

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Assistant Treasurer, Minister for Housing and Minister for Homelessness, Social and Community Housing**

*Taxation Administration Act 1953*

*Taxation Administration (Public Ancillary Fund) Guidelines 2022*

The *Taxation Administration Act 1953* (the Act) contains the administrative framework for the taxation and superannuation law in Australia.

Section 426-103 in Schedule 1 to the Act provides that the Minister must formulate guidelines setting out rules for public ancillary funds and their trustees if the funds are to be, or are to remain, endorsed as deductible gift recipients under the taxation law. A deductible gift recipient is an entity or fund that can receive tax deductible gifts.

The *Taxation Administration (Public Ancillary Fund) Guidelines 2022* (the 2022 Guidelines) remakes and updates the *Public Ancillary Fund Guidelines 2011* (2011 Guidelines) which sunset on 1 April 2022.

Section 50 of the *Legislation Act 2003* provides that all legislative instruments, other than exempt instruments, progressively sunset according to a prescribed timetable. Legislative instruments generally cease to have effect after 10 years unless their operation is extended such as by remaking the instrument. The 2011 Guidelines automatically repeal on 1 April 2022.

The 2022 Guidelines remake the 2011 Guidelines with minimal changes to substantive requirements. Further explanation of the minor changes in the 2022 Guidelines from the 2011 Guidelines are set out at Attachment A. The 2022 Guidelines broadly follow the same structure of the 2011 Guidelines.

Detailed information on the establishment, operation, and compliance requirements of public ancillary funds as set out in the 2011 Guidelines can be found on the Australian Taxation Office (ATO) website.

One substantive change included in the 2022 Guidelines is the availability of merits review of the Commissioner of Taxation's (the Commissioner) decisions on applications for a lower minimum annual distribution rate. This is consistent with the Government's intention to have administrative decisions subject to independent review to ensure that decisions are made correctly under the law and to ensure that there is accountability for decisions made by public officials.

The instrument also amends the *Taxation Administration (Private Ancillary Fund) Guidelines 2019* to also allow merits review for private funds seeking a reduced annual distribution rate.

The 2022 Guidelines are a legislative instrument for the purposes of the *Legislation Act 2003*.

Further details of the 2022 Guidelines are in [Attachment A](#). Finding tables have been included at [Attachment B](#) to assist in identifying the corresponding provisions in the 2022 Guidelines to the 2011 Guidelines.

The 2022 Guidelines commenced and applied from the day after their registration. The 2022 Guidelines also repealed the 2011 Guidelines from the commencement of the 2022 Guidelines.

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

A public consultation process was run from 18 November 2021 to 09 December 2021. There were 40 submissions received. Stakeholder feedback was broadly supportive of the draft 2022 Guidelines. However, refinements to the draft guidelines have been made in response to some stakeholders' concern regarding the restrictions on who can act as a responsible person.

The 2022 Guidelines have been amended to reflect stakeholder feedback.

Prior to the making of the Guidelines and in accordance with the Office of Best Practice Regulation's Guidance Note on sunseting instruments, the Department of the Treasury self-assessed that the 2011 Guidelines were operating effectively and efficiently, and therefore a Regulation Impact Statement was not required. This assessment was informed by the public consultation on the exposure draft Guidelines.

A Statement of Compatibility with Human Rights is at [Attachment C](#).

**Details of the *Taxation Administration (Public Ancillary Fund) Guidelines 2022***

This Attachment sets out further details of the *Taxation Administration (Public Ancillary Fund) Guidelines 2022* (the 2022 Guidelines). All references are to the 2022 Guidelines unless otherwise stated.

All sections in the 2022 Guidelines replicate (and in some cases consolidate) the corresponding provisions in the *Public Ancillary Fund Guidelines 2011* (2011 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.

**Section 1 – Name**

This section provides that the name of the instrument is the *Taxation Administration (Public Ancillary Fund) Guidelines 2022*.

**Section 2 – Commencement**

This section prescribes that the instrument commences the day after it is registered on the Federal Register of Legislation.

**Section 3 – Authority**

The instrument is made under section 426-103 in Schedule 1 to the *Taxation Administration Act 1953* (the Act).

