MT 2005/D1 - The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number

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Draft Miscellaneous Taxation Ruling

The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number

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Preamble

This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVAAA of the ***Taxation Administration Act 1953****. It is only final Taxation Rulings that represent authoritative statements by the Australian Taxation Office.*

What this Ruling is about

1. This Ruling provides assistance to entities in determining their entitlement to an Australian Business Number (ABN). In doing this the Ruling considers the meaning of certain key words and phrases used in the *A New Tax System (Australian Business Number) Act 1999* (ABN Act) to define:

- an entity (section 37); and
- an enterprise (section 38).

Unless otherwise stated, all legislative references in this Ruling are to the ABN Act.

2. Some entities have an automatic entitlement to an ABN due to the nature of the entity, for example Corporations Act companies (see paragraph 20). For other entities, for example partnerships, the entitlement to an ABN requires that the entity is carrying on an enterprise. It is these entities that are the relevant entities referred to in this Ruling as being required to carry on an enterprise.

3. Included within the meaning of enterprise under paragraphs 38(1)(d), (e) and (f) are all of the activities done by:

- the trustees of funds covered by, or by authorities or institutions covered by, Subdivision 30-B of the *Income Tax Assessment Act 1997* (ITAA 1997) and to which deductible gifts can be made;
- charitable institutions and the trustees of charitable funds; and
- religious institutions.

This Ruling does not consider the meaning of these types of entities.

4. The Ruling also does not consider the meaning of supplies that are connected with Australia under paragraph 8(1)(b). The Dictionary at section 41 defines 'connected with Australia' and 'supply' by reference to the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). 'Connected with Australia' has the meaning given by section 195-1 of the GST Act and 'supply' has the meaning given by section 9-10 of the GST Act.

5. This Ruling does not consider the meaning of 'lease', 'licence' or 'other grant of an interest in property'.

Date of effect

6. This draft Ruling represents the preliminary, though considered view of the Australian Taxation Office. This draft may not be relied on by taxpayers or practitioners. When the final Ruling is issued, it is proposed that it will apply from its date of issue.

Background

Policy intent

7. The ABN is a single, unique business identifier to be used by entities that are entitled to it for all dealings with the Commonwealth Government. It is also available to State, Territory and Local Government regulatory bodies to use for carrying out their functions.

8. The establishment of a unique business identifier was originally recommended by the Small Business Deregulation Taskforce in order to facilitate the development of a single entry point into government for small business. The ABN regime was introduced in 1999 as part of the Government's Tax Reform Package.

9. One of the main objects of the ABN Act is to allow businesses to identify themselves reliably for the purposes of taxation laws.[1] Part of the policy intent supporting the ABN regime is to help improve the integrity of the taxation system. It complements other reporting regimes such as pay as you go (PAYG) and provides a record of entities that carry on businesslike activities.

[1] Subsection 3(2).

10. Entitlement to be registered for an ABN is not restricted to entities carrying on a business. Some entities such as Corporations Act companies, superannuation funds and government entities are entitled to an ABN. For other entities the entry threshold chosen for the ABN regime is an enterprise test. This test is defined in the legislation and covers a wide range of activities including leasing, and activities done by religious and charitable institutions. Activities done by particular entities are included in the definition of enterprise so that those entities can become registered for ABN and GST purposes and to allow them to obtain input tax credits.[2]

The registration process

11. During the registration process, an entity is allocated an ABN and its details are entered in the Australian Business Register. The public can access certain specified information contained in the Register under section 26 unless a successful application has been made that keeps details undisclosed. The Commissioner of Taxation is the Registrar of the Australian Business Register.[3]

12. Where an entity's circumstances change so that the information recorded in the Register is no longer correct, the entity is required to notify the Australian Taxation Office (Tax Office) of the change within 28 days of becoming aware of it.[4]

13. An entity's registration in the Australian Business Register will be cancelled in accordance with section 18 if it is no longer entitled to an ABN. For example the registration will be cancelled where the entity no longer carries on an enterprise. If the entity were again to become entitled to an ABN, the number allocated to it may be the same as the number originally provided to the entity.

14. An entity's registration can also be cancelled at the entity's request. For example a registration may be cancelled if the entity has an ABN but is never required to quote it.

15. Where an entity is registered for both GST and ABN, the ABN is also the entity's registration number for GST. However, in specific cases the GST Act provides that an entity may register for GST in a particular capacity (where that entity would not be able to register for an ABN in that capacity). The requirement for resident agents acting for non-residents to register under Division 57 of the GST Act is one such specific case.

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[2] See paragraph 2.3 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.
[3] Subsection 28(2).
[4] Section 14.

Definitions

Entity

16. 'Entity' has the meaning given by section 37. It is defined in the same way in section 184-1 of the GST Act. A similar definition of 'entity' can be found in section 960-100 of the ITAA 1997. It is intended that the term entity has a common meaning across the ABN, GST and income tax Acts. However, the particular definition of 'entity' still needs to be considered in the context of the Act in which it is found. Also note for ABN and GST purposes a defined part of an entity is taken to be an entity in itself.[5]

Enterprise

17. 'Enterprise' is defined in section 38 in substantially the same way as the definition of 'enterprise' in section 9-20 of the GST Act. The discussion in this Ruling is considered to also apply to the term 'enterprise' in the GST Act in so far as the definition of the term in the two Acts is consistent.[6] However, as with every defined term it needs to be considered in the context of the Act in which it is found.

18. The 'enterprise' definition in the GST Act includes the activities done by a trustee of a complying superannuation fund or, if there is no trustee of the fund, by a person who manages the fund.[7] For the purposes of the ABN Act those activities are not included in the definition of an enterprise. However, superannuation funds, including complying superannuation funds, as well as government entities and non-profit sub-entities are entitled to an ABN as they are taken to be carrying on an enterprise in Australia.[8]

Ruling with Explanation

Entitlement to an ABN

19. The ABN Act states who is entitled to an ABN.

20. All Corporations Act companies are entitled to an ABN.[9] The term 'Corporations Act company' is defined to mean 'a body registered as a company under the *Corporations Act 2001*'.[10] Such companies have an Australian Company Number (ACN). Bodies with an Australian Registered Body Number (ARBN) are not Corporations Act companies.

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5 See section 5 of the ABN Act and Divisions 63 and 149 of the GST Act.
6 See Goods and Services Tax Determination GSTD 2000/8.
7 Paragraph 9-20(1)(da) of the GST Act.
8 Section 5.
9 Subsection 8(2).
10 Section 41.

21. Other entities are entitled to an ABN provided they meet the criteria in subsection 8(1) which provides that:

> You are entitled to have an Australian Business Number (ABN) if:
>
> (a) you are carrying on an enterprise in Australia; or
>
> (b) in the course or furtherance of carrying on an enterprise, you make supplies that are connected with Australia.

22. 'You' is defined in section 41 to apply to entities generally.

23. 'Australia' is defined in section 41. It does not include any external Territory. However, it does include an installation within the meaning of the *Customs Act 1901* that is deemed by section 5C of that Act to be part of Australia. An example of an installation of this nature would be a gas or oil rig.

What is an entity for ABN purposes?

