



14 November 2019

Senator the Hon Zed Seselja
Assistant Minister for Finance, Charities and Electoral Matters
Parliament House
Canberra ACT 2600
Via email: Senator.Seselja@aph.gov.au
CC: Dlo-amf@finance.gov.au; CommitteeScrutiny@treasury.gov.au

Dear Assistant Minister,

Taxation Administration (Private Ancillary Fund) Guidelines 2019 [F2019L01227]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and requests your advice in relation to this matter.

Consultation

Section 17 of the *Legislation Act 2003* (Legislation Act) provides that, before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation in relation to the instrument that is considered by the rule-maker to be appropriate and reasonably practicable to undertake. Paragraph 15J(2)(d) of the Legislation Act further requires the explanatory statement to a legislative instrument to contain a description of the nature of any consultation that has been carried out in relation to it.

The committee notes that the explanatory statement to the instrument does not appear to contain a separate description of the nature of any consultation undertaken, as required by the Legislation Act. After making preliminary inquiries with Treasury, the committee understands that consultation in relation to the instrument was undertaken, consistent with the usual practices for remaking sunseting instruments.

In light of this advice, the committee requests that the explanatory statement to the instrument be revised to describe the nature of the consultation undertaken, in accordance with the requirements of the Legislation Act.

Merits review

Senate standing order 23(3)(c) requires the committee to ensure that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

The instrument appears to permit the Commissioner of Taxation to make certain discretionary decisions, which may affect certain financial rights and interests. For example,

subsections 15(7) to 15(10) of the instrument provide that the Commissioner may reduce the minimum annual distribution rate for a fund, subject to certain conditions. Neither the instrument nor its explanatory statement indicates whether the discretionary decisions of the Commissioner are subject to independent merits review.

After making preliminary inquiries with Treasury, the committee understands that the *Taxation Administration Act 1953* only provides for the independent merits review of certain decisions made under a taxation Act or regulations, but not other legislative instruments, including this instrument.

Where independent merits review of decisions made under a legislative instrument is not available, the committee generally expects the explanatory statement to expressly identify established grounds for excluding merits review, by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.

The committee therefore requests your advice as to what characteristics of the Commissioner's decisions under the instrument justify the exclusion of independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

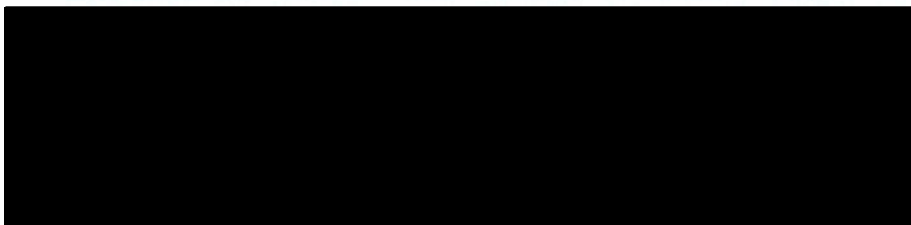
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **28 November 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair

Senate Standing Committee on Regulations and Ordinances



SENATOR THE HON ZED SESELJA
Assistant Minister for Finance, Charities and Electoral Matters

REF: MS19-002970

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Concetta
Dear Senator Fierravanti-Wells,

Senate Regulations and Ordinances Committee – Private Ancillary Fund Guidelines 2019

I am writing to in response to your letter dated 14 November 2019 on behalf of the Senate Regulations and Ordinances Committee (the Committee) which requested advice relating to the *Taxation Administration (Private Ancillary Fund) Guidelines 2019* (the Guidelines).

The Committee has requested:

- the Explanatory Statement to the Guidelines be revised to describe the nature of the consultation undertaken in accordance with the requirements of the *Legislation Act 2003*; and
- advice as to what characteristics of the Commissioner's decisions under the Guidelines justify the exclusion of independent merits review.

