SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION, FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS19-003144

18 DEC 2019

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

Dear Senator Fierravanti-Wells

I am writing in response to your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), dated 5 December 2019, which requested advice relating to the *ASIC Corporations (Whistleblower Policies) Instrument 2019/1146 [F2019L01457]* (the Instrument). The Committee has sought advice as to why it is considered necessary and appropriate to use delegated legislation to make exemptions from the requirements of subsection 1317AI(1) for an indefinite period of time, instead of amending the *Corporations Act 2001* (Corporations Act).

Background on the Instrument

The Instrument provides relief to public companies, limited by guarantee that are not-for-profits or charities with annual (consolidated) revenue of less than $1 million, from the requirement to have a whistleblower policy under subsection 1317AI(1) of the Corporations Act.

Under section 1317AI of the Corporations Act, all public companies, large proprietary companies, and proprietary companies that are trustees of registrable superannuation entities must have a whistleblower policy and make the policy available to their employees and officers. The provision was inserted into the Corporations Act by *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*, which contained the Government's reforms to strengthen the corporate sector whistleblower protection regime.

The corporate sector whistleblower protection regime applies to all companies, but the express requirement to have a whistleblower policy applies only to public companies, large proprietary companies, and proprietary companies (regardless of size) that are trustees of registrable superannuation entities.

In relation to proprietary (private) companies, the Parliament has legislated an express size and function test for when the company must have a whistleblower policy. That is, only large proprietary companies or proprietary companies that act as trustees of registrable superannuation entities must have a whistleblower policy.

However, the Parliament has not legislated a size or function test for when a public company must have a whistleblower policy, and instead, imposed the obligation on all public companies, together with legislating a power for ASIC to grant relief from the requirement.

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The use of delegated legislation

The relief was framed following public consultation (please see additional information) and consideration of the existing regulatory framework for public companies and not-for-profit and charitable public companies limited by guarantee in particular.

The Instrument uses the power given by the Parliament to ASIC and allows ASIC to modify the operation of the Corporations Act to provide a tailored and flexible regulatory environment that is fit for purpose for public company structures. The relief responds to the current circumstances where the class of small public companies limited by guarantee may experience a disproportionate regulatory burden by facing a requirement to have a whistleblower policy.

Including this relief in the text of the statute would result in additional cost and unnecessary complexity for other users of the Corporations Act, and lack the flexibility to respond to potential changes to policy settings from future reviews to the regulatory framework for these entities.

The Instrument is subject to sunsetting in 10 years, and the need for the relief can also be reconsidered at that time.

Additional Information - Reasons for the relief

The pairing of the whistleblower policy requirement with the relief power allows ASIC to respond to circumstances where a class of public companies facing a requirement to have a whistleblower policy may experience a disproportionate regulatory burden.

Without the relief, the whistleblower policy requirement applies equally to for-profit businesses structured as public companies limited by shares (such as ASX-listed companies) and not-for-profit organisations or charities structured as public companies limited by guarantee. As described in the Explanatory Statement to the Instrument, in Consultation Paper 321 Whistleblower policies (CP 321), ASIC consulted on the exercise of the power to relieve the class of public companies that are limited by guarantee and operate on a not-for-profit basis, and what an appropriate relief threshold would be.

ASIC received 21 submissions on this issue, and 18 of those submissions supported the idea of providing relief to this class of public companies. Respondents noted that, particularly when compared with for-profit public companies limited by shares, many not-for-profits and charities have few or no paid staff (or are run by volunteers). Many have limited financial resources and, as they do not have dedicated compliance or human resources functions, would incur higher costs to obtain professional advice or training to implement a whistleblower policy. This contrasts significantly with the circumstances of for-profit public companies limited by shares.

The key reasons contained in submissions in support of the proposed relief included:

- the whistleblower policy requirement would impose a compliance burden that outweighs its benefits;
- the requirement for all public companies that are not-for-profits or charities to have a whistleblower policy appears unfair when viewed in relation to the exemption for small proprietary companies; and
- the summary of the Regulation Impact Statement annexed to the Revised Explanatory Memorandum for the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018 had indicated there was no expected compliance costs for individuals or community organisations.

Following consideration of the regulatory framework for public companies and analysis of submissions to CP 321, ASIC determined to provide relief to public companies limited by guarantee that are not-for-profits or charities with annual consolidated revenue of less than $1 million.