24. Entity is defined in subsection 37(1) to mean any of the following:

(a) an individual;

(b) a body corporate;

(c) a corporation sole;

(d) a body politic;

(e) a partnership;

(f) any other unincorporated association or body of persons;

(g) a trust;

(h) a superannuation fund.

Many of these are defined terms in the ABN Act. If not defined they take their meaning from the general law (which in this Ruling is used as the term for common law and Australian statute law).

25. In some cases particular organisations are treated as if they are entities. This applies to government entities and non-profit sub-entities.[11] In the absence of this treatment some of these organisations would only be part of another entity. For a further discussion of these entities, see paragraphs 82 to 86.

26. A legal person including a company is an entity in itself and can also be a part of another entity. For example an individual is an entity and can be a partner in a partnership. Further, a legal person is taken to be a separate entity in a different role or capacity from itself when that person is a trustee of a trust or a superannuation fund. For further information about multiple roles, see paragraphs 76 to 81.

[11] See section 5.

Individual

27. The term 'individual' is defined in section 41 to mean 'a natural person'.

Body corporate

28. 'Body corporate' is not a defined term. The term takes its meaning from the general law. 'Body corporate' is a general term to describe an artificial entity having a separate legal existence. A body corporate has the ability to continue in existence indefinitely and to keep its identity regardless of changes to its membership. It also has the power to act, hold property, enter into legal contracts, sue and be sued in its own name, just as a natural person can.

29. A body corporate may be created:

- by common law, for example a chartered corporation;
- by statute, for example a Corporations Act company; or
- by registration pursuant to a statute, for example building societies, credit unions, trade unions and incorporated associations.

30. Further examples of bodies corporate specifically established under various Acts include:

(a) the governing bodies of various religious institutions, for example, see the *Anglican Church of Australia (Bodies Corporate) Act 1938* (NSW). This Act also confers the right to establish other bodies corporate under that Act by ordinance;

(b) strata title bodies corporate established under Acts such as the *Conveyancing and Law of Property Act 1884* (Tasmania);[12] and

(c) city and shire councils established by a State or Territory Local Government Act, for example the *Local Government Act 1993* (Qld) or, in some cases, under an Act in their own right, for example the Brisbane City Council [*City of Brisbane Act 1924* (Qld)].

31. Each State and Territory has legislation that allows various kinds of non-profit bodies to become bodies corporate, for example the *Associations Incorporation Act 1987* (WA). These bodies usually comprise of a certain number of members (for example five or more), a committee structure and a set of rules about how the organisation is to be run. Bodies incorporated under these Acts are normally community, cultural, educational or charitable type organisations.

[12] See Taxation Ruling IT 2505 Income tax: bodies corporate constituted under strata title legislation.

32. If a body is not established under an Act of Parliament or under a statutory procedure of registration, such as the *Corporations Act 2001*, or incorporated under a specific Act, for example the *Baptist Union Incorporation Act 1919* (NSW), ordinarily it is not a body corporate. The body should be further examined to see whether it falls into one of the other categories of 'entity'.

Corporation sole

33. 'Corporation sole' is not a defined term. The term takes its meaning from the general law. Corporations sole are established either by an Act of Parliament or by statutory procedure.[13] However it may be possible for a corporation sole to be created by the common law. Corporations sole can be established for all purposes or limited to certain purposes specified by statute.

34. A corporation sole is a corporation ordinarily consisting of one natural person only and that person's successors to a particular position. However it is possible for parliament to create a corporation sole without requiring it to consist of individuals.[14]

35. A corporation sole constitutes an artificial legal person that is separate from the individual who occupies the position. This artificial legal person can sue and be sued in the title of the position and can hold title to land and other property. It is the office that is the 'legal person'. The office continues to exist as a legal entity in its own right, regardless of who holds it or even if it is vacant from time to time.

Body politic

36. 'Body politic' is not a defined term. The term takes its meaning from the general law. It includes the Crown in right of the Commonwealth, a State or Territory. However, government departments are not bodies politic in their own right. Instead, they are part of the larger body politic of the Commonwealth or State or Territory (see the treatment of departments in paragraphs 82 to 83). Bodies such as municipal councils are bodies corporate rather than bodies politic.

37. A body politic, like a body corporate and corporation sole, has the ability to continue in existence indefinitely and to keep its identity regardless of changes to its membership. It also has the power to act, to hold property, to enter into legal contracts and to sue and be sued in its own name, just as a natural person can.

38. The term 'body politic' is not restricted to Australia in any way, and can also mean a foreign nation and its government.

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[13] See, for example, the Acts in various states constituting the Public Trustee as a corporation sole, for example, section 7 of the *Public Trustee Act 1913* (NSW).

[14] See *Bank of New South Wales v. Commonwealth* (1948) 76 CLR 1 at 361; [1948] 2 ALR 89 at 236.

Partnership

39. The term 'partnership' is defined by section 41 and by section 195-1 of the GST Act to have the meaning given by section 995-1 of the ITAA 1997. Section 995-1 defines a partnership to mean, 'an association of persons carrying on business as partners or in receipt of ordinary income or statutory income jointly, but does not include a company'.

40. This definition of partnership is wider than at common law.[15] The first limb of the definition reflects the definition of partnership contained in State and Territory partnership Acts. The second limb of the definition extends partnership for taxation purposes to include persons in receipt of income jointly.

41. A partnership within the extended meaning for taxation purposes exists, for example, where two or more persons derive income from real estate that they own as joint tenants or as tenants in common. It is an entity in its own right as it is a partnership for the purposes of the ABN Act.

Any other unincorporated association or body of persons

42. The phrase 'any other unincorporated association or body of persons' is not defined and takes its meaning from the general law. It should be read as a whole, that is the word 'unincorporated' qualifies both the terms 'association' and 'body of persons'.

43. A useful starting point is the ordinary meaning of these terms. The Shorter Oxford English Dictionary defines the terms separately as follows:

> **Association 2.** A body of persons associated for a common purpose; the organisation formed to effect their purpose; a society; *e.g.* the British Association for the Advancement of Science, etc.
>
> **Body IV. 2.** A society, association, league, fraternity. **4.** (loosely) a collective mass of persons

44. Similarly, the Macquarie Dictionary has the following definitions:

> **association 1.** an organisation of people with a common purpose and having a formal structure.
>
> **body 16.** a number of things or people taken together: *the student body*

[15] For further information about partnerships, see Goods and Services Tax Ruling GSTR 2003/13 Goods and services tax: general law partnerships, and Goods and Services Tax Ruling GSTR 2004/6 Goods and services tax: tax law partnerships and co-owners of property.

45. These concepts have arisen from United Kingdom law dating back to the early eighteenth century.[16] Broadly, an unincorporated association or body of persons may be seen as consisting of a group of persons who associate to achieve a common aim or purpose and who are bound by mutual obligations and rights.

46. Australian courts have sometimes used these terms interchangeably, as is illustrated in *City of Gosnells v. Duncan and others* where Anderson J stated:[17]

> The 'club' had no constitution and no rules. It did not therefore have the essential characteristic of an unincorporated association, ie, a composite body of persons in 'a legal relationship …giving rise to joint rights or obligations or mutual rights and duties' See *Re Commonwealth Homes & Investment Co Ltd* [1943] SASR 211 at 228 per Mayo J.