Consultation

The Committee's concerns about the lack of a detailed description regarding consultation in the Explanatory Statement to the Guidelines are noted. The Explanatory Statement to the Guidelines will be revised to include a detailed description of the consultation that was undertaken as per the Committee's request.

Consultation was undertaken consistent with the standard practice for remaking sunseting instruments. An exposure draft of the draft Guidelines was released for four weeks public consultation, from 25 July 2019 to 21 August 2019. Six submissions addressing the draft Guidelines were received. Direct consultation with the Australian Taxation Office also had taken place at the same time.

In response to these submissions, minor drafting changes were made to clarify the operation of provisions in the Guidelines. Overall, the consultation confirmed that the *Taxation Administration (Private Ancillary Guidelines) 2009* were largely operating effectively and efficiently, and that the Guidelines would effectively remake the 2009 guidelines as intended.

Merits review

Part IVC of the *Taxation Administration Act 1953* outlines the process whereby applications can be made to the Administrative Appeals Tribunal for review of decisions by the Commissioner in relation to certain taxation decisions. However, Part IVC of the *Taxation Administration Act 1953*

only applies to decisions made under a taxation law (an Act) or regulations made under such an Act.

As the Guidelines are a subordinate instrument, other than regulations, decisions made under the Guidelines do not fall within the scope of Part IVC of the *Taxation Administration Act 1953*. As such, any decisions made by the Commissioner under the Guidelines cannot be subject to merits review by the Administrative Appeals Tribunal. The sunsetted guidelines were similarly not within the scope of the Part IVC merits review regime as merits review system established by Parliament for the review of taxation decisions does not extend to decision of the Commissioner under legislative instruments (other than regulations).

This limitation for merits review as outlined in the primary legislation applies to all subordinate instruments made under a tax Act (other than regulations). For merits review to be extended to the Commissioner's decisions under the Guidelines, a change to the primary law would be required.

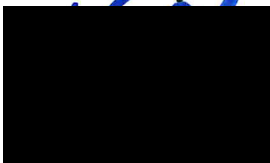
However, both an internal review mechanism, as well as judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, remains available to private ancillary funds concerned with a decision of the Commissioner under the Guidelines.

Over the period in which the sunsetted guidelines were in effect, neither the Treasury, nor any of its Ministers, have received representations seeking merits review being extended to the Commissioner's administrative decisions being made under the Guidelines. Further, the Commissioner is only provided with very limited decision-making authority under the Guidelines which, for the most part, is limited to extending relief from certain general obligations imposed by the Guidelines for individual tax years in only the most exceptional circumstances, having regard not only to the circumstances of the fund seeking relief, but also the financial needs of the charitable sector more generally.

If you have any queries about this response, the Committee's Secretariat may contact Simon Li from the Treasury on (02) 6263 2997 or Simon.Li@treasury.gov.au.

I trust this information will be of assistance to you.

Yours sincerely



Senator the Hon Zed Seselja
Assistant Minister for Finance, Charities and Electoral Matters

03 DEC 2019

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.

Part IVC of the *Taxation Administration Act 1953* outlines the process whereby applications can be made to the Administrative Appeals Tribunal for review of

decisions by the Commissioner in relation to certain taxation decisions. Part IVC only applies to decisions made under a taxation Act or regulations. As the 2019 Guidelines are a subordinate instrument, other than regulations, this instrument does not fall within the scope of Part IVC. As such, any decisions made by the Commissioner under the 2019 Guidelines cannot be subject to merits review by the Administrative Appeals Tribunal. The 2009 Guidelines was similarly not within the scope of Part IVC merits review regime.

Both an internal review mechanism, as well as judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, remains available to private ancillary funds concerned with a decision of the Commissioner under the Guidelines.

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

An exposure draft of the 2019 Guidelines was released for public consultation, from 25 July 2019 to 21 August 2019. Six submissions addressing the draft Guidelines were received. Direct consultation with the Australian Taxation Office took place at the same time. In response to these submissions, minor drafting changes were made to clarify the operation of provisions in the Guidelines. Overall, the consultation confirmed that the sun-setting instrument was largely operating effectively and efficiently, and that the 2019 Guidelines would effectively remake the 2009 Guidelines as intended.

