



Law Council
OF AUSTRALIA

Legal Practice Section

30 January 2026

Dexter Marcenko
Tax Counsel Network
Australian Taxation Office
GPO Box 9990
SYDNEY NSW 2001

By email: Dexter.Marcenko@ato.gov.au

Dear Mr Marcenko

TD 2025/D3—Income tax: when does a private or public ancillary fund ‘provide’ a ‘benefit’?

1. This submission has been prepared by the Charity and Not-for-profit Law Committee of the Law Council of Australia’s Legal Practice Section (the **Committee**). The Committee welcomes the opportunity to make a submission to the Australian Taxation Office (**ATO**) in relation to the draft TD 2025/D3¹.

General Comments

2. The Committee suggests the use of the word ‘benefit’, when used to refer to the provision of money, property or benefits under Guideline 15(4), needs further clarification to avoid the suggestion or any confusion that money and property can be provided without this being for the benefit of the DGR. Perhaps the term could be capitalised, and TD 2025/D3 could include a statement that any provision of money, property or Benefits must be for the benefit of the DGR in order to be included as a distribution.
3. The Committee recommends that the paragraphs relating to Guideline 22(3) are reviewed to reflect the interpretation of benefit being consistent with the general principles that ancillary funds are philanthropic in nature and for the public (not private) benefit.² The ATO has taken this approach in drafting the model deed for Ancillary Funds which allows, under clause 5.2, a benefit to be given to a DGR that is a Related entity as a distribution under clause 4.1.
4. This clarification is necessary as many DGRs have set up Ancillary Funds as fundraising foundations and the DGR may be the founder, the trustee, a donor, or one of the members of an Ancillary Fund, and therefore the DGR is a Related entity.

¹ We have adopted the same definitions as in TD 2025/D3 without repeating them in this submission.

² Paragraph 3 TD 2025/D3.

The public is giving to the Ancillary Fund in order for it to support the DGR. The purposes are often expressed as being for the benefit of the DGR. The interpretation of Guideline 22(3) in TD 2025/D3 would mean these Ancillary Funds can no longer make grants to the DGR.

5. In addition, under clause 5.2 of the model deed, a benefit may be provided to a Related entity under the uncommercial benefits provision or under the indemnity provision.
6. TD 2025/D3 must be consistent with the approach taken in the model deed.
7. Finally, there have been examples where an Ancillary Fund has the same investments as the founder or donor, which may indirectly benefit the Related entity. But, as the benefits are the same and arguably incidental, the ATO has confirmed this is not a breach of Guideline 22(3). This type of situation needs to be reflected in TD 2025/D3.

Specific Comments—Benefits under Guideline 15(4)

8. Paragraph 10 should be clarified by excluding a related entity from consideration of a Benefit under Guideline 15(4) e.g: *'anything that is for the good of a DGR (in the case of Guideline 15(4)), or related entity (in the case of Guideline 22(3)), and that puts them, or it, in a better or more favourable position'*.
9. Paragraph 17 states:

The advantage, profit, or gain, provided under subsection 15(4) must be objectively ascertainable and it must present an actual benefit to the DGR. Moreover, the benefit must be capable of having a market value.

However, an issue that arises regularly is how to determine the market value of the Benefit when an Ancillary Fund makes a loan to a DGR (as referred to in Example 4 under Guideline 15(4) extracted in paragraph 31 of TD 2025/D3). Example 4 requires:

The market value of the benefit to the DGR is determined as an amount equal to the discount to the interest rate which would be charged on a comparable loan sourced from a financial institution at arm's length.

In most instances the DGR would not be able to get a comparable loan from a financial institution at arm's length—generally due to the lack of security, flexible repayment terms or lack of regular reliable income sources, as examples. The Committee considers the tax determination should clarify how to determine the value of the Benefit where there is no comparable loan. Otherwise, paragraph 17 could be interpreted as suggesting that, where there is no comparable loan available from a financial institution at arm's length, the Benefit to the DGR is not capable of having a market value and therefore cannot be included as a distribution.

10. Paragraph 20 can be deleted as it incorrectly refers to the examples under Guideline 15(4) as indicating the distribution is:

... net of any corresponding money, property, or benefits received by the ancillary fund in relation to the distribution.

The reference to 'net' or 'gross' is incorrect in the context of all the examples or at a minimum confusing, and the intention of this paragraph is more completely and correctly covered in the first two bullet points of paragraph 32.

11. Paragraphs 22–27 together with the information on the ATO website relating to 'Grant funding provided by ancillary funds'³ lead to the conclusion that Ancillary Funds cannot make binding agreements to provide funding. These paragraphs merely raise a question as to the enforceability of multi-year funding agreements without explaining the characteristics of a binding agreement vs a non-binding promise.
12. Importantly, these paragraphs do not explain how to identify Benefits that can form part of an Ancillary Fund's distribution nor how to determine the market value of the Benefit if it is a binding agreement—see the Committee's recommendation in paragraph 15 below.
13. In particular, paragraphs 24 and 25 imply that it is a fettering of a future discretion for trustees to agree to fund a multi-year project and to decide to provide the funds in instalments rather than in one upfront payment, resulting in the agreement not being binding and there being no Benefit to the DGR. The Committee does not consider this to be a correct application of the law relating to the trustee's discretion, particularly in the context of the model trust deed, in circumstances where a trustee can decide to fund a set amount payable in instalments in the future.
14. In this context the Committee queries the consistency of these paragraphs with example 5 of Guideline 15(4) where a guarantee is provided by an Ancillary Fund— noting that a guarantee is a binding agreement to pay funds in the future if certain circumstances arise.
15. The Committee recommends this issue could be more clearly addressed by stating that, because the market value of any Benefit a DGR receives from entering into a multi-year funding agreement cannot be clearly identified, Ancillary Funds may only record the amount of payment made, as part of their distribution in the year the payment is made. There is no need to raise the question of whether the arrangements are binding or not as this will be highly dependent on the facts in each circumstance and the inclusion of the relevant paragraphs will simply create confusion.
16. As a letter of intention is clearly not binding in example 2 in paragraphs 28 and 29, there is no reason for the Ancillary Fund to record the intention as a debt payable in the balance sheet. If the point of this example is that, even if an Ancillary Fund records a debt payable in relation to a (binding or non-binding) future grant payment,

³ <https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/your-organisation/gst-for-not-for-profits/grants-and-sponsorships-for-not-for-profits#ato-Grantfundingprovidedbyancillaryfunds>

it cannot include the Benefit in its distribution amount until the amount is paid to the DGR, then this point needs to be more clearly made.

17. The Committee suggests that the references to 'net' and 'gross' Benefit in paragraph 32 be removed. They are confusing and not necessary as the concept is covered in the first and second bullet points in this paragraph.
18. It is not clear what is intended by the third bullet point in paragraph 32. It is suggested that some examples or further explanation of the types of conditions attaching to the Benefit, that would need to be accounted for in determining the market value, should be included. Without further explanation, it could be interpreted that the usual conditions, such as requiring reporting on the application and impact of the money, property of Benefit, including any financial reporting, need to be costed by the DGR and advised to the Ancillary Fund for the purpose of the Ancillary Fund calculating the market value of the Benefit for the purposes of determining the distributions. It also raises the question of whether this requirement also applies to grants of money to a DGR.

Specific Comments—benefits under Guideline 22(3)

19. In relation to paragraphs 36–52 relating to the benefits under Guideline 22(3) please also note the comments in paragraphs 3-7 above.
20. Paragraph 46 may not be a benefit as there are many examples in commercial dealings where the penalty is agreed not to be imposed, or a new deadline is negotiated. For example, the Trustee may decide not to enforce the penalty because it would cost more than \$10,000 to do so, taking into account court costs and litigation risks. It would be illogical if a Trustee, acting reasonably and in the best interests of the Ancillary Fund in these circumstances, was required to pay to the ATO a penalty of \$10,000.
21. The Committee suggests that Example 5 is reviewed. There seems little chance that Pascal will make enough profit from the construction to repay Adele \$300,000 and may have numerous creditors. There seems no requirement for Pascal to provide any of these funds to Adele.
22. Example 6 should be replaced as:
 - (a) Snowy DGR could not agree to such a condition. Snowy DGR would need to ensure it made an independent decision to engage a construction company based on the usual due diligence and assessment of relevant matters including fair and reasonable arm's length terms in the best interests of furthering Snowy DGR's purposes.
23. Even if this situation could occur, it is unclear whether the benefit to Burra Creek Constructions is the amount of the profit or some other amount based on the benefit being '*placing Burra Creek Constructions in a position to earn a profit*'.⁴ What if the Ancillary Fund required Snowy DGR to engage Burra Creek Constructions because Burra Creek was offering a lower than market rate for the construction? In either

⁴ Paragraph 51 TD 2025/D3.

situation, how would the Ancillary Fund know whether a profit is being generated from this construction project and what the value of that is?

The Committee suggests that an example be included which provides better clarification of the benefit and its value.

24. The Committee would welcome the opportunity to discuss this submission with the ATO and is happy to expand or provide further explanations in relation to any of the above comments. In the first instance, please contact the Committee Chair, Alice Macdougall [REDACTED]

Yours sincerely



Greg McIntyre SC
Chair, Legal Practice Section