47. Also see *Quinton and Quinton, trading as Adelaide Psychology Consultants v. South Australian Psychological Board* where Olsson J stated:[18]

> In the modern idiom the term association has come to be regarded as attaching to a body of persons associated for a common purpose; a society (Shorter Oxford Dictionary). It may be incorporated or unincorporated and, usually, this appellation is attached to a society of a non-trading or commercial type…

48. In *Conservative and Unionist Central Office v. Burrell (Inspector of Taxes)*[19] the court considered some of the characteristics of an unincorporated association or body of persons as follows:

- there are members of the association;
- there is a contract binding the members amongst themselves;
- there is a constitutional arrangement for meetings of members and for appointing officers;
- the members will normally be free to join or leave the association;
- the association will normally continue in existence independently of any change to the composition of the association; and
- as a matter of history, there will have been a moment in time when a number of persons combined to form the association.

However, not all of these characteristics need to be present.

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[16] Avery Jones, JF 'Bodies of Persons', *British Tax Review*, 1991, vol 11 & 12, p 453.
[17] (1994) 12 WAR 437 at page 448; (1994) LGERA 214 at 223.
[18] (1985) 38 SASR 523 at 531.
[19] [1980] 3 All ER 42 at 58; [1980] STC 4000 at 415. This decision was affirmed on appeal, see *Conservative and Unionist Central Office v. Burrell (Inspector of Taxes)* [1982] 2 All ER 1; [1982] 1 WLR 522; [1982] STC 317; [1981] TR 543.

49. Courts have also held that for a group of persons to be an association or body of persons, more than a common aim or purpose is required. In *Twycross and other v. Potts and another* [1928] SC 633 (the *Caledonian Employees' Benevolent Society Case)* at 635, Lord President Clyde, referring to the *Companies (Consolidation) Act 1908*, said:

> It is not, I think, open to doubt that the fundamental and essential characteristic of the whole class of bodies described in the Act as companies, associations, and partnerships, is that they are bodies constituted by some species of contract of society, and founded on the contractual obligations thus undertaken by the members, or *socii*, *inter se*...

50. It has also been held that the contract between the members will be based on rules that set out obligations and confer rights on members. The rules can fall short of a legally enforceable contract between members.[20]

51. An unincorporated association or body of persons is not a legal person. Unlike a body corporate it has no separate legal identity. It consists of the aggregate of its members at a particular moment in time and does not have perpetual succession. Because it is not a legal person, subject to specific legislation, it does not have the right to hold property, or to take or be subjected to legal proceedings in its own name.

52. An unincorporated association or body of persons that is included under another more specific entity category is not an entity that is an unincorporated association or body for the purposes of the definition of entity.

Example 1 – unincorporated association of persons

53. *The Newcity Model Train Club is a non-profit association that conducts meetings at weekends. The club has a membership, a committee, a system of rules, and an understanding between the members of their rights, privileges and responsibilities. Members are free to join or leave the association at will and the membership changes over time.*

54. *The club is an unincorporated association and an entity for the purposes of section 37*.

Example 2 – expense sharing arrangement that does not amount to an unincorporated association of persons

55. *Five artists rent and share a studio. They pool enough funds to cover the rent and other property expenses.*

[20] See *Cameron v. Hogan* (1934) 51 CLR 358.

56. *The arrangement is an expense sharing arrangement that does not amount to an unincorporated association or body of persons. The five artists are not an entity for ABN purposes*.

Exclusion to any other unincorporated association or body of persons – non-entity joint venture

57. While it may appear that a non-entity joint venture could be said to be 'any other unincorporated association or body of persons', subsection 37(1A) makes it clear that a non-entity joint venture is not included within the meaning of that expression and is therefore not an entity. It is not entitled to an ABN.

58. A 'non-entity joint venture' is defined in section 41 to mean:

> an arrangement that the Registrar is satisfied is a contractual arrangement:
>
> (a) under which 2 or more parties undertake an economic activity that is subject to the joint control of the parties; and
>
> (b) that is entered into to obtain individual benefits for the parties, in the form of a share of the output of the arrangement rather than joint or collective profits for all the parties.'

59. Some of the characteristics of a non-entity joint venture are that the joint venturers:

- undertake a specific economic project;
- incur their own expenses and liabilities and raise their own finance which represents their own obligations;
- get a share of the output (the products) of the venture as opposed to getting joint or collective profits for all parties;
- individually determine the disposal of its share of the output;
- are bound by a contractual agreement that establishes the operation, management, share of costs and output of the venture; and
- jointly control the venture.[21]

[21] See the Explanatory Memorandum to the Indirect Tax Legislation Amendment Bill 2000 at paragraph 7.19. This Bill inserted the term 'non-entity joint venture' and its definition. For information about joint ventures for GST purposes, see Goods and Services Tax Ruling GSTR 2004/2 Goods and services tax: What is a joint venture for GST purposes?

Example 3 – non-entity joint venture not entitled to an ABN

60. *Akira and Michiko both want to build units to sell at a profit. Both are interested in the same piece of land. They decide to buy the land together (half share each) and to build a three story block with six units on that land. Akira and Michiko each want a separate share of the output of the project and agree which units are for Akira and which ones are for Michiko.*

61. *When the building is close to completion they each enter into a separate contract with different real estate agents to market the units. Akira wants a quick sale of his units and is more flexible in his negotiations about price with prospective buyers than Michiko. Akira's units sell first. He works out his profits on his units and takes no further part in the project.*

62. *The joint-venture is a non-entity joint-venture. Consequently, the joint venture is not an entity in itself and cannot get an ABN.*[22] *However, both Akira and Michiko are each in their own right an entity as they are individuals.*

Example 4 – an entity that is not a non-entity joint venture

63. *Mara and Lauren go into business together to buy a block of land jointly and to build a block of units with a view to making a profit. They enter into an agreement to share the profit on sale of the units and to employ a real estate agent to market the units.*

64. *Mara and Lauren have created a partnership to undertake the activities. The partnership is an entity. It is not a non-entity joint venture as each of them takes a share of the profits generated by the venture.*

Trust

65. 'Trust' is not a defined term. It can be described as:

> An obligation enforceable in equity which rests on a person (the trustee) as owner of some specific property (the trust property) to deal with that property for the benefit of a certain person (the beneficiary) or persons, or for the advancement of certain purposes.[23]

A trust itself is not a legal person and therefore must be represented by the trustee for the trust. For further information on trustees, see paragraphs 68 to 78.

[22] Entities engaged in a joint venture can have it approved as a joint venture under Division 51 of the GST Act if the requirements for approval are meet. If the joint venture obtains GST registration it will be a GST registration number but not an ABN.

[23] Ford, HAJ and Lee, WA 1996, *Principles of the Law of Trusts*, 3rd edn, LBC Information Services, Sydney, p. 3.

Superannuation fund

66. The term 'superannuation fund' is defined under section 41 to have the meaning in section 995-1 of the ITAA 1997, which in turn provides that 'superannuation fund' has the meaning given by section 10 of the *Superannuation Industry (Supervision) Act 1993*. This defines a superannuation fund as a fund that is:

- an indefinitely continuing fund; and
- is a provident, benefit, superannuation or retirement fund; or
- a public sector superannuation scheme.

