p>Taxation Administration Regulations 1976</p> <p>Crimes Act 1914 4AA(1)</p> <p>Private Ancillary Fund Guidelines 2009 8</p> <p>Private Ancillary Fund Guidelines 2009 9</p> <p>Private Ancillary Fund Guidelines 2009 10</p> <p>Private Ancillary Fund Guidelines 2009 11</p> <p>Private Ancillary Fund Guidelines 2009 12</p>

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Related practice statements	PS LA 2011/6
Case references	1-4URPB4G
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