

EXPLANATORY STATEMENT

Issued by authority of the Assistant Minister for Finance, Charities and Electoral Matters

Taxation Administration Act 1953

Taxation Administration (Private Ancillary Fund) Guidelines 2019

Section 426-110 in Schedule 1 to the *Taxation Administration Act 1953* provides that the Minister must formulate guidelines setting out rules for private ancillary funds and their trustees if the funds are to be, or are to remain, endorsed as deductible gift recipients.

The purpose of the *Taxation Administration (Private Ancillary Fund) Guidelines 2019* (the 2019 Guidelines) is to remake the *Private Ancillary Fund Guidelines 2009* (the 2009 Guidelines) before it ‘sunset’. The *Legislation Act 2003* provides that all legislative instruments, other than exempt instruments, progressively sunset according to the timetable in section 50 of that Act. Legislative instruments generally cease to have effect after 10 years unless their operation is extended such as by remaking the instrument. The 2009 Guidelines are due to be automatically repealed on 1 October 2019.

The 2019 Guidelines remake the effect of the 2009 Guidelines but with simplified language and with consolidated and restructured provisions for ease of comprehension and navigation. The key minor changes from the 2009 Guidelines are:

- the adoption of current drafting practices such as referring to ‘sections’ rather than ‘guidelines’;
- improvements to the structure to make the provisions easier to understand and navigate; and
- the centralisation of definitions of some key terms upfront to improve clarity.

These changes are not intended to affect the substantive meaning, operation or the legal effect of the provisions of the 2009 Guidelines.

Further explanation of the minor changes in the 2019 Guidelines from the 2009 Guidelines are set out in Attachment A. Detailed information on establishing a private ancillary fund, the distribution of funds, compliance and voluntary disclosure are available on the Australian Taxation Office’s website:

<https://www.ato.gov.au/Non-profit/Getting-started/In-detail/Types-of-DGRs/Private-ancillary-funds---trustee-guidance/>.

Finding tables, which set out the provisions of the 2019 Guidelines in relation to the corresponding provisions in the 2009 Guidelines, are at Attachment B.

The Act does not specify any conditions that need to be met before the power to make the 2019 Guidelines may be exercised.

As this sunseting instrument is being remade without significant change, and has been assessed, including through a four week public consultation process, to be operating effectively and efficiently, a Regulatory Impact Statement is not required.

The 2019 Guidelines are a legislative instrument for the purposes of the *Legislation Act 2003*.

The 2019 Guidelines commence on the day after the instrument is registered on the Federal Register of Legislation.

A Statement of Compatibility with Human Rights is at Attachment C. The Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Details of the *Taxation Administration (Private Ancillary Fund) Guidelines 2019*

This Attachment sets out further details of the *Taxation Administration (Private Ancillary Fund) Guidelines 2019* (the 2019 Guidelines). All references are to the 2019 Guidelines unless otherwise stated. References to a ‘corresponding provision’ are to the corresponding provision in the *Private Ancillary Fund Guidelines 2009* (the 2009 Guidelines), as identified by the finding tables at Attachment B.

All sections in the 2019 Guidelines replicate (and in some cases consolidate) the corresponding provisions in the 2009 Guidelines, but have been updated in accordance with current drafting practice. This Attachment does not catalogue changes of a minor or machinery nature, such as references to ‘section’ rather than ‘guideline’. Where changes are made that require further explanation, these are identified and explained in this Attachment.

Details of existing law can be found in the Explanatory Statement to the 2009 Guidelines and at www.ato.gov.au.

Part 1 - Preliminary

Section 1 – Name of instrument

This section provides that the title of the 2019 Guidelines is the *Taxation Administration (Private Ancillary Fund) Guidelines 2019*.

Section 2 – Commencement

This section provides that the 2019 Guidelines commence the day after registration.

Section 3 – Authority

This section provides that the 2019 Guidelines is made under the *Taxation Administration Act 1953*.

Section 4 – Schedules

This section provides that each instrument listed in a Schedule to the 2019 Guidelines is amended or repealed in accordance with the instructions in the Schedule.

Section 5 – Definitions

This section replicates the corresponding provision in the 2009 Guidelines but has been updated in accordance with current drafting practice. To improve clarity, section 5 now includes definitions of key terms previously included in later provisions of the 2009 Guidelines, as follows:

- the definitions of ‘distribution’ and ‘responsible person’; and
- ‘governing rules’ is defined to have the same meaning as in the *Australian Charities and Not-for-profits Commission Act 2012*.

Section 6 – Penalties

This section replicates the corresponding provision in the 2009 Guidelines, but has been updated to reflect current drafting practice. Section 6 provides that the amount of an administrative penalty imposed for a breach of these Guidelines is set out, or worked out, in accordance with the relevant provision of the 2019 Guidelines which has been breached.

No changes have been made to any penalties for breaching the 2019 Guidelines – the penalty provisions (and amounts) identified throughout the 2019 Guidelines reflect the corresponding penalty provisions (and amounts) in the 2009 Guidelines.