67. Section 5 of the ABN Act ensures that all superannuation funds are entitled to an ABN.

Trustee of a trust or superannuation fund

68. Trusts and superannuation funds are given statutory status as entities in themselves under subsection 37(1). Some superannuation funds are trusts. At law, a trust is not a legal person. It is a collection of rights, duties and powers arising from the relationship to property held by the trustee for the benefit of the beneficiaries. The trust itself cannot be a party to legal proceedings nor have other obligations placed upon it. The trustee is the appropriate party. This is recognised in subsection 37(2) which provides that the trustee in that capacity is taken to be the trust entity. Consequently a trust entity is identified both by the trust relationship itself (the trust) and by reference to one of the necessary legal persons to that relationship (the trustee). The Act does not create two separate entities – the trust and trustee – but rather the relevant entity is the trust, with the trustee standing as that entity if legal personality is required.

69. As stated, rights and obligations cannot be placed directly upon a trust. Therefore, the trustee is the legal person who may create rights and have obligations in relation to the trust property. The trustee is the legal person who holds the ABN for the trust or superannuation fund. In addition the trustee is obliged to meet obligations under the ABN Act such as the obligation to provide information under section 15.

Example 5 – role of trustee

70. *Sylvie is the trustee of the White Family Trust. She holds a commercial property upon trust for the two beneficiaries, Daniel and Lawrie. Sylvie as trustee leases out the building to commercial tenants. She distributes the profits to Daniel and Lawrie.*

71. *Pursuant to subsection 37(1) the White Family Trust is an entity but rights and obligations cannot be directly placed upon it. For the purposes of the ABN Act, Sylvie in her role as trustee is taken to be the entity (the White Family Trust).*

72. *Sylvie as trustee applies for an ABN for the White Family Trust. On registration the entity's name is shown in the Australian Business Register as 'The Trustee for the White Family Trust'. Sylvie's name is also recorded in the Australian Business Register as she is the trustee at the time of registration.*[24]

73. From time to time, the trustee of a trust or superannuation fund may change. However, only the trustee in its capacity as trustee for the trust or superannuation fund at any given time is taken to be the entity that is a trust.[25] The use of the phrase 'at any given time' in subsection 37(2) takes into account that a trustee may change. This means that where there is a change of trustee, the ABN for the trust remains the same. However section 14 requires that the Tax Office be advised of the change of trustee so that the relevant details in the Australian Business Register can be updated.

Example 6 – change of trustee

74. *Continuing on the facts in Example 5, the trust deed of the White Family Trust allows a trustee to be replaced in certain circumstances. Sylvie is the trustee of the White Family Trust from 1 January 2003, and as trustee of the White Family Trust Sylvie applies for and is issued with an ABN for the trust. However on 1 July 2003 Sylvie resigns and Max becomes the new trustee of the White Family Trust.*

75. *From the 1 January to 30 June 2003, Sylvie in her capacity as trustee is taken to be the entity that is the White Family Trust. When Max becomes trustee on 1 July, Sylvie is no longer taken to be that entity. Instead Max is now taken to be the entity that is the White Family Trust. The trust is still the same entity. This means that the same ABN is used, but the Tax Office must be advised of the change of trustee.*

Multiple roles

Trustee

76. A legal person, including a company, can have a number of different roles or act in different capacities. In each of these roles or capacities, the person is taken to be a different entity under subsection 37(3). The person may be entitled to an ABN in each of these roles or capacities.

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[24] Subsection 25(2) and Australian Business Number Regulations 1999 regulation 6. However not all the information about an entity that is contained in the Australia Business Register is available to the public. One of the details not available is the name of the trustee, see section 26 and Australian Business Number Regulations regulation 8.

[25] Subsection 37(2).

77. For example, a company may be the trustee of a trust. It is entitled to an ABN as a Corporations Act company. As a trustee it is also entitled to hold another ABN as it is taken to be the trust entity, provided the trustee in that capacity is carrying on an enterprise.

78. Similarly, for managed investment schemes registered under the *Corporations Act 2001*, it is accepted that the public company (already entitled to an ABN) is entitled to hold another ABN as the responsible entity and trustee provided that the activities the public company does in that capacity amount to an enterprise.

Agent

79. A person acting as an agent can be thought to be acting like a trustee operating in a different capacity from itself as a person. However the position of an agent is quite different from that of a trustee. It is essential for a trust relationship that property is vested in the trustee for the benefit of the beneficiaries of the trust. An agency can be created without the agent having property vested in it for another's benefit. Further, an agent acts under instructions from the principal while a trustee's duty is to act under the terms of the trust. The beneficiaries of the trust have no right to direct the trustee in the performance of trust duties given to the trustee to perform at their discretion.

80. An agent is not a separate kind of entity. A person, in undertaking activities as an agent, is not acting in a different capacity from itself as a person. The agent is performing another entity's activities. The activities are taken into account in ascertaining whether that other entity carries on an enterprise. For further discussion on agency and when an agent is carrying on an enterprise, see paragraphs 101 to 106.

Other roles

81. Every legal person is an entity in their own right and may also be part of another entity. For example an individual is an entity and the individual may also be a partner in a partnership or a member of an unincorporated association.

The ABN Act applies as if an entity exists

Government entities

82. The ABN Act applies to a government entity as if it were an entity in its own right.

83. The term 'government entity' is defined in section 41. The GST Act uses the same definition.[26] The definition includes Commonwealth government departments as well as departments of a State or a Territory. It also includes executive and statutory agencies and some bodies established by the Commonwealth, a State or Territory to carry on activities for a public purpose. Unless the ABN Act applies to these as if they were separate entities, these departments, agencies and bodies would be part of a body politic.

Non-profit sub-entity

84. The ABN Act also applies to a non–profit sub-entity as if it were an entity in its own right. The term 'non-profit sub-entity' is defined in section 41. It is a branch of an entity. For the branch to be a non-profit sub-entity, the entity must have chosen to apply Division 63 of the GST Act, and that choice still has effect.

85. Division 63 of the GST Act allows some non-profit entities to choose to have branches treated as separate entities for GST purposes. Entities that can choose include:

- charitable institutions;
- trustees of a charitable fund;
- gift-deductible entities;
- government schools; and
- non-profit bodies exempt from income tax under certain provisions of the ITAA 1997.[27]

86. To come within the ABN definition of a non-profit sub-entity the branch must also:

(a) maintain an independent system of accounting;

(b) be separately identified by reference to:

(i) the nature of activities carried on through the branch; or

(ii) the location of the branch; and

(c) be referred to in the entity's records to the effect that it is to be treated as a separate entity for the purposes of the GST law.

Where the branch satisfies these conditions it is considered to be an entity separate from the non-profit entity.

[26] Section 195-1 of the GST Act.
[27] Section 63-5 of the GST Act.

Enterprise

87. An entity, other than a Corporations Act company, must carry on an enterprise or be taken to carry on an enterprise in Australia in order to be entitled to an ABN.[28] Government entities, superannuation funds and non-profit sub-entities are taken to be carrying on an enterprise.

88. Where activities are done by a number of different entities it is necessary to determine which entity is actually carrying on the enterprise, see paragraphs 92 to 109.

89. Carrying on an enterprise includes activities done in the commencement or termination of the enterprise. For a discussion of these issues, see paragraphs 110 to 138. What is an enterprise is discussed in paragraphs 139 to 314.

Government entities, superannuation funds and non-profit sub-entities

90. For the avoidance of doubt, government entities, superannuation funds and non-profit sub-entities are taken to be carrying on an enterprise in Australia for the purposes of the ABN Act.[29]

91. The meanings of these terms have been discussed in previous paragraphs:

- 'government entity' – paragraphs 82 to 83;
- 'superannuation fund' – paragraphs 66 to 67; and
- 'non-profit sub-entity' – paragraphs 84 to 86.

Who is carrying on an enterprise?

92. Activities that are an enterprise may be done by more than one entity. This may occur where there are associated entities. However, in these cases it is necessary to identify which entity is carrying on the enterprise. It is the activities of a particular entity that are to be examined.

Groups of entities

93. For income tax purposes there are special rules that allow a wholly owned group to form a consolidated group.[30] Such a group is treated as a single income tax paying entity because the subsidiary members of the group are taken to be parts of the head company. The activities of the subsidiary members are taken to be the activities of the head company.

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[28] See section 8. For further information on companies, see paragraph 20.
[29] Section 5.
[30] See Part 3-90 of the ITAA 1997.

94. There are also rules in the GST Act which allow groups of related entities to be treated as a single entity for certain GST purposes.[31] Members of a GST group must be registered under the GST Act. When a GST group is formed a 'representative member' must be nominated to represent the group. The representative member has responsibility for submitting a GST return, is ordinarily liable for the group's GST and entitled to the group's input tax credits.

95. The income tax consolidation rules and the GST grouping rules do not apply for ABN purposes. This means that, for entities that need to carry on an enterprise to be entitled to an ABN, each entity has to determine whether it is carrying on an enterprise in its own right and is entitled to an ABN.

Example 7 – more than one enterprise carried on by a consolidated group

96. *A company (Head Co) and its subsidiary members being a company (Sub Co) and a trust, form a consolidated group for income tax purposes.*

97. *The consolidated group carries on a number of wine making and selling activities. Head Co provides accountancy and taxation services to the other group members. Sub Co operates a wine cellar where wine is made and sold. The trustee for the trust grows and supplies grapes to Sub Co.*

98. *The activities of the entire group are not examined as a whole in order to determine if an enterprise is being carried on. The activities of each entity of the group are examined separately to determine whether that entity is carrying on an enterprise.*

99. *Both Head Co and Sub Co are carrying on enterprises. Both are entitled to an ABN. They would be entitled to an ABN whether or not they were carrying on an enterprise because they are Corporations Act companies. It is only necessary to determine whether they carry on an enterprise for GST purposes. The trustee for the trust holds an ABN for the trust as the trustee in that capacity is carrying on an enterprise.*

[31] See Divisions 48 and 49 of the GST Act.

Partnership

100. As previously explained in paragraphs 39 to 41, the definition of partnership is wide and has the meaning given by section 995-1 of the ITAA 1997. Partnerships, except incorporated limited partnerships,[32] are not recognised under the general law as a separate legal person distinct from the members of the partnership. They are an entity for ABN purposes because of the operation of paragraph 37(1)(e). This means that the business the partners carry on in association with each other is taken to be an enterprise carried on by the partnership.[33] As a result, a partner (that is required to carry on an enterprise to be entitled to an ABN), will not be entitled to an ABN unless they carry on some other enterprise independently of the partnership and in their own capacity.

Agency

101. The general law of agency applies to entities. An agent is authorised to do something on behalf of another entity (the principal). In that case the activity done by the agent on behalf of the principal is taken to be an activity done by the principal. All activities by the principal, including the activities performed by the agent as an agent, have to be considered in determining whether the principal is carrying on an enterprise and entitled to an ABN.

102. The agent is not entitled to an ABN in its capacity as an agent. The agent is entitled to an ABN if it carries on an enterprise in its own right. For example, an agent may sell your car but also be in the business of selling used cars. In this case the agent would be entitled to an ABN in respect of the business of selling used cars. The agent may also carry on activities that amount to an enterprise in providing agency services. Such an agent would charge a fee for the provision of services, perhaps employ people to undertake its agency activities and may promote the agency as being able to undertake agency work. In this situation the agent would be entitled to an ABN in respect of the business of being an agent.

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[32] Incorporated limited partnerships are a body corporate with a separate legal personality from the partners, for example, see section 84 of the *Partnership Act 1958* (Vic).

[33] See paragraph 31 of GSTR 2003/13 which confirms that a general law partnership carries on an enterprise. See also Goods and Services Tax Ruling GSTR 2004/6 Goods and services tax: tax law partnerships and co-owners of property, paragraphs 61 to 63, which discusses when a tax law partnership is carrying on an enterprise.

103. However, it should be noted that under Division 57 of the GST Act a resident agent acting for a non-resident is effectively made responsible for the GST consequences of what the non-resident does through its resident agent. Division 57 also requires the resident agent to be registered for GST if the non-resident principal is registered or required to be registered for GST. The date on which the registration takes effect is entered in the Australian Business Register pursuant to subsection 25-10(2) of the GST Act. The agent will not be entitled to an ABN in the capacity of an agent for a non-resident under Division 57 of the GST Act as the agent is not the one carrying on an enterprise in Australia.[34] However, if the entity's agency activities amount to an enterprise (or it is a Corporations Act company) it is entitled to an ABN in its own right.

Example 8 – agent is not entitled to an ABN

104. *Jacob operates a number of bakeries. His business is expanding and he wishes to purchase a bakery. He knows that his friend Sarah is a very good negotiator and he thinks that she would be able to get a favourable deal for him. He requests that Sarah negotiates the purchase of the bakery on his behalf and she agrees to do so.*

105. *Jacob is entitled to an ABN as he is carrying on an enterprise of operating bakeries. Sarah is not entitled to an ABN in her role as Jacob's agent in the negotiations for the new bakery. She is not carrying on the bakery enterprise. Her activities are Jacob's activities as he is the principal.*

106. *However Sarah is entitled to an ABN if she is carrying on an enterprise in her own right, for example, if she is a buyer's agent.*

Religious practitioner

107. There is a special rule concerning the activities of religious practitioners. Under section 5A, the activities performed by a religious practitioner in pursuit of his or her vocation and as a member of a religious institution, are taken to be the activities of the religious institution (and not the activities of the religious practitioner). Therefore, these activities cannot by themselves entitle the religious practitioner to an ABN. The activities done by the religious institution (including the activities by the practitioner) are an enterprise.[35]

[34] For further information on resident agents acting for non-residents, see Goods and Services Tax Ruling GSTR 2000/37 Goods and services tax: agency relationships and the application of the law.
[35] See paragraph 38(1)(f).

108. Religious practitioner is defined in section 41 to mean:

(a) a minister of religion; or

(b) a student at an institution who is undertaking a course of instruction in the duties of a minister of religion; or

(c) a full-time member of a religious order; or

(d) a student at a college conducted solely for training persons to become members of religious orders.

