

***PAF 2011/1 -***



# Public Ancillary Fund Guidelines 2011

made under section 426-103 in Schedule 1 to the

*Taxation Administration Act 1953*

## Compilation No. 03

**Compilation date:** 12 June 2020

**Includes amendments up to:** *Taxation Administration (Coronavirus  
Economic Response Package—Ancillary Funds)  
Amendment Guidelines 2020*

Prepared by The Treasury

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## About this compilation

### **This compilation**

This is a compilation of the *Public Ancillary Fund Guidelines 2011* that shows the text of the law as amended and in force on 12 June 2020 (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If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.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 of Guidelines

These Guidelines are the *Public Ancillary Fund Guidelines 2011*.

### 3. Interpretation

Expressions have the same meaning in these Guidelines as in the *Income Tax Assessment Act 1997*. The interpretation rules in Division 950 of that Act also apply to these Guidelines.

*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.*

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

### 4. Penalties

If a person is liable to an administrative penalty under section 426-120 in Schedule 1 to the *Taxation Administration Act 1953* because of a contravention of a provision of these Guidelines, the amount of the administrative penalty is the penalty that these Guidelines set out, or the penalty worked out in accordance with these Guidelines, in relation to that provision.

*Note 1: The Commissioner may remit all or part of an administrative penalty: see section 298-20 in Schedule 1 to the Taxation Administration Act 1953.*

*Note 2: An administrative penalty under section 426-120 in Schedule 1 to the Taxation Administration Act 1953 cannot be reimbursed from the fund: see subsection 426-120(4).*

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**5. Part 2: Rules for endorsement as a deductible gift recipient**

Part 2 sets out the rules that a \*public ancillary fund must comply with in order to be endorsed, and remain endorsed, as a \*deductible gift recipient.

**6. Part 3: Transitional rules for funds established before 1 January 2012**

Part 3 sets out transitional rules modifying how Part 2 applies 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 *Income Tax Assessment Act 1997* at the end of 31 December 2011.

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## PART 2

# RULES FOR ESTABLISHING AND MAINTAINING PUBLIC ANCILLARY FUNDS AS DEDUCTIBLE GIFT RECIPIENTS

## OBJECT

7. The object of these Guidelines is to set minimum standards for the governance and conduct of a \*public ancillary fund and its trustee.

## GENERAL PRINCIPLES

8. A \*public ancillary fund must be established, maintained and wound up in accordance with the following principles:
- it is an ancillary fund, it is philanthropic in character and it is a vehicle for philanthropy; and
  - it is a trust that:
    - seeks to comply with all relevant laws and obligations; and
    - is open, transparent and accountable to the public (through the Commissioner and the Commissioner of the Australian Charities and Not-for-profits Commission (if a \*registered charity)).

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

## ESTABLISHING A PUBLIC ANCILLARY FUND

### PURPOSE AND OBJECTS OF THE FUND

9. A \*public ancillary fund must be established and maintained, under a will or an instrument of trust, as a valid trust under \*State law or \*Territory law.
10. It must be established and maintained solely as described in item 2 in the table in section 30-15 of the *Income Tax Assessment Act 1997*.
- 10.1. Its governing rules must include objects that clearly set out and reflect the purpose of the fund.

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- 10.2. Its governing rules must require that, on the fund winding up or ceasing to be a \*public ancillary fund, its net assets must be provided as described in paragraph (a) of item 2 in the table in section 30-15 of the *Income Tax Assessment Act 1997*.

*Note: Paragraph (a) of item 2 in 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; and for any purposes set out in an item in a table in Subdivision 30-B of the Income Tax Assessment Act 1997 that covers the fund, authority or institution.*

## **NOT-FOR-PROFIT**

11. It must be established and operated as a not-for-profit entity.
- 11.1. Its governing rules must clearly set out and reflect that it is established and operated as a not-for-profit entity.

## **OPERATED IN AUSTRALIA**

12. It must be established and operated only in Australia.

## **THE TRUSTEE**

13. The trustee of the fund must exercise the same degree of care, diligence and skill that a prudent individual would exercise in managing the affairs of others.
14. At all times, a majority of the individuals involved in the decision-making of the fund must be individuals with a degree of responsibility to the Australian community as a whole.