This threshold aligns with the full financial reporting and auditing requirements that apply to companies limited by guarantee under the Corporations Act, and the definition of 'large' not for-profits and charities registered with the Australian Charities and Not-for-profits Commission (ACNC).

In addition, submissions did not support limiting the relief to a particular time period. In this context, ASIC was aware that section 1317AK of the Corporations Act requires the Minister to initiate a review of the operation of the corporate sector whistleblower protection regime, including the whistleblower policy requirements. The review must be conducted as soon as practicable after the end of 5 years after 1 July 2019, and the report tabled in Parliament. In addition, the final report of the Government's review of the Australian Charities and Not-for-profits Commission legislation was tabled on 22 August 2018. The report recommends increases to the financial reporting thresholds for entities registered with the ACNC, which would likely have an impact on the thresholds adopted by the relief.

I trust this information will be of assistance to you.

Yours sincerely

[redacted]

Senator the Hon Jane Hume

SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION,
FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS19-002912

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

Dear Senator Fierravanti-Wells,

I am writing in response to your two your letters on behalf of the Senate Regulations and Ordinances Committee, now the Senate Committee for the Scrutiny of Delegated Legislation, (the Committee) both dated 14 November 2019 which requested advice relating to *Financial Sector (Collection of Data) (Reporting Standard) Determinations Nos. 10 to 21* and *30 of 2019* (the Instruments).

The Committee has sought advice as to why the Australian Prudential Regulation Authority's (APRA) decisions under the Instruments are not considered to fall within the definition of 'reviewable decision' in section 31 of the *Financial Sector (Collection of Data) Act 2001* (FSCODA).

Also, in relation to the *Financial Sector (Collection of Data) (Reporting Standard) Determinations Nos. 10 to 21 of 2019* the Committee has sought advice as to:

- why the amended explanatory statements omitting information about merits review were tabled in Parliament after the disallowance period had expired, rather than before; and

- why the committee was not alerted to APRA's changed position and its intention to amend the explanatory statements to omit information relevant to merits review, noting the previous advice to the committee regarding equivalent instruments that merits review was available.

APRA's position on merits review

APRA's long-held position is that decisions made by APRA exercising discretions under its prudential and reporting standards are not subject to merits review. The standards are subject to extensive public consultation, through which APRA takes into account the impact on regulated institutions. Most of the discretions within the standards serve to allow APRA an efficient means to provide concessions or exemptions to the general rules. Often these are discretions of a relatively minor or operational nature. Moreover, Parliament granted APRA the authority to give itself such discretion within its standards, and it is difficult to envisage a circumstance in which an entity could be worse off by the exercise of the discretion than if APRA had not granted itself the discretion in the first place. As a result, in APRA's view it is not necessary or appropriate for exercise of these discretions to be subject to individual merits review.

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Merits review is of course applicable where it is provided for in legislation. For example, whilst decisions under APRA's prudential standards are not subject to merits review, the enabling legislation, such as the *Banking Act 1959*, expressly provides that APRA's decision to issue a direction, including a direction to comply with the prudential standards, is a reviewable decision.

FSCODA does not expressly provide for merits review in relation to discretions exercisable by APRA under the reporting standards, other than in relation to a reporting standard made for an individual entity.

As a policy matter in this particular case, APRA considers decisions under the Instruments should be excluded from merits review. APRA's reporting standards collect financial data from regulated entities. APRA is mindful of the impacts of data collection on industry resources and undertakes a process of formal consultation on all changes to reporting standards. Major changes to data collections such as a new data collection and significant revisions to existing collections are subject to informal industry engagement, formal consultation and long lead times from initial consultations to implementation.

Material portions of the data collected are used to compile key macroeconomic indicators for Australia. The Reserve Bank of Australia uses the data to compile and publish its monetary and credit aggregates. The Australian Bureau of Statistics uses the data to compile the National Accounts. The data is also used to meet Australia's international reporting obligations. Delays caused by an entity seeking merits review could compromise these publications. As the publications are at an aggregate level, a significant lack of data from one entity caused by a merits review claim could prevent the release of the entire publication.

Why the Instruments do not fall within the definition of 'reviewable decision'

APRA may determine reporting standards to apply to classes of financial entities (such as the Instruments), but may also determine a reporting standard for a particular financial sector entity.

Section 31 of the FSCODA provides that a decision to *"vary a reporting standard determined under section 13 for a particular financial sector entity"* is a reviewable decision (paragraph (e) of the definition of "reviewable decision").

APRA considers that, when considered in context, paragraph (e) must refer to APRA's decision to formally change a standard that was determined for a particular entity, rather than referring to the exercise of a discretion, for a particular entity, within a class standard. APRA has advice of senior counsel supporting this view.

Timing of replacement explanatory statement and APRA's changed position

When APRA received queries from the Committee regarding the availability of merits review in relation to the exercise of discretions under reporting standards, it sought internal, and later, external legal advice. As a result, APRA initially incorrectly indicated the availability of merits review in the material that was tabled in Parliament.

At the time the replacement explanatory statements were prepared and lodged, external advice from senior counsel had confirmed APRA's long-held position, and therefore references to merits review were removed in the replacement explanatory statements. Unfortunately, by the time APRA had prepared the replacement explanatory statement, taking into account senior counsel's advice, the disallowance period had expired. APRA had not taken the disallowance period into account and the correspondence from the Committee had not mentioned the disallowance period or timeframe for lodgement of the replacement explanatory statement.

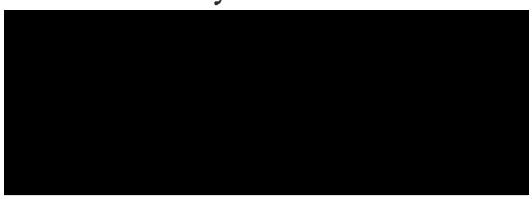
In my advice provided to the Committee in my letter of 16 July 2019, I relied upon this incorrect advice from APRA. I apologise for this error and have communicated my disappointment to APRA.

APRA has committed to provide additional information in explanatory statements for future reporting standards to clarify that decisions in relation to the reporting standards are not subject to merits review. Further, APRA outlined that it would lodge replacement explanatory statements to the *Financial Sector (Collection of Data) (Reporting Standard) Determinations Nos. 22 to 27 of 2019* stating the correct position.

APRA acknowledges that its previous response regarding the application of merits review for reporting standards has caused unfortunate confusion and will review its processes for tabling legislative instruments, ensure that relevant staff fully understand the parliamentary scrutiny process and in particular the importance placed on explanatory statements and the need to lodge any replacement explanatory statement before the disallowance period expires.

I trust this information will be of assistance to you.

Yours sincerely



Senator the Hon Jane Hume

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

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 Committees request.

Consultation was undertaken consistent with the standard practice for remaking sunsetting 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

[redacted]

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 'sunsets'. 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 sunsetting 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.

ATTACHMENT A

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	*No equivalent*
4	*No equivalent*
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	*No equivalent*
Schedule 1	*No equivalent*
omitted	5
omitted	6

Table B.2: 2009 Guidelines to 2019 Guidelines

2009 Guidelines	2019 Guidelines
1	1
2	2
3	5
4	6
5	*omitted*
6	*omitted*
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
No equivalent	30
No equivalent	Schedule 1
No equivalent	3
No equivalent	4

ATTACHMENT C

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.

Australian Government | eSafetyCommissioner

17 December 2019

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

Via email: regords.sen@aph.gov.au

Cc: zoe.hawkins@communications.gov.au; dlo@communications.gov.au

Dear Senator Fierravanti-Wells

Telecommunications (Protecting Australians from Terrorist or Violent Criminal Material) Direction (No. 1) 2019 [F2019L01159]

Thank you for the opportunity to provide a private briefing to the Committee on 27 November 2019, and for your letter dated 5 December 2019.

I have considered the feedback from the Committee and advise that the explanatory statement will be amended to indicate that a copy of the *List of websites hosting terrorist or violent criminal material (No. 1)* will be made available free of charge on request to the eSafety Commissioner. A replacement explanatory statement will be lodged in January 2020 to give effect to this change.

If you have any questions, please contact:

- Toby Dagg, Acting Executive Manager, at toby.dagg@esafety.gov.au or on (02) 9334 7951;
- Sheona Colombage, Acting Manager, Cyber Report, at shoena.colombage@esafety.gov.au or on (02) 9334 7767; or
- Nicole Chew, Manager, Legal Affairs and Public Policy, at nicole.chew@esafety.gov.au or on (02) 9334 7884.

Yours sincerely,

[redacted]

Julie Inman Grant
eSafety Commissioner