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 |
|-----------------|----------------------|
| 1 | 1 |
| 2 | 2 |
| 3 | <i>No equivalent</i> |
| 4 | <i>No equivalent</i> |
| 5 | 3 |
| 6 | 4 |
| 7 | 7 |
| 8 | 8 |
| 9 | 9 and 10 |
| 10 | 11 |
| 11 | 12 |
| 12 | 13 to 16 |
| 13 | 17 |
| 14 | 18 |
| 15 | 19 |
| 16 | 20 to 23 |
| 17 | 24 and 25 |

| 2019 Guidelines | 2009 Guidelines |
|-----------------|----------------------|
| 18 | 26 and 27 |
| 19 | 28 and 29 |
| 20 | 30 to 32 |
| 21 | 33 to 40 |
| 22 | 41 and 42 |
| 23 | 43 |
| 24 | 44 to 47 |
| 25 | 48 and 49 |
| 26 | 50 |
| 27 | 51 |
| 28 | 51A |
| 29 | 59 and 60 |
| 30 | <i>No equivalent</i> |
| Schedule 1 | <i>No equivalent</i> |
| <i>omitted</i> | 5 |
| <i>omitted</i> | 6 |

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.



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Senate Standing Committee for the
Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600
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6 February 2020

Senator the Hon Zed Seselja
Assistant Minister for Finance, Charities and Electoral Matters
Parliament House
Canberra ACT 2600

Via email: Senator.Seselja@aph.gov.au

CC: Dlo-amf@finance.gov.au; CommitteeScrutiny@treasury.gov.au

Dear Assistant Minister,

**Taxation Administration (Private Ancillary Fund) Guidelines 2019
[F2019L01227]**

Thank you for your letter of 3 December 2019 in response to the committee's scrutiny concerns regarding the above instrument. The committee considered your response at its private meeting on 5 February 2020.

Consultation

The committee welcomes your undertaking to revise the explanatory statement to include a detailed description of the consultation undertaken, in accordance with the committee's request. This undertaking has been recorded in *Delegated Legislation Monitor 1 of 2020*.

Merits review

The committee notes your advice that the enabling Act does not currently provide for the independent merits review of decisions made under the instrument, and the provision of such review would require amendments to the *Taxation Administration Act 1953* (enabling Act). In this regard, the committee acknowledges that the enabling Act does not expressly provide for the independent merits review of decisions made under instruments other than regulations. However, in the absence of any express statutory prohibition on the provision of independent merits review, it remains unclear why the instrument itself cannot be amended to make such review available. Moreover, the committee has long considered that the failure of an enabling Act to provide for independent merits review is not, of itself, a sufficient justification for failing to provide for independent merits review of discretionary decisions.

The committee also notes your advice that internal review and judicial review remain available for decisions made under the instrument, and Treasury has not received any representations seeking the extension of merits review to decisions made under the instrument. In this regard, the committee reiterates that it does not consider internal review or judicial review to be appropriate substitutes for independent merits review.

Accordingly, the committee requests your further advice as to:

- **why the provision of independent merits review of decisions made under the instrument would require amendments to the enabling Act, rather than the instrument itself; and**
- **the characteristics of the decisions, if any, that would justify their exclusion from independent merits review, by reference to the Administrative Review Council's guide, *What decisions should be subject to merits review?*.**

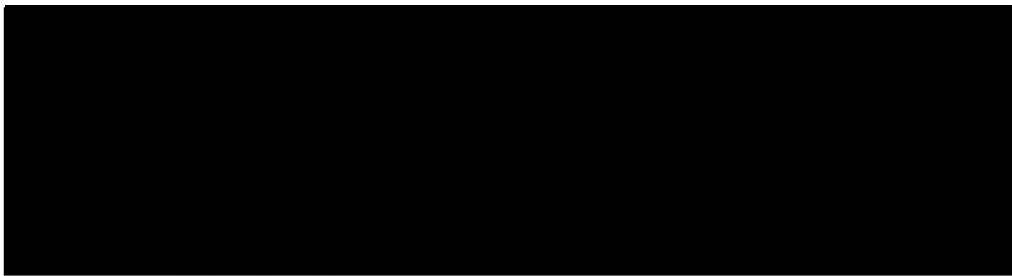
Noting that notice has been given to disallow the instrument, the committee would appreciate your response by **Thursday, 20 February 2020**, to facilitate the timely resolution of this matter before the revised disallowance period expires.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



SENATOR THE HON ZED SESELJA
Assistant Minister for Finance, Charities and Electoral Matters

REF: MS20-000313

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

Taxation Administration (Private Ancillary Fund) Guidelines 2019

I am writing in response to your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), dated 6 February 2020, concerning the *Taxation Administration (Private Ancillary Fund) Guidelines 2019* (the Guidelines).

The purpose of the Guidelines is to remake the *Private Ancillary Fund Guidelines 2009*, which ceased on 21 September 2019 as part of the sunseting regime.

The purpose of the sunseting regime is to ensure that all legislation on the Parliament's statute book remains relevant and fit-for-purpose over time. This requires thorough analysis of each sunseting instrument. Consultation with stakeholders is a vital element of this process. Where the existing instrument is considered to be working effectively, the sunseting instrument is remade without the need for substantive policy changes. Alternatively, if the legislation is no longer considered relevant or fit-for-purpose, the sunseting instrument is removed from the statute book.

The *Taxation Administration Act 1953* outlines the policy and legislative framework for the broader tax system. This longstanding framework provides that certain decisions made by the Commissioner under a taxation law (an Act) or regulations made under such an Act may be subject to merits review, but does not extend this to decisions made under other legislative instruments. This longstanding policy applies to all Acts, regulations and other legislative instruments within the broader tax framework. It applied to the sunseting instrument, and continues to apply to the remade instrument.

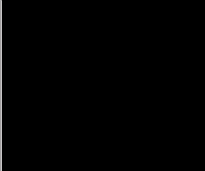
The standard sunseting process was followed in remaking the Guidelines. Overall, consultation with key stakeholders confirmed that the sunseting instrument was largely operating effectively and efficiently, and that the 2019 Guidelines would effectively remake the 2009 Guidelines as intended. No stakeholders raised any concerns in relation to merits review. Accordingly, the existing policy will continue to apply to the remade instrument.

The Guidelines is a vital legislative instrument which sets minimum standards for the governance and conduct of private ancillary funds and their trustees. Private ancillary funds are 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.

I note that the Guidelines instrument is subject to a disallowance motion. I trust that the Committee can resolve this matter before the disallowance period expires, so that the Guidelines can continue to provide the necessary legislative protection to ensure that private ancillary funds remain properly accountable and act in the manner expected of an entity holding philanthropic funds for a broad public benefit.

I trust this information will be of assistance to you.

Yours sincerely



Senator the Hon Zed Seselja
Assistant Minister for Finance, Charities and Electoral Matters

19 / 1 / 2020



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**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

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27 February 2020

Senator the Hon Zed Seselja
Assistant Minister for Finance, Charities and Electoral Matters
Parliament House
CANBERRA ACT 2600

Via email: Senator.Seselja@aph.gov.au

CC: DLO-amf@finance.gov.au; CommitteeScrutiny@treasury.gov.au


Dear Assistant Minister,

Taxation Administration (Private Ancillary Fund) Guidelines 2019 [F2019L01227]

Thank you for your response of 19 February 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) in relation to the above instrument.