**Section 4 – Schedules**

This section provides that existing instruments set out in a Schedule are amended or repealed in accordance with the details set out in the Schedule.

**Section 5 – Definitions**

This section sets out the definitions used in the 2022 Guidelines.

Further, expressions have the same meaning in the 2022 Guidelines as in the *Income Tax Assessment Act 1997*.

This section replicates the corresponding provision in the 2011 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 2011 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*.

There have not been any substantive changes to the existing meanings attributable to definitions now included in section 5.

### Section 6 – Penalties

The imposition of administrative penalties for non-compliance with the 2022 Guidelines is provided for in paragraph 426-103(1)(b) in Schedule 1 to the Act. While the Act imposes the penalty, the guidelines determine the amount of the administrative penalty for non-compliance with particular sections of the instrument.

Section 6 replicates the corresponding provision in the 2011 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 a guideline is set out, or worked out, in accordance with the relevant provision of the 2022 Guidelines which has not been complied with.

The Government consulted extensively in 2010 on the new regulatory framework for public ancillary funds. The rate of penalty for non-compliance has not altered from the 2011 to the 2022 Guidelines.

In addition, the rate of penalty applied in the 2022 Guidelines for non-compliance remains consistent with penalties applied for similar breaches in the Act. The level of penalty imposed is also consistent with the principles outlined in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. This guide is freely available on the Attorney-General's Department website.

The penalties in the 2022 Guidelines complement other administrative powers of the Commissioner that are contained in the Act, such as those to suspend, remove or replace trustees of private ancillary funds that intentionally disregard the guidelines or other relevant Australian laws.

The amount for the penalty outlined in the 2022 Guidelines is consistent with the principles established by the Australian Law Reform Commission *Report 95: Principled Regulation: Federal Civil and Administrative Penalties in Australia*. Public confidence is built slowly but lost quickly. The administrative penalties imposed for breaches reflect a desire to protect public trust and confidence by ensuring credible and effective deterrents are in place.

Trust in the integrity of a public ancillary fund and the responsible persons administering that fund is critical, and the level of administrative penalties maintained in the 2022 Guidelines continues to reflect this.

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

#### Sections 7 and 8 – Object and general principles

These sections replicate the corresponding provisions in the 2011 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 public ancillary funds.

Section 8 establishes general principles or objects which underpin rules contained within the guidelines.

### Sections 9, 10 and 11 – Establishing a public ancillary fund

These sections replicate the corresponding provisions in the 2011 Guidelines that set out rules for establishing and operating a public ancillary fund but have been updated in accordance with current drafting practice.

Section 9 provides that a public 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 about 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 in section 25).

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

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

### Section 12 – Trustees of public ancillary funds

This section replicates and consolidates the corresponding provisions in the 2011 Guidelines concerning trustees of public 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.

### Section 13 and 14 – Governing rules of public ancillary funds

These sections replicate the corresponding provisions in the 2011 Guidelines but have been updated in accordance with current drafting practice.

Section 13 requires a trustee to notify the Commissioner of any changes a public ancillary fund’s governing rules.

Section 14 prohibits a public 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 2011 Guidelines but has been updated in line with current drafting practice. A further change from 2011 Guidelines is also outlined below.

Section 15 requires a public ancillary fund to distribute a proportion of its income and assets each year to eligible deductible gift recipients. An important change is the inclusion of a definition of ‘distribution’ in subsection 15(4) to improve clarity (this definition is also referenced in section 5). The definition does not alter the substantive effect of the rewritten section

A key change in the 2022 Guidelines is that section 15 now provides for a public ancillary fund seeking a reduction in their annual distribution rate, and that is dissatisfied with a decision of the Commissioner to reject a request for a distribution rate below the minimum annual distribution rate, with the ability to seek merits

review of this decision, in accordance with the standard procedures for taxation decisions set out in Part IVC of the Act.

Similarly, amendments set out in Schedule 1 to the 2022 Guidelines provide private ancillary funds with the ability to seek merits review in relation to Commissioner's decision on applications for a lower minimum annual distribution rate.

#### Section 16 – Valuations

This section replicates and consolidates the corresponding provision in the 2011 Guidelines that prescribe procedures for working out the market value of a public 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 2011 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 *Taxation Administration (Private Ancillary Fund) Guidelines 2019*.

The penalties in the 2022 Guidelines recognise the important place directors and responsible persons have in the operation of a charity. They further support the policy objective of protecting public trust and confidence in the charitable sector. This is consistent with the reforms arising from the *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review 2018* (the Review).

The fines in the 2022 Guidelines are consistent with the principles and amounts recommended in the Attorney General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide to Framing Commonwealth Offences)*. *Penalty Comparisons across Commonwealth Legislation* are found in Annexure A of the *Guide to Framing Commonwealth Offences*.

#### Sections 20 and 21 – Investment strategy and limitations

These sections replicate and consolidate the corresponding provisions in the 2011 Guidelines that require the trustee of a public 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 2011 Guidelines that generally prohibit the trustee of a public 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 2011 Guidelines that allows a trustee of a public ancillary fund to be reimbursed or remunerated out of a public ancillary 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 2011 Guidelines.

A public fund is public by nature, and this section makes clear that the public must be regularly invited to contribute to a public ancillary fund. Failure to comply with this directive will result in 30 penalty units, which is an addition from the 2011 Guidelines.

The introduction of a specific administrative penalty amount for this requirement reflects the importance of a public fund being open, accountable, and marketed as public. This is a fundamental and critical tenet of a public ancillary fund. Awareness and trust are critical for public ancillary funds and both are linked. Higher awareness and knowledge of the fund and its activities can contribute to higher trust. The importance of trust in the charitable giving sector is demonstrated in the paragraphs above under the explanation for section 6. The Report makes clear that trust in the charitable giving sector is in decline.

The amount of penalty units is set at a level to increase accountability, awareness, and integrity. It is also consistent with similar offences and breaches in the Act and the *Corporations Act 2001*. Further discussion of the rate of penalties can be found in the explanation for section 6.

Section 30-228 of the *Income Tax Assessment Act 1997* provides further rules about receipts for deductible gift recipient.

## Section 25 – Compliance with all relevant laws

This section replicates the corresponding provisions in the 2011 Guidelines that require the trustee of a public ancillary fund to comply and ensure a public ancillary fund complies 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, similar references have also been removed from those contained in the 2011 Guidelines as they are duplicative and unnecessary.

## Sections 26 and 27 – Winding up, or ceasing to be, a public ancillary fund and portability

These sections replicate the corresponding provisions in the 2011 Guidelines concerning winding up, or ceasing to be, a public ancillary fund, and portability of assets, but have been updated in line with current drafting practice.

## Section 28 – Rules inconsistent with these guidelines

Part 3 outlines application and transitional provisions.

Section 28 sets out rules for maintaining public ancillary funds as deductible gift recipients. Section 28 specifically addresses the requirements for funds that were endorsed as a deductible gift recipient before 30 December 2011. This captures the period before the 2011 Guidelines came into effect.

A public ancillary fund endorsed before 30 December 2011 must have one trustee that is a constitutional corporation otherwise it is in breach of the 2022 Guidelines, unless it is a fund established by a will or trust as specified in section 30-15 of the *Income Tax Assessment Act 1997*.

Section 21(1) limits a trustee of a public ancillary fund from certain borrowings of money or maintaining an existing borrowing. However, subsection 28(2) facilitates a public ancillary fund that had an existing borrowing on 30 December 2011 maintaining and repaying that borrowing. However, a public ancillary fund with a borrowing pre-dating the 2011 Guidelines may not alter the terms of the borrowing without the prior agreement of the Commissioner.

Section 29- transitioning seamlessly from the *Public Ancillary Fund Guidelines 2011* to *Taxation Administration (Public Ancillary Fund) Guidelines 2022*

Section 29 provides guidance for how rules for establishing and maintaining public ancillary funds as deductible gift recipients transition from the 2011 Guidelines to 2022 Guidelines.

This section provides certainty that anything such as a notice or application made under the 2011 Guidelines as in force immediately prior to repeal continues to operate under the 2022 Guidelines. This section works to ensure that there is a seamless transition from the 2011 Guidelines to the 2022 Guidelines.

Section 30- Carry forward credit for distributions in excess of minimum

Under section 15, a public ancillary fund must typically distribute a minimum amount of at least 4 per cent of the market value of its net assets each financial year (other than in the first four financial years following the financial year in which it was established).

However, section 30 provides a transitional rule that was introduced by the *Taxation Administration (Coronavirus Economic Response Package—Ancillary Funds) Amendment Guidelines 2020*. The amendments encouraged additional giving by these funds in the 2019-20 and 2020-21 financial years. It did this by allowing funds that made donations that sufficiently exceeded the minimum required distributions under the Guidelines for the 2019- 20 and 2020-21 financial years to benefit from a reduced minimum annual distribution rate in the 2021-22 financial year and potentially later financial years.

The rule is maintained in the 2022 Guidelines to allow funds to continue to carry forward any unused credits.

**Repealed sections**

Some provisions in the 2011 Guidelines were not rewritten into the 2022 Guidelines as they were identified as spent or redundant.

**Schedule 1-Amendments**

Schedule 1 makes amendments to the corresponding *Taxation Administration (Private Ancillary Fund) Guidelines 2019* that apply to private ancillary funds to extend merits review to a private ancillary fund that is dissatisfied with a decision of the Commissioner in relation to an application for a lower minimum annual distribution rate.



## Attachment B

### Finding tables

As a result of changes described at Attachment A, it is necessary to renumber the provisions in the 2022 Guidelines. This Attachment includes finding tables to assist in identifying the corresponding provisions in the 2022 Guidelines to the 2011 Guidelines that have been rewritten or consolidated, and vice versa. Tables 1 and 2 (below) locate the provisions of the 2022 Guidelines in relation to the corresponding provisions in the 2011 Guidelines.

In the finding tables, in the ‘2011 Guidelines’ column, ‘*no equivalent*’ means this is a new provision that has no corresponding provision in the 2011 Guidelines. In the ‘2022 Guidelines’ column, ‘*omitted*’ means that the section from the 2011 Guidelines has not been remade. Typically, these are redundant provisions.

**Table 1: Section in 2022 Guidelines corresponding to 2011 Guidelines**

| 2022 Guidelines | 2011 Guidelines      | 2022 Guidelines | 2011 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 46.1           |
| 8               | 8                    | 25              | 47 and 48            |
| 9               | 9 and 10             | 26              | 49                   |
| 10              | 11                   | 27              | 50                   |
| 11              | 12                   | 28              | 54 to 57             |
| 12              | 13 to 16             | 29              | <i>No equivalent</i> |
| 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 2: Section in 2011 Guidelines corresponding to 2022 Guidelines**

| 2011 Guidelines | 2022 Guidelines | 2011 Guidelines | 2022 Guidelines |
|-----------------|-----------------|-----------------|-----------------|
| 1               | 1               | 26 and 27       | 18              |
| 2               | 2               | 28 and 29       | 19              |
| 3               | 5               | 30 to 32        | 20              |

| 2011 Guidelines | 2022 Guidelines |
|-----------------|-----------------|
| 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              |

| 2011 Guidelines      | 2022 Guidelines |
|----------------------|-----------------|
| 33 to 40             | 21              |
| 41 and 42            | 22              |
| 43                   | 23              |
| 44 to 46.1           | 24              |
| 47 and 48            | 25              |
| 49                   | 26              |
| 50                   | 27              |
| 51A                  | 28              |
| <i>No equivalent</i> | 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 (Public Ancillary Fund) Guidelines 2022***

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*.

The *Taxation Administration (Public Ancillary Fund) Guidelines 2022* (2022 Guidelines) remake the *Public Ancillary Fund Guidelines 2011* (2011 Guidelines) before they sunset. The 2022 Guidelines set minimum standards for the governance and conduct of public ancillary funds and their trustees. The 2022 Guidelines operate to ensure that public ancillary funds are properly accountable and act in the high standards expected of an entity holding philanthropic funds contributed by the public for a broad public benefit.

A public ancillary fund is an ancillary trust fund designed to support and facilitate public philanthropy by providing the public a vehicle to contribute to philanthropic purposes. The 2022 Guidelines remake the 2011 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 2011 Guidelines unless specifically noted.

**Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

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