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

Sections 7 and 8 – Object and general principles

These sections replicate the corresponding provisions in the 2009 Guidelines, but have been updated in accordance with current drafting practice. Section 7 provides that the object of Part 2 is to set minimum standards for the governance and conduct of private ancillary funds. Section 8 establishes general principles which private ancillary funds must observe.

Sections 9, 10 and 11 – Establishing a private ancillary fund

These sections replicate the corresponding provisions in the 2009 Guidelines that set out rules for establishing and operating a private ancillary fund, but have been updated in accordance with current drafting practice.

Section 9 provides that a private ancillary fund must be established and maintained, under a will or an instrument of trust, as a valid trust. This provision no longer refers to ‘a valid trust *under State law or Territory law*’. The reference to State or Territory law has been removed because the trustee must comply with *all* relevant laws that go to a trust’s validity including common law, State law, Territory law, Commonwealth law and, where relevant, foreign law. The additional text merely created unnecessary confusion and was therefore removed (similar references to State or Territory law have also been removed at section 25, see below).

Section 10 provides that a private ancillary fund must be established and operated as a not-for-profit entity.

Section 11 provides that a private ancillary fund must be established and operated in Australia, and clarifies that this does not prevent the fund from making a distribution to an eligible deductible gift recipient that operates outside Australia.

Section 12 – Trustees of private ancillary funds

This section replicates and consolidates the corresponding provisions in the 2009 Guidelines concerning trustees of private ancillary funds, but has been updated in accordance with current drafting practice. In addition, a definition of ‘responsible person’ has been included at subsection 12(7) to improve clarity and readability.

Subsection 12(8) contains limitations on who can be a ‘responsible person’, to ensure that at least one independent person is involved in the decision-making of each private

ancillary fund. This provision has been updated to provide greater consistency with similar restrictions applying to responsible persons in the model trust deed.

Section 13 and 14 – Governing rules of private ancillary funds

These sections replicate the corresponding provisions in the 2009 Guidelines, but have been updated in accordance with current drafting practice. Section 13 obligates a trustee to notify the Commissioner of any changes to the fund's governing rules. Section 14 prohibits a private ancillary fund from indemnifying a trustee against losses due to their decisions in certain situations where the trustee's behaviour is considered highly inappropriate.

Section 15 – Minimum annual distribution

This section replicates the corresponding provision in the 2009 Guidelines, but has been updated in line with current drafting practice. Section 15 requires a private ancillary fund to distribute a proportion of its income and assets each year to eligible deductible gift recipient(s). The key change is the inclusion of a definition of 'distribution' at subsection 15(4) to improve clarity (this definition is also referenced in section 5). The definition does not alter the substantive effect of the section.

The section retains the amendments introduced in 2016 that permit the Commissioner to reduce the minimum distribution requirements for a fund for a particular year. The Commissioner also retains the power to subject a decision to reduce the minimum distribution rate for a fund for a year, to conditions the Commissioner considers necessary. Those conditions may seek to protect the integrity of the regulatory framework or improve the operation of a fund to minimise the likelihood of a future requests for a lower distribution being made.

Section 16 – Valuations

This section replicates and consolidates the corresponding provisions in the 2009 Guidelines that prescribe procedures for working out the market value of a private ancillary fund's assets, but has been updated in accordance with current drafting practice.

Sections 17, 18 and 19 – Record keeping, financial reporting and audits

These sections replicate and consolidate the corresponding provisions in the 2009 Guidelines that set out the rules for record keeping, financial reporting and audits, but have been updated to reflect current drafting practice and to provide greater consistency with the *Public Ancillary Fund Guidelines 2011*.

Sections 20 and 21 – Investment strategy and limitations

These sections replicate and consolidate the corresponding provisions in the 2009 Guidelines that require the trustee of a private ancillary fund to implement an investment strategy and comply with certain investment limitations to protect a fund's philanthropic assets, but have been updated in line with current drafting practice.

Section 22 – Uncommercial transactions and benefits to founders and donors

This section replicates and consolidates the corresponding provisions in the 2009 Guidelines that generally prohibit the trustee of a private ancillary fund from

entering into uncommercial transactions or providing benefits to founders and donors, but has been updated in accordance with current drafting practice.

Section 23 – Fees and expenses

This section replicates the corresponding provision in the 2009 Guidelines that allows a trustee of a private ancillary fund to be reimbursed or remunerated out of the fund's income or capital, but has been updated in accordance with current drafting practice.

Section 24 – Donors

This section replicates and consolidates the corresponding provisions in the 2009 Guidelines that prohibit private ancillary funds from soliciting public donations, but has been updated in accordance with current drafting practice.

Minor changes have been made to this provision to improve clarity and ensure the law operates as intended – that is, the section now ensures there can be no misunderstanding that following the death of a founder, the founder's family can continue to donate and operate the private ancillary fund as a vehicle for the family's private philanthropic purposes.

Section 25 – Compliance with all relevant laws

This section replicates the corresponding provisions in the 2009 Guidelines that require the trustee of a private ancillary fund to comply and ensure the fund's compliance with all relevant Australian laws, but has been updated in accordance with current drafting practice.

Consistent with the removal of unnecessary references to State or Territory law at section 9 (outlined above), similar references have also been removed from this provision – the additional text is unnecessary, because section 25 requires the trustee to comply with *all* relevant laws that go to a trust's validity.

Sections 26, 27 and 28 – Winding up, or ceasing to be, a private ancillary fund

These sections replicate the corresponding provisions in the 2009 Guidelines concerning winding up, or ceasing to be, a private ancillary fund, and portability of assets, but have been updated in line with current drafting practice.

Part 3—Application and transitional provisions

Section 29 – Transitional rules for former prescribed private funds

This section replicates and consolidates the corresponding provisions in the 2009 Guidelines that set out transitional rules for private ancillary funds that were prescribed before 1 October 2009, but has been updated in accordance with current drafting practice.

Section 30 – Transitional rules for things done under the 2009 Guidelines

This new section sets out transitional rules modifying how Part 2 applies to a private ancillary fund to ensure a seamless transition between the 2009 Guidelines and the 2019 Guidelines. The intention is that the effect of the 2009 Guidelines continues, despite being repealed and remade into 2019 Guidelines.

Schedule 1—Repeals and consequential amendments

Schedule 1 repeals the 2009 Guidelines from the commencement of the 2019 Guidelines. Schedule 1 also updates a cross-reference to the 2019 Guidelines in the *Public Ancillary Fund Guidelines 2011*.

ATTACHMENT B

Finding tables

As a result of changes described at [Attachment A](#), it was necessary to renumber the provisions in the 2019 Guidelines. This Attachment includes finding tables to assist in identifying which provision in the 2019 Guidelines corresponds to a provision in the 2009 Guidelines that has been rewritten or consolidated, and vice versa.

Tables B.1 and B.2 (below) locate the provisions of the 2019 Guidelines in relation to the corresponding provisions in the 2009 Guidelines.

In the finding tables, in the ‘2009 Guidelines’ column, ‘*no equivalent*’ means this is a new provision that has no corresponding provision in the 2009 Guidelines. In the ‘2019 Guidelines’ column, ‘omitted’ means that the section from the 2009 Guidelines has not been remade. Typically, these are spent or non-operative provisions, guidance material or similar.

Table B.1: 2019 Guidelines to 2009 Guidelines

2019 Guidelines	2009 Guidelines	2019 Guidelines	2009 Guidelines
1	1	18	26 and 27
2	2	19	28 and 29
3	<i>No equivalent</i>	20	30 to 32
4	<i>No equivalent</i>	21	33 to 40
5	3	22	41 and 42
6	4	23	43
7	7	24	44 to 47
8	8	25	48 and 49
9	9 and 10	26	50
10	11	27	51
11	12	28	51A
12	13 to 16	29	59 and 60
13	17	30	<i>No equivalent</i>
14	18	Schedule 1	<i>No equivalent</i>
15	19	<i>omitted</i>	5
16	20 to 23	<i>omitted</i>	6
17	24 and 25		

Table B.2: 2009 Guidelines to 2019 Guidelines

2009 Guidelines	2019 Guidelines
1	1
2	2
3	5
4	6
5	<i>omitted</i>
6	<i>omitted</i>
7	7
8	8
9 and 10	9
11	10
12	11
13 to 16	12
17	13
18	14
19	15
20 to 23	16
24 and 25	17

2009 Guidelines	2019 Guidelines
26 and 27	18
28 and 29	19
30 to 32	20
33 to 40	21
41 and 42	22
43	23
44 to 47	24
48 and 49	25
50	26
51	27
51A	28
59 and 60	29
<i>No equivalent</i>	30
<i>No equivalent</i>	Schedule 1
<i>No equivalent</i>	3
<i>No equivalent</i>	4

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Taxation Administration (Private Ancillary Fund) Guidelines 2019

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Taxation Administration (Private Ancillary Fund) Guidelines 2019* (2019 Guidelines) remake the *Private Ancillary Fund Guidelines 2009* (2009 Guidelines) before it sunsets. These Guidelines set minimum standards for the governance and conduct of private ancillary funds and their trustees. The Guidelines aim to ensure that private ancillary funds are properly accountable and act in the manner expected of an entity holding philanthropic funds for a broad public benefit.

A private ancillary fund is a form of ancillary trust fund designed to encourage private philanthropy by providing private groups, such as businesses and families, with greater flexibility to start their own trust funds for philanthropic purposes.

The 2019 Guidelines remake the effect of the 2009 Guidelines but with simplified language and with consolidated and restructured provisions for ease of comprehension and navigation. These changes are not intended to affect the substantive meaning, operation or the legal effect of the provisions of the 2009 Guidelines.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms because it relates to slight updates to rules for specific types of philanthropic funds rather than affecting the rights or freedoms of individuals.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.