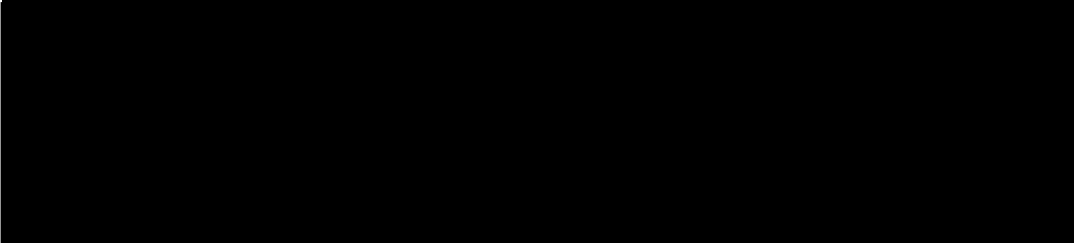
The committee considered your response at its private meeting on 26 February 2020. The committee is concerned that the response did not address the specific questions which the committee asked in its correspondence of 6 February 2020.

Accordingly, the committee has resolved not to withdraw the notice of motion to disallow the instrument previously placed by the committee. The committee has also resolved to seek a meeting with senior officials of your department, to provide committee members with an opportunity to be briefed on the relevant issues and ask questions relating to its scrutiny concerns. In this regard, I request that the relevant officials please liaise with the committee secretariat to arrange a mutually convenient time to meet in the week beginning **Monday 2 March 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website. If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



SENATOR THE HON ZED SESELJA
Assistant Minister for Finance, Charities and Electoral Matters

REF: MS20-000483

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

Taxation Administration (Private Ancillary Fund) Guidelines 2019

I am writing in relation to correspondence from the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) relating to the Taxation Administration (Private Ancillary Fund) Guidelines 2019 (the Guidelines).

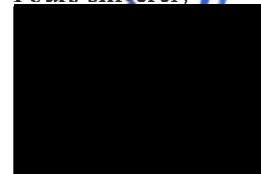
As advised to the Committee, merits review within the framework set out in Part IVC of the *Taxation Administration Act 1953* can only be applied to decisions made under a taxation law (an Act) or regulations made under such an Act. Therefore, merits review does not currently extend to other subordinate instruments made under a tax Act, such as the Guidelines.

Following representations made by the Committee, I have asked my Department to progress the development of an amendment to primary legislation that would enable merits review within the framework provided for in the *Taxation Administration Act 1953* to be provided to administrative decisions of the Commissioner of Taxation made under the Guidelines.

I have asked for the amendments to be progressed as soon as is practicable within the context of the Treasury's Minor and Technical Amendments process.

I trust this information will be of assistance to the Committee.

Yours sincerely



Senator the Hon Zed Seselja
Assistant Minister for Finance, Charities and Electoral Matters

17 / 3 / 2020



3 April 2020

Senator the Hon Zed Seselja
Assistant Minister for Finance, Charities and Electoral Matters
Parliament House
CANBERRA ACT 2600

Via email: senator.seselja@aph.gov.au

CC: dlo-amf@finance.gov.au

Dear Assistant Minister,

Taxation Administration (Private Ancillary Fund) Guidelines 2019 [F2019L01227]

Thank you for your response of 17 March 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 1 April 2020.

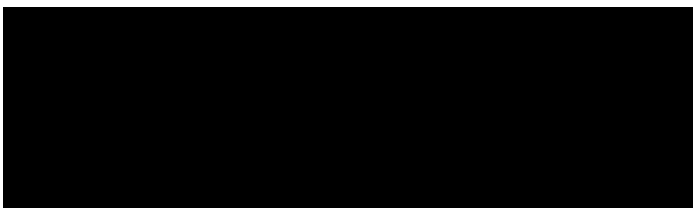
The committee welcomes your undertaking to progress amendments to primary legislation that would enable merits review of decisions made under the instrument, within the framework provided for in the *Taxation Administration Act 1953*.

On the basis of this advice, the committee has concluded its examination of the instrument.

In the interests of transparency, I note that your undertaking will be recorded in the *Delegated Legislation Monitor*, and that this correspondence will be published on the committee's website. The committee would appreciate receiving your further advice once this undertaking has been implemented.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation