Law Council
OF AUSTRALIA

Legal Practice Section

17 November 2026

Hon Dr Andrew Leigh MP
Assistant Minister for Productivity, Competition, Charities and Treasury
House of Representatives
Canberra ACT 2600

Pete Robjent
Director, Not-for-Profits
Treasury
1 Langton Crescent
Parkes ACT 2600

By email: andrew.leigh.mp@aph.gov.au
CC: peter.robjent@treasury.gov.au

Dear Assistant Minister Leigh

Public Giving Funds—Distributions to a deductible gift recipient (DGR) that is, or is operated by, a related entity

1. This submission has been prepared by the Charities and Not-for-profits Committee of the Law Council of Australia's Legal Practice Section (**Committee**).

2. The Committee draws your attention to the *Taxation Administration (Public Ancillary Fund) Guidelines 2022* (Cth) (**Guidelines**) and understands that amendments are currently being drafted to these Guidelines to:

   (a) update the name to public giving funds (**PuGFs**) to implement changes as a result of Schedule 7 to the *Treasury Laws Amendment (Strengthening Accountability for Tax Adviser Misconduct and Other Measures) Act 2026* (Cth); and

   (b) increase the minimum annual distribution required during each financial year under clause 15 to 6 per cent consistent with your media release on 26 February 2026.

3. The Committee requests that you consider a further amendment to clause 22(3) of the Guidelines to properly reflect the intent of this Guideline, which is to prevent private benefits being provided through a PuGF.

4. Clause 22(3) provides that a PuGF must not provide any benefit (except as set out in clause 23), directly or indirectly, to:

   (a) the trustee; or

   (b) a member, director, employee, agent or officer of the trustee; or

   (c) a donor to the fund; or

   (d) a founder of the fund; or

   (e) a relative of an individual covered by paragraph (c) or (d); or

   (f) an associate of any of those entities (other than a deductible gift recipient).

5. As you are aware PuGFs must only have a purpose of providing benefits to a fund, authority or institution gifts to which are deductible under item 1 of the table in section 30-15 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 97**) (**eligible entity**)

6. In this letter we refer to the parties listed in paragraphs (a)–(f) of Guideline 22(3) as "**related entities**".

7. The request for this amendment has arisen as a matter of urgency as a result of the recent release by the ATO of Taxation Determination TD 2026/3—*Income tax: when does a private or public ancillary fund "provide" a "benefit"?* (TD 2026/3) in which the ATO emphasises that Guideline 22(3) is to be read and applied as not allowing any distributions from the PuGF that may benefit any of the related parties, even if they are an eligible entity or the benefit is not for the purpose of providing a private benefit. We note this is contrary to the current wording in clause 5.2 of the ATO's model deed for PuGFs, which had been generally understood as setting out the ATO's previous interpretation of Guideline 22(3).

8. Clause 5.2 of the ATO's model deed carves out distributions by the PuGF under its purpose clause 4.1, which allows benefits to be made to the related parties where the purpose is to benefit eligible entities.

> *Apart from a payment or application in accordance with clauses 4.1, 5.1, 9 or 14, or a payment or application allowed by the Commissioner, no part of the Trust Fund may be paid or applied, directly or indirectly, to or for:*
>
> *(a) a Trustee;*
>
> *(b) a member, director, employee, agent or Officer of a Trustee;*
>
> *(c) a Donor;*
>
> *(d) a Founder; or*
>
> *(e) an Associate of any of these entities*

9. Guideline 22(3) must be amended to reflect both charity law principles and the policy intent prohibiting a purpose of providing private benefits

Recommended version of Guideline 22(3)

10. We note Guideline 22(3) should be redrafted to more accurately include the Guidelines covered by clauses 5.1 and 9 referred to in the model deed (Guidelines 22(1) and 14, respectively), and address the issue of private benefits, so as to read:

> *The trustee of a public giving fund must ensure the fund does not pay or apply the fund, directly or indirectly, to or for:*
>
> *(a) the trustee;*
>
> *(b) a member, director, employee, agent or Officer of the trustee;*
>
> *(c) a donor to the fund;*
>
> *(d) a founder of the fund; or*
>
> *(e) an associate of any of these entities,*
>
> *unless the payment or application is:*
>
> *(f) made in accordance with the purposes of the fund, section 23, or as a permitted indemnity, and is not prohibited under sections 14 or 22(1); or*
>
> *(g) allowed by the Commissioner.*

The practical use of PuGFs

11. Giving funds "act as an intermediary between donors and other entities with DGR status that undertake charitable work" (Productivity Commission, *Future foundations for giving inquiry report* (**PC Report**) at [8.1]).

12. Significant amendments were made to the structure of PuGFs in 2011. It was noted in the explanatory memorandum to the bill that brought in those changes, the *Tax Laws Amendment (2011 Measures No. 7) Bill 2011* (**EM**), that PuGFs are "commonly used for community and fundraising appeals" (at [8.4]) and must be used exclusively for the sole purpose of providing money, property or benefits to DGRs or the establishment of DGRs (at [8.9]). They operate like "a conduit or temporary repository for channelling gifts to other DGRs" (at [8.9])

13. In a significant number of circumstances particularly those established by hospitals, educational institutions, religious bodies, museums, art galleries and many welfare bodies and other eligible entities:

    (a) the trustee of the PuGF is an eligible entity or operates one or more eligible entities;

    (b) the sole member of the trustee is an eligible entity or operates one or more eligible entities; or

    (c) the donors to the PuGF include employees of an eligible entity or those receiving services from the eligible entity (hospitals are strong examples of this).

14. In all these circumstances, in spite of the terms of the trust deed and the donor's wishes, TD 2026/3 makes it clear that the PuGF can no longer make distributions to the eligible entity as either providing a direct benefit to the trustee or a member of the trustee or an indirect benefit in the case of paragraph (c). Whereas the issue under

charity law is whether the trustee has an impermissible ***purpose*** of providing private benefit or a permissible purpose of providing a public benefit where any private benefit is necessary or incidental to the provision of the public benefit.

15. There is no private benefit where the distribution from a PuGF is made to an eligible entity and so this should clearly be exempted from Guideline 22(3).

Donors to PuGFs

16. The public nature of PuGFs, including the requirement that the public is invited to donate to the fund, means that often the donors to the fund are people who also have some involvement in the causes that the fund supports. The groups of those donating to the PuGF and those ultimately or indirectly benefitting from distributions made by the PuGF are not necessarily mutually exclusive. The issue should be whether the purpose of the distribution to an eligible entity is for the public benefit or for the private benefit of the donor to the PuGF.

17. On a strict reading of TD 2026/3, an indirect benefit may be provided to a donor to a PuGF, or a relative of a donor, in breach of clause 22(3)(e) in circumstances where the donor, or the relative of the donor, receives services from an eligible entity that has received a distribution from the PuGF. In this regard, we note that the term "relative" is defined broadly in section 995-1 of the ITAA 97 and does not just include immediate family, but also grandparents, aunts and uncles, nieces and nephews, and all lineal descendants.

18. It is not clear how a PuGF would even know whether the donor or a relative of the donor was receiving services from the eligible entity the PuGF is making distributions to. This result is unreasonable and is contrary to both charity law and the policy intention of preventing a PuGF from having a purpose of providing private benefits.

Grandfathered PuGFs

19. We are aware of PuGFs established prior to the release of the Guidelines that are operated as endowment funds with the trust purpose of supporting a specific DGR entity, where the initial capital for the endowment was provided by the DGR. Notwithstanding that the PuGF has continued to receive gifts from many other parties since its establishment, clause 22(3)(c) technically prohibits it from making distributions to the specific DGR for the life of the giving fund. This results in a situation where the trust is frustrated because the trustees cannot administer the trust property within the terms of the trust deed while still complying with the Guidelines.

Negligible risk of abuse

20. Distributions from a PuGF to an eligible entity operated by related entities should be characterised as a distribution to an eligible entity in furtherance of the fund's purposes and it is not consistent with charity law principles or the policy intent to have a blanket prohibition on these distributions under clause 22(3) as there is no private benefit arising from this arrangement.

21. PuGFs are required to report to either the ATO or the ACNC on an annual basis. ACNC reporting is publicly available on the ACNC Charity Register. The DGRs receiving distributions from PuGFs are also required to report to the ACNC—the

funds are, and remain, public monies set aside for specific DGR purposes as they move from the PuGF to the DGR. There is no reason to assume that, merely because of their relatedness to the PuGF, some DGRs are less trustworthy than others to properly administer the DGR assets for DGR purposes.

22. PuGFs are required to comply with the public fund requirements set out in Taxation Ruling TR 95/27—*Income Tax: public funds*, which the EM notes ensure "a reasonable standard of governance as these rules are intended to ensure that moneys and property donated to the fund are applied for the purpose for which the fund was established" (EM at [8.6]). Those requirements, coupled which the requirements to have public participation in the PuGF, are said to be a measure to ensure integrity in the tax concessional and DGR system (EM at [8.7])

23. As far back as 2016, the ATO indicated that it considered arrangements like those discussed in this letter to be commonplace, and that the higher reporting requirements for PuGFs (when compared to other DGR categories) ensure this is a lower risk from a compliance perspective than donations being received directly into item 1 DGRs.

24. The same result as under these arrangements can be achieved by restructuring at the expense of the public funds intended for the eligible entity but this would prioritise the form of the transaction (i.e. prohibited distribution to the related entity) over the substance of the transaction (i.e. distribution to an eligible entity in furtherance of the trust purpose). This gives rise to bad regulation and unnecessary red tape.

25. Further, the model trust deed promulgated by the ATO[1] permits distributions to the related entities (where they are, or operate, an eligible entity) under clause 5.2. This clause provides that the prohibition on distributions to related parties applies only where such distribution would not be a proper application of the trust fund in accordance with clauses 4.1 and 5.1, that is, to an eligible entity and in furtherance of the trust purpose of providing a public benefit.

26. Allowing distributions to an eligible entity in furtherance of the fund's purposes (even where the recipient is a related party or a related party may indirectly benefit) is aligned with and does not disrupt the integrity of Australia's tax system.

27. We have also contacted Tom Wheeler, Assistant Commissioner, ATO Not-for-Profits to request that the ATO does not take any action for past breaches or current breaches of Guideline 22(3) until you have taken a position on whether this Guideline can be amended.

Examples

28. In Committee members are aware, in their practices, of a large number of organisations that are structured in this way. We have attached some examples of the structures commonly used.

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1 Public ancillary fund model trust deed | Australian Taxation Office

Conclusion

29. We are concerned that there is widespread inadvertent non-compliance with the stricter interpretation of this provision across the charity sector.

30. Restructuring their arrangements to meet the now stricter interpretation will be a costly endeavour, with negligible mitigation of risk or benefit to revenue.

31. Rather than requiring restructuring to enable strict compliance with the form of clause 22(3), we request that you consider amending clause 22(3) to allow a PuGF to make distributions to a related entity where the distribution is in furtherance of the trust purposes and for the purpose of providing a public benefit.

32. We consider this issue to be significant and one that is generating considerable concern and consternation in the charity sector. For this reason, we are bringing it to your attention directly. We have also reached out to the ATO.

33. The Committee would welcome the opportunity to discuss this submission with you. Please contact Alice Macdougall, Chair, [redacted] if you have any queries.

Yours sincerely



Greg McIntyre SC
Chair, Legal Practice Section