Employee

109. Activities undertaken by an individual to which paragraph 38(2)(a) applies, for example an employee, are the activities of the entity to whom that individual provides work or services and not of the individual. This is made clear by the note to that paragraph in the legislation.[36]

When is an enterprise being carried on?

110. In order to be entitled to an ABN most entities must carry on an enterprise. The term 'carrying on' is defined in section 41. The definition ensures that activities done in the course of commencement or termination of the enterprise are included in determining whether the activities of the entity amount to an enterprise. The term 'enterprise' is discussed in paragraphs 139 to 314.

111. An identical definition of 'carrying on' an enterprise can be found in section 195-1 of the GST Act and section 995-1 of the ITAA 1997.

Commencement of an enterprise

112. Given this definition, it follows that activities done by an entity that are part of a process of beginning or bringing into existence an enterprise are activities in carrying on an enterprise.

113. In our view the term, 'doing anything in the course of the commencement….of an enterprise' describes the kind of activities undertaken. The ultimate outcome of the activities and whether or not an ongoing enterprise eventuates is not a determinative factor. An entity has to determine its entitlement to an ABN from the time of its first activities.

[36] The note states that 'Acts done as mentioned in paragraph (a) will still form part of the activities of the enterprise to which the person provides work or services'.

114. If the activities have the character of those ordinarily undertaken to commence an enterprise they will be accepted as falling within the statutory definition. This leads to a broad range of preliminary activities being accepted as an enterprise. These types of activities may still be considered to be commencement activities even where the eventual enterprise is conducted differently from the one originally contemplated.

115. An enterprise must start somewhere and the first step or steps may be minor. In *Ferguson v. Federal Commissioner of Taxation* Bowen CJ and Franki J expressed the point in this way:[37]

> Repetition and regularity of the activities is also important. However, every business has to begin and even isolated activities may in the circumstances be held to be the commencement of carrying on business.

116. In the case of feasibility studies involving genuine business activities where, from the scale and nature of these activities it is clear that there has been serious contemplation of developing an enterprise, it will be accepted that this has been the commencement of an enterprise.[38]

117. In contrast there is a range of activities that are of a private nature or too remote from fruition that are not the commencement activities of an enterprise. As well, commencement activities require more than an intention. For example, if a person undertakes a tour of a wine region to enhance their knowledge of the wine industry with the aim to possibly establish some future business activity, we would not consider this to be commencement activities.

118. Activities undertaken to establish an entity, for example drawing up of a trust deed and the settlement of trust property, are not commencement activities. This is because the trust cannot commence activities until it is in existence.

119. In the context of registering for overseas Value Added Tax regimes, a number of cases have considered the broad issue of commencement activities. These have, of course, been decided in the context of their own particular legislative regimes. In *Intercommunale voor Zeewaterontzilting (Inzo), in liquidation v. Belgian State*[39] the taxpayer undertook a feasibility study taking several years into the conversion of salt or brackish water into fresh drinking water. Even though the study showed the activity would be unprofitable (and the project did not proceed) the court held that the taxpayer was entitled to input tax credits.

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[37] (1979) 37 FLR 310 at 314; 79 ATC 4261 at 4264; 9 ATR 873 at 876; (1979) 26 ALR 307 at 311.

[38] This can be contrasted with income tax cases about the deductibility of expenses associated with the commencement of a business. Expenses, such as feasibility studies prior to a business commencing, may not be deductible.

[39] [1996] 1 ECJR 857; [1996] BVC 362.

120. An earlier leading case allowing input tax credits on preparatory activities was *DA Rompelman and EA Rompelman-Van Deelan v. Minister van Financien (Case No 268/83)*.[40] It was held that activities undertaken before commencing a business could be treated as part of an economic activity taken up at a later date, so that the taxpayer could be considered a taxable person entitled to input tax credits. See also *Merseyside Cablevision Ltd v. Commissioners of Customs and Excise* and *Park Commercial Developments plc v. Commissioners of Customs and Excise*.[41]

Example 9 – feasibility study activities that are commencement activities

121. *A trust was formed for the expected purpose of carrying on a business of a particular kind. After it was formed the trust obtained finance and undertook a feasibility study to determine whether or not this particular business should be entered into by that trust. In carrying out the feasibility study a wide range of activities were undertaken and costs incurred. The activities undertaken were planned, organised and carried out in a businesslike manner over a period of time. Premises were rented, staff employed, consultants engaged, equipment acquired and significant research including market testing carried out. Following the feasibility study an ongoing business was set up.*

122. *The feasibility study activities are commencement activities and are activities in carrying on an enterprise.*

Example 10 – an unsuccessful tender

123. *Victoria and Jacques have many years experience in the information technology industry. They entered into a partnership agreement forming VJ Computing Partnership for the purpose of supplying computer services to a large organisation. They put together a tender for a significant value for that supply. In putting together the tender a number of activities were undertaken. The partnership undertook market research and investigated the most economical way to supply the computer services. They rented premises, bought hardware and software, employed a consultant and hired staff. The VJ Computing Partnership's tender was ultimately unsuccessful.*

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[40] [1985] 1 ECJR 655; (1985) 2 BVC 200157.

[41] Input credits were allowed in *Merseyside Cable Vision Ltd v. Commissioners of Customs and Excise* [1987] 3 CMLR 290; (1987) 3 BVC 596; [1987] VATTR 134 where it was held that it did not matter that it was not absolutely certain that the taxpayer would be able to operate a cable business. However, in *Park Commercial Developments plc v. Commissioners of Customs and Excise* [1990] 2 CMLR 746; (1990) 5 BVC 669 a taxpayer who floated a share issue to raise money to buy developed land was held not to be entitled to input tax credits as it was too remote from the proposed enterprise.

124. *The activities are considered to be commencement activities. (However to be eligible for an ABN the VJ Computing partnership must meet a further test of having a reasonable expectation of profit or gain. See paragraphs 364 to 390 and Example 49.) The activities have the character of those ordinarily undertaken to commence such an enterprise. Relevant factors include the nature of the business plan, the significant expenditure incurred in the tender process and Victoria and Jacques' track record and experience in the industry. It is irrelevant that the preparatory activities did not result in an ongoing enterprise. The partnership had to decide their eligibility to register for an ABN early in the tender process.*

Example 11 – activities not done in the course of commencement of an enterprise

125. *Yoko wonders whether she should establish a florist business in her neighbourhood. She discusses the idea with her friends and family. She buys some business magazines and a laptop computer with a software package that could be used to prepare accounts. Yoko also visits some florist shops while she is interstate on holidays. She then abandons the idea.*

126. *Yoko is not entitled to an ABN. An objective assessment of all the circumstances concludes that the activities are essentially private in character. In addition, the scale and nature of her activities and their remoteness from any enterprise supports the view that they are not commencement activities.*

Example 12 – establishment of a trust is not commencement activity

127. *Luke returns from overseas to establish a furniture manufacturing business. He undertakes some preliminary research and consults his advisers. He then receives advice that his business would be best run through a trust. His advisers prepare the trust deed and arrange the settlement of trust property for the creation of the trust.*

128. *The research, documentation and other activities that lead to the trust coming into existence are not activities done in the commencement of an enterprise carried on by the trust. This is because the trust cannot commence activities until it is in existence.*

Termination of an enterprise

129. Carrying on an enterprise includes doing anything in the course of the termination of the enterprise. An enterprise terminates when the activities related to that enterprise cease. Ordinarily, that occurs when all assets are disposed of or converted to another purpose or use and all obligations satisfied. In the course of terminating an enterprise, a number of obligations may need to be finalised. These include finalising accounts, paying creditors, repaying loans, cancelling licences and business registrations.

130. An enterprise is also considered to terminate where outstanding obligations cannot be satisfied and other activities have ceased.

131. Disposal of assets, in the context of the enterprise ceasing, includes the sale, scrapping, or other disposal of the asset. For example, an enterprise would cease where the underlying income producing property is sold and not replaced.

132. A change in purpose or use of all assets could result in the termination of an enterprise. A change could occur where an asset is no longer used by the entity in the enterprise and is instead used for private purposes.

133. If some assets continue to be held by the entity because they cannot be disposed of or converted to another use, then those assets must be worthless or of little value for the enterprise to be said to have terminated.

134. However, an entity is still entitled to an ABN where it has ended some activities that themselves would constitute a separate enterprise but it is still running at least one enterprise. This is because an entity is entitled to an ABN while it is carrying on an enterprise. The entity is also entitled to an ABN where the only activities performed are those that it does in terminating the enterprise, for example the sale of its business premises. Those activities are done in carrying on an enterprise.

135. The question of whether the activities are done in terminating the enterprise or at some later point and do not have a connection with the termination activities is one of fact and degree depending on the circumstances of each particular case.

Example 13 – an enterprise that has not terminated

136. *Joel, who has been farming cotton for a number of years, decides to retire, sell up everything and move to town. All assets are sold with the exception of a number of bales of cotton. Joel expects to sell the cotton at some future time and pays to have it stored in a commercial warehouse. The enterprise has not terminated until the cotton is sold or is determined to be worthless or of little value.*

Example 14 – an activity not in the course of the termination of an enterprise

137. *Assuming the same facts as Example 13, before Joel sells the bales of cotton he undertakes an overseas tour which takes in some farming areas in a number of countries. He goes on this tour after the farm is sold.*

138. *We do not consider that there is sufficient connection with the termination of Joel's cotton farming activities for the overseas tour to be 'in course of the termination of the enterprise'. This is because the last activity necessary to terminate the enterprise of cotton farming is to sell or otherwise dispose of the bales of cotton. The overseas trip is not connected with this process.*

What is an enterprise for ABN purposes?

139. Section 38 defines enterprise. It provides that an enterprise is an activity, or a series of activities, done:

(a) in the form of a business; or

(b) in the form of an adventure or concern in the nature of trade; or

(c) on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property; or

(d) by the trustee of a fund that is covered by, or by an authority or institution that is covered by, Subdivision 30-B of the ITAA 1997 and to which deductible gifts can be made; or

(e) by a charitable institution or by a trustee of a charitable fund; or

(f) by a religious institution; or

(g) by the Commonwealth, a State or a Territory, or by a body corporate, or corporation sole, established for a public purpose by or under a law of the Commonwealth, a State or a Territory.

140. Some activities are specifically excluded from being an enterprise. These are discussed in paragraphs 315 to 393.

141. Enterprise is an important concept for both ABN and GST. It is a requirement that in order to register for ABN and/or for GST purposes, the entity (unless specifically excluded) must carry on an enterprise.

Activity, or series of activities

142. The ABN Act does not define an 'activity, or series of activities'. In the absence of a statutory definition these terms take their ordinary meaning. An activity is essentially an act or series of acts that an entity does. Entities can undertake a wide range of activities with varying degrees of interrelationship. The meaning of the term 'activity, or series of activities' for an entity can range from a single undertaking including a single act to groups of related activities or to the entire operations of the entity.

143. For an entity that has to carry on an enterprise to be entitled to an ABN, it is necessary to identify one activity or a series of activities that amount to an enterprise. If an entity carries on a number of activities, only one of those activities need constitute an enterprise in order for the entity to be entitled to an ABN. However, not every activity or series of activities that an entity carries on would by themselves amount to an enterprise or be activities carried on by them in an enterprise. Some activities will be specifically excluded while others may not fall within the definition of enterprise.

144. An entity is ordinarily only entitled to **one** ABN even though the activities or series of activities it conducts may amount to several separate enterprises. It is the entity and not the enterprise that is entitled to an ABN. However there are two exceptions to this rule. The first exception is if a part of the entity is taken to be an entity in itself. For example a non-profit sub-entity is part of a larger entity. A non-profit sub-entity is, for the purposes of the ABN Act, taken to be an entity and is taken to carry on an enterprise.[42] For further discussion on non-profit sub-entities, see paragraphs 84 to 86.

145. The second exception is if the entity is a legal person that acts in different roles or capacities. In each of these roles or capacities, the person is, or is taken to be, a different entity under subsection 37(3). The entity may be entitled to hold an ABN in each of these roles or capacities. For example an individual may operate a business as a sole trader and also be a trustee of a trust. For a further discussion of this issue, see paragraphs 76 to 81.

Example 15 – entity with a new enterprise, but one ABN

146. *Rhys is a sole trader. He operates a grocery store and an import/export business. He has applied for and been allocated one ABN because he is carrying on an enterprise. Sometime later Rhys sells his grocery store and his import/export business as he is going on an extended overseas holiday. He advises the Tax Office of the change. The Tax Office cancels his ABN as he is no longer carrying on an enterprise.*

147. *Rhys returns from his holiday and purchases a newsagency. He advises the Tax Office of his new enterprise and his original ABN is reactivated. This is because it is Rhys (the entity) that is entitled to an ABN not the enterprise he carries on.*

148. Whether or not an activity, or series of activities, amounts to an enterprise is a question of fact and degree having regard to all of the circumstances of the case.

[42] Section 5.

149. It is important that the relevant activity or series of activities are identified in order to determine whether an enterprise is being carried on. This is because one activity may not amount to an enterprise but that activity taken into account with other activities may form an enterprise. All activities need to be taken into account including activities from the commencement to the termination of the enterprise. For further information on commencement and termination activities, see paragraphs 110 to 138.