*Note 1: Those individuals with a degree of responsibility to the community as a whole are generally known as 'responsible persons'. This requirement is stricter than the requirement applying to private ancillary funds. The Taxation Administration (Private Ancillary Fund) Guidelines 2019 require at least one of the individuals involved in the decision-making of the fund to be a responsible person.*

*Note 2: 'Individuals with a degree of responsibility to the Australian community as a whole' would generally include: school principals, judges, religious practitioners, solicitors, doctors and other professional persons, mayors, councillors, town clerks and members of parliament. 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 (such as the Institute of Chartered Accountants, State Law Societies and Medical Registration Boards) 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*



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community (for example, an Order of Australia award) will also usually have the requisite degree of responsibility.

- 14.1. An individual with a degree of responsibility to the Australian community as a whole includes an individual before whom a statutory declaration may be made.

*Example: An individual who before whom a statutory declaration may be made include individuals who are licensed or registered to practice 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, 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.*

- 14.2. The individuals referred to in guideline 14 must be actively involved in the decision-making of the fund either by being directors of the trustee or members of any other controlling body of the fund.
- 14.3. This guideline does not apply to the Public Trustee of a state or territory.
15. The trustee or any other controlling body of the fund must not exercise any discretion or power while guideline 14 is not being complied with.
- 15.1. However, the trustee or other controlling body may exercise a discretion or power:
- to appoint a new trustee; or
  - to protect the property of the fund; or
  - to deal with an urgent matter that cannot be postponed.
16. An individual must not be a director of a trustee or a member of any other controlling body of the fund, if he or she has been convicted of a taxation offence (within the meaning of Part III of the *Taxation Administration Act 1953*) that is an indictable offence.
- 16.1. If an existing director is convicted of such an offence, he or she must cease to be a director within 1 month after the conviction.

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## CHANGES TO GOVERNING RULES

17. The trustee must notify the Commissioner in the \*approved form (within 21 days) of any change to the fund's governing rules.

*Note: Certain changes to the governing rules may require the fund to seek re-endorsement as a deductible gift recipient.*

- 17.1 However, the trustee does *not* need to notify the Commissioner under this guideline 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*.

PENALTY: 5 penalty units.

## LIABILITY OF TRUSTEE

18. The governing rules of a \*public 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:

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

*Note: An administrative penalty under section 426-120 in Schedule 1 to the Taxation Administration Act 1953 cannot be reimbursed from the fund, see subsection 426-120(4).*

## OPERATION OF A PUBLIC ANCILLARY FUND

### MINIMUM ANNUAL DISTRIBUTION

19. During each \*financial year, a \*public ancillary fund must distribute at least 4 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).

*Note 1: 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).*

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*Note 2: The minimum annual distribution rate may be lowered under Guidelines 19.2 and 19.7 for a financial year.*

- 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 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 Guideline 19. If any of a fund's expenses are paid out of the fund's assets or income, its minimum distribution is \$8,800 or the amount calculated under Guideline 19 whichever is greater.*

- 19.2. No distribution is required during the \*financial year in which the fund is established or during the next 4 financial years.

*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.*

- 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.

*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.*

*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.*

*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.*

*Example 4: If a public ancillary fund lends money to a 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 a benefit whose market value is equal to the discount.*

*Example 5: If a public ancillary fund guarantees a loan provided by a financial institution to a deductible gift recipient, the fund is providing a benefit whose market value is equal to the discount to the interest rate which would 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 a distribution (being the provision of money, property or benefits).*

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*Note 1: 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.*

- 19.4. The penalty for a contravention of this guideline is 30 penalty units if the shortfall is greater than \$1,000.
- 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.
- 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.

*Accessing a lower minimum distribution rate for a financial year*

- 19.7. 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.
- 19.7.1 Recognising the purpose and object of the fund, the Commissioner must only reduce the minimum annual distribution rate if the Commissioner is satisfied that there are circumstances that warrant the Commissioner reducing the rate.
- 19.7.2 The Commissioner may reduce the minimum annual distribution rate at any time, including after the relevant financial year has finished.
- 19.7.3 In determining whether to reduce the rate and what the reduced rate should be, the Commissioner must have regard to:
- the general market conditions in Australia; and
  - the past, current and expected levels of returns from the fund's investments; and
  - the long-term impact on the assets of the fund from not reducing the rate for a \*financial year; and
  - the level of distributions made by the fund in previous financial years; and

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- the investment strategy and distribution strategy of the fund; and
  - the size of the fund; and
  - the compliance history of the fund and the trustee; and
  - the fees and expenses of the fund; and
  - the terms and other circumstances relating to any gift to the fund under a will; and
  - any other relevant matter that Commissioner considers relevant.

*Note: Having regard to the 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, and the performance of \*approved stock exchanges. It could also include examining changes in conditions over time.*

## VALUATION

20. The \*market value of the 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'.*

- 20.1. Subject to guideline 22, the trustee may estimate the \*market value itself or arrange for a qualified valuer or another appropriate entity to make the estimate.

*Note 1: It is not intended that making or arranging for an estimate of market value be onerous or expensive.*

*Note 2: A trustee should 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 the valuation is likely to be difficult or complex.*

*Note 3: The trustee may ask the Commissioner to undertake a valuation. The Commissioner may charge the trustee for undertaking a valuation.*

- 20.2. Whoever makes the estimate must base it on reasonably objective and supportable data. The methodology and data used for an estimate should be documented in the fund's records.
- 20.3. The estimate should be of the \*market value as at the end of the relevant \*financial year. Unless to do so would be unnecessarily onerous and expensive, the estimate should be conducted within 2 months before or after 30 June for each asset.

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21. The \*market value of land must be estimated at least once every 3 \*financial years.

21.1. The \*market value of land must be estimated by a certified and independent valuer or by the Commissioner.

21.1.1. The trustee must obtain from the valuer a written estimate of the \*market value of the land. The written estimate must also include the valuation methodology and a reference to supporting materials used in making the estimate.

*Note: The trustee may ask the Commissioner to undertake the valuation. The Commissioner may charge the trustee for undertaking a valuation.*

21.2. The trustee may use the estimate as the \*market value of the land for the next 3 \*financial years.

22. If the Commissioner considers the estimate of the \*market value of any asset to be unreasonable, the Commissioner may request the trustee to arrange for another valuation to be undertaken. 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. The Commissioner may charge the trustee for undertaking a valuation.*

23. Estimates must be completed before the fund is required to give to the Commissioner its \*income tax return for the relevant \*financial year.

*Note: A public ancillary fund will be required to lodge an income tax return whether or not it is exempt from income tax. The Commissioner will approve an appropriate income tax return form for public ancillary funds.*

## ACCOUNTS

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.

*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.*

PENALTY: 10 penalty units.

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25. The trustee must make the accounts available to the Commissioner upon request.

PENALTY: 10 penalty units.

## FINANCIAL STATEMENTS

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.

- 26.1. The financial statements 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 meet this requirement.*

- 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.

- 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.

PENALTY: 10 penalty units.

27. The trustee must make the financial statements available to the Commissioner upon request, unless the financial statements have already been given to the Commissioner of the Australian Charities and Not-for-profits Commission.

PENALTY: 10 penalty units.

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## AUDIT

28. Except as set out below, each \*financial year the trustee must arrange for an auditor to audit:

- the financial statements of the fund; and
- compliance with these Guidelines by the fund and the trustee.

28.1. The auditor must be a registered company auditor (within the meaning of the *Corporations Act 2001*).

28.1.1. The Public Trustee of a state or territory may have the Auditor-General of that state or territory undertake the audit.

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.

28.2.1. A reviewer must 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 taken to be a registered company auditor for the purpose of this guideline.

*Note: This has the effect of widening the class of individuals who can undertake a review.*

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.

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.

PENALTY: 10 penalty units.

29. The trustee must make the report available to the Commissioner upon 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.

## **INVESTMENT STRATEGY**

30. The trustee must prepare and maintain a current investment strategy for the fund.

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.

30.2. The strategy must reflect the purpose and circumstances of the fund and have particular regard to (but not be limited to):

- 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
- 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; and
- status of the fund as a \*registered charity (where applicable); and
- real or perceived material conflicts of interest in holding particular investments (including those relating to individuals involved in the decision-making of the fund); and
- the terms and other circumstances relating to any gift to the fund under a will.

PENALTY: 10 penalty units.

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31. The trustee must implement the investment strategy, and must ensure that all investment decisions are made in accordance with it.

PENALTY: 15 penalty units.

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, a reviewer or the Commissioner can determine whether the fund has complied with these Guidelines and other \*Australian laws.

PENALTY: 10 penalty units.

### **INVESTMENT LIMITATIONS**

33. The trustee must not \*borrow money or maintain an existing borrowing of money.

- 33.1. However, this guideline does not prohibit a trustee from \*borrowing money if:

- 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.

- 33.2. This guideline also does not prohibit a trustee from \*borrowing money if:

- 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.

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- 33.3. Guideline 33 also does not apply to the acquisition of a financial instrument excluded by the Commissioner from that guideline.
34. The fund's investments must be made and maintained on an \*arm's length unless another guideline allows otherwise.
35. The trustee must not give a security over, or in relation to, an asset of the fund.
- 35.1. However, this guidelines does not apply to:
- the acquisition of a financial instrument excluded by the Commissioner from that guideline; or
  - an agreement to guarantee the repayment of any money lent by a creditor for the sole benefit of one or more \*deductible gift recipients.
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:
- 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.
37. The trustee must keep the assets of the fund separate from all other assets.
- 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.
38. The fund must not acquire an asset (except by way of gift) if the asset is capable of being a \*collectable.
- 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.
39. The penalty in relation to each of guidelines 33 to 38 is 30 penalty units.
40. The fund must not \*carry on a \*business.

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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.

40.2. A fund also does not contravene this guideline if it undertakes public fundraising appeals.

*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.*

*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.*

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.

## **UNCOMMERCIAL TRANSACTIONS AND BENEFITS TO FOUNDER/DONOR**

41. The fund must not enter into any transaction that is uncommercial when entered into, unless the transaction is:

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

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.

PENALTY: 30 penalty units.

42. The fund must not \*provide any material benefit (except as set out in guideline 43), directly or indirectly, to:

- 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

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- 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.

## FEES AND EXPENSES

43. The trustee may apply income or capital of a \*public ancillary fund:

- 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.

*Note: A trustee incurs reasonable expenses on behalf of a fund when providing reasonable remuneration benefits to some of the individuals listed in guideline 42 (including providing benefits of a minor or incidental nature to an employee).*

## DONORS

44. The fund must be public in nature.<sup>1</sup>

*Note 1: A fund will be public in nature where it is the intention of the founders or promoters of the fund that the public will contribute to the fund and that the public participates in the administration of the fund.*

*Note 2: Due to the public nature of the fund, it will generally be good practice for a trustee to review, amongst other things, the purpose(s) of the fund and any non-binding preferences indicated by donors, before making distributions, unless the governing rules of the fund provide otherwise.*

45. The public must be invited to contribute to the fund.

*Note 1: The features of a \*public ancillary fund can be contrasted with those of a private ancillary fund, because these funds can collect donations from the public.*

*Note 2: A public ancillary fund may establish sub-funds in relation to contributions from particular donors. However, the fund must be under no obligation to comply with any requests from a donor.*

46. The fund must issue a receipt (upon request) in respect of each gift it receives.

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<sup>1</sup> *Bray v Federal Commissioner of Taxation* (1978) 140 CLR 560.

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- 46.1. The receipt must include the name and \*ABN of the fund and the name of the donor and must state that the receipt is for a gift received by the fund.

*Note: See section 30-228 of the Income Tax Assessment Act 1997 for further rules about receipts to be issued by deductible gift recipients.*

## **COMPLIANCE WITH ALL RELEVANT LAWS**

47. The fund must comply with all relevant \*Australian laws, all legally binding directions given to it by the Commissioner and all the requirements contained in these Guidelines.
48. The trustee must ensure that the fund's distributions to \*deductible gift recipients do not put at risk the validity of the trust under \*State law or \*Territory law.

*Note: In some states and territories, distributions cannot be lawfully made from a charitable fund to a non-charitable deductible gift recipient.*

## **WINDING UP A PUBLIC ANCILLARY FUND OR TRANSFERRING FUNDS TO ANOTHER ANCILLARY FUND**

### **WINDING UP OR CEASING TO BE A PUBLIC ANCILLARY FUND**

49. Except as set out in guideline 50, if the fund winds up or ceases to be a \*public ancillary fund, all the fund's net assets must be provided as described in paragraph (a) of item 2 in the table in section 30-15 of the *Income Tax Assessment Act 1997*.

*Note: see note to guideline 10.*

## **PORTABILITY**

50. With the agreement of the Commissioner, a \*public ancillary fund may transfer assets to another \*ancillary fund if:
- it transfers all of its net assets to that ancillary fund (or if the public ancillary fund has sub-funds, it transfers all of the net assets of the sub-fund to that ancillary fund); and
  - it has already complied with guidelines 19 to 19.6 (as affected by Part 3) for that financial year (about minimum annual distributions); and

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- the net assets have not previously been transferred to another ancillary fund during the previous 2 financial years.
- 50.1 The Commissioner must not agree to the transfer of assets between \*ancillary funds if the transfer involves moving assets contributed, either directly or indirectly, by the general public from a public ancillary fund to a private ancillary fund.

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## PART 3 TRANSITIONAL RULES FOR PUBLIC ANCILLARY FUNDS

### INTRODUCTION

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 *Income Tax Assessment Act 1997* at the end of 31 December 2011.

51.1. These transitional rules are intended to help a public ancillary fund make the transition into the new regime.

### 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.

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.

### TRANSITIONAL RULE: CORONAVIRUS ECONOMIC RESPONSE—CARRY FORWARD CREDIT FOR DISTRIBUTIONS IN EXCESS OF MINIMUM

57. This guideline applies to a \*public ancillary fund if the fund exceeds its annual minimum distribution for the \*financial years 2019-20 to 2020-21, as calculated under guideline 57.1, by more than 4.

57.1. Work out how much a \*public ancillary fund exceeds its annual minimum distribution for the \*financial years 2019-20 to 2020-21 as follows:



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*Method statement*

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|---------|---|
| 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.   |
| Step 4. | Reduce the result of step 3 by 8, but not so as to reduce the result to an amount less than nil. The result is how much a *public ancillary fund exceeds its annual minimum distribution for the financial years 2019-20 to 2020-21.  |

57.2. Where this guideline applies, the minimum annual distribution rate for a \*public ancillary fund for the purposes of guideline 19 for a \*financial year covered by guideline 57.3 is 3 per cent.

57.3. The following are the \*financial years covered by this guideline for a \*public ancillary fund:

- the 2021-22 financial year; and
- the 2022-23 financial year; and
- a subsequent financial year or years for each amount of 2 the result of the method statement in guideline 57.1 exceeds 4.

*Example: If the result of the method statement is 7 for a public ancillary fund, the 2023-24 financial year is also covered by this guideline.*

## 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.

**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

## Endnote 3—Legislation history

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Name	Registration	Commencement	Application, saving and transitional provisions
<i>Public Ancillary Fund Guidelines 2011</i>	20 December 2011 (F2011L02758)	1 January 2012	
<i>Private Ancillary Fund and Public Ancillary Fund Amendment Guidelines 2016</i>	4 May 2016 (F2016L00651)	5 May 2016	—
<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	—

## Endnote 4—Amendment history

**Endnote 4—Amendment history**

<b>Provision affected</b>	<b>How affected</b>
Guideline 2	rep. LA s48D
Guideline 8	am. No. F2016L00651, 2016
Guideline 8 (note)	am. No. F2016L00651, 2016
Guideline 12 (note)	rep. No. F2016L00651, 2016
Guideline 14 (note)	am No. F2019L01227, 2019
Guideline 14.1	am. No. F2016L00651, 2016
Guideline 17.1.	ad. No. F2016L00651, 2016
Guideline 19	am. No. F2016L00651, 2016
Guideline 19 (note 1)	am. No. F2016L00651, 2016
Guideline 19 (note 2)	ad. No. F2016L00651, 2016
Guideline 19.1.	am. No. F2016L00651, 2016
Guideline 19.1 (note)	am. No. F2016L00651, 2016
Guideline 19.3	am. No. F2016L00651, 2016
Guideline 19.3 (note 1)	ad. No. F2016L00651, 2016
Guideline 19.7	ad. No. F2016L00651, 2016
Guideline 19.7.1	ad. No. F2016L00651, 2016
Guideline 19.7.2	ad. No. F2016L00651, 2016
Guideline 19.7.3	ad. No. F2016L00651, 2016
Guideline 19.7.3 (note 1)	ad. No. F2016L00651, 2016
Guideline 20.1 (note 3)	am. No. F2016L00651, 2016
Guideline 21.1	am. No. F2016L00651, 2016
Guideline 21.1.1 (note)	am. No. F2016L00651, 2016
Guideline 22 (note)	am. No. F2016L00651, 2016
Guideline 26.1 (note)	ad. No. F2016L00651, 2016
Guideline 27	am. No. F2016L00651, 2016
Guideline 29	am. No. F2016L00651, 2016
Guideline 30.2	am. No. F2016L00651, 2016
Guideline 31	am. No. F2016L00651, 2016
Guideline 32	am. No. F2016L00651, 2016
Guideline 34	am. No. F2016L00651, 2016
Guideline 35.1	am. No. F2016L00651, 2016
Guideline 44 (note 1)	am. No. F2016L00651, 2016
Guideline 44 (note 2)	ad. No. F2016L00651, 2016
Guideline 50.1	ad. No. F2016L00651, 2016
Guideline 52	rep. No. F2016L00651, 2016
Guideline 53	rep. No. F2016L00651, 2016
Guideline 54	rep. No. F2016L00651, 2016

## Endnote 4—Amendment history

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Provision affected	How affected
Guideline 55	rep. No. F2016L00651, 2016
Guideline 57 (2 <sup>nd</sup> occurring)	ad No. F2020L00684, 2020

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