Example 16 – activities associated with the sale of real property

150. *Giovanna sells a block of units. Has she carried on an enterprise?*

151. *Giovanna carried out a series of activities that led to the sale of the units. These activities included:*

- *assessing the economic viability of the project;*
- *purchasing the land;*
- *engaging an architect;*
- *constructing a block of units on the land;*
- *engaging a real estate agent and auctioneer; and*
- *arranging for the sale of the units at auction.*

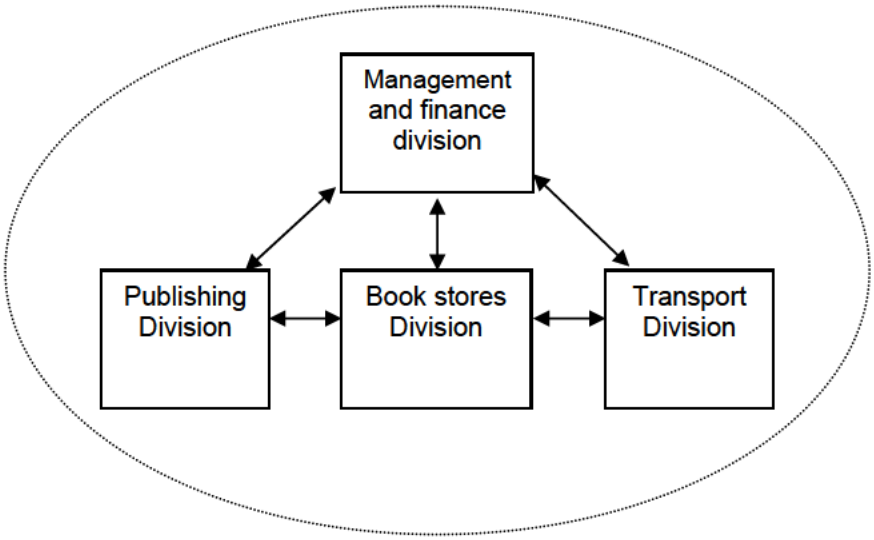
152. *An activity such as the selling of an asset may not of itself amount to an enterprise but account should also be taken of the other activities leading up to the sale to determine if Giovanna carried on an enterprise.*

153. If there are a number of separate activities, the entity may be carrying on an enterprise which includes activities that by themselves could amount to smaller enterprises. If that is the case, the following elements are indicators that part of an enterprise may itself be an enterprise:

- a degree of autonomy;
- a separate management structure;
- a system of internal user charging;
- a separate budget; and
- agreements with internal service providers or external users.

Example 17 – overall enterprise

154. *The Newbook Partnership carries on activities in different divisions of publishing books, owning bookstores and running transport vehicles. There are links between the different divisions. Newbook transports its books for sale using its own vehicles and its books are for sale in its bookstores. These divisions in turn are controlled by a central management and finance division.*



155. *The Newbook Partnership is carrying on an enterprise of publishing and selling books. Different parts of the large enterprise of publishing and selling books may amount to an enterprise in their own right. For example the publishing division may be an enterprise or a single bookstore may be enterprise. For ABN purposes it is only necessary to identify one enterprise and Newbook Partnership can only have one ABN.*

Example 18 – an activity that is an enterprise

156. *Doctor Jones is a medical practitioner who runs her own profitable practice. She also has a primary production activity that is a hobby that she conducts as an individual.*

157. *Doctor Jones is entitled to an ABN in respect of the medical practice as the activities amount to an enterprise.*

158. *The hobby activity, which is a separate and distinct activity from the practice, is not an enterprise. It is specifically excluded from the definition of enterprise by paragraph 38(2)(b). For a discussion of exclusions from the definition of enterprise, see paragraphs 315 to 393.*

In the form of a business

159. An enterprise includes an activity, or series of activities, done in the form of a business.[43] The phrase 'in the form of a business' is very broad and has as its foundation the longstanding concept of a business. The wider phrase has not been considered by Australian courts.[44] The definition clearly includes a business and the use of the phrase 'in the form of' indicates a wider meaning than the word 'business' on its own. We consider that not all of the main features of a business such as a capacity to earn and distribute profits need to be present before an activity has the form of a business.[45] For example, smaller superannuation funds that arguably are not carrying on a business were however intended to be covered by the original definition of enterprise (that is, 'in the form of a business') and this was put beyond doubt by an amendment to section 5.[46]

160. In New Zealand the term 'taxable activity' in the *Goods and Services Tax Act 1985* (NZ) is an equivalent concept to 'enterprise' for the purposes of registration. 'Taxable activity' is defined broadly in section 6 of that Act and includes:

> ...any such activity carried on in the form of a business, trade, manufacture, profession, vocation, association, or club:

161. A White Paper advising of proposals for the administration of a new system of goods and services tax was presented to the New Zealand House of Representatives in March 1985.[47] The paper provides an explanation of what was envisaged to come within the term 'taxable activities'. It stated that:

> 25. To determine who will be registered persons liable to account for tax on supplies of goods and services, it is proposed to use a form of business test. To indicate that the concept is wider than business in its traditional sense, and to avoid confusion with the use of that term in the Income Tax Act, it will, for the purposes of the GST, be termed a taxable activity.

162. As well, in *Case P73* 14 NZTC 4489 at 4,493 Barber DJ stated that:

> I accept that a taxable activity can be something less in degree of activity than a business by virtue of the definition of 'taxable activity' in sec GST 6(1)(a).

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[43] Paragraph 38(1)(a).
[44] See also *Body Corporate,Villa Edgewater Cts 23092 v. FC of T* 2004 ATC 2056; 55 ATR 1162.
[45] However, while a profit making purpose would normally be a feature of a business this is not necessarily always the case. See *The Queen v. Trade Practices Tribunal: ex parte St George County Council* (1973) 130 CLR 533; (1974) 48 ALJR 26; (1974) 2 ALR 371.
[46] Paragraph 11.2 of the Revised Explanatory Memorandum to the Indirect Tax Legislation Bill 2000.
[47] Proposals for the Administration of the Goods and Services Tax, presented to the New Zealand House of Representatives by leave, March 1985.

163. As outlined above, the phrase 'in the form of a business' is very broad and requires an understanding of the longstanding concept of a business. Section 41 defines 'business' to include:

> any profession, trade, employment, vocation or calling, but does not include occupation as an employee.

164. The definition is the same as the definition of 'business' in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936), section 995-1 of the ITAA 1997, and section 195-1 of the GST Act.

165. As the definition of 'business' is identical in the ABN Act and ITAA, it can be interpreted in a similar way. The meaning of 'business' is considered in Taxation Ruling TR 97/11. Although TR 97/11 deals with carrying on a primary production business, the principles discussed in that Ruling apply to any business.

Indicators of a business

166. To determine whether an activity, or series of activities, amounts to a business, the activity needs to be considered against the indicators of a business established by case law.

167. TR 97/11 discusses the main indicators of carrying on a business. Based on that discussion some indicators are:

- a significant commercial activity;
- a purpose and intention of the taxpayer to engage in commercial activity;
- an intention to make a profit from the activity;
- the activity is or will be profitable;
- the recurrent or regular nature of the activity;
- the activity is carried on in a similar manner to that of other businesses in the same or similar trade;
- activity is systematic, organised and carried on in a businesslike manner and records are kept;
- the activities are of a reasonable size and scale;
- a business plan exists;
- commercial sales of product; and
- the entity has relevant knowledge or skill.

168. There is no single test to determine whether a business is being carried on. Paragraph 12 of TR 97/11 states that 'whilst each case might turn on its own particular facts, the determination of the question is generally the result of a process of weighing all the relevant indicators'. TR 97/11 can be referred to for a fuller discussion on whether a particular activity constitutes the carrying on of a business.[48]

Small scale activities

169. An enterprise can be conducted in a small way.[49] The size or scale of the activities, although important, is not the sole test of whether they amount to an enterprise. The larger the scale of the activities the more likely it is that they are an enterprise. However, if the activities are carried on in a small way, other indicators become more important in determining whether they amount to an enterprise.

170. It is important to note that activities are excluded from the definition of enterprise if they are carried on by an individual or a partnership (all or most of the members of which are individuals) without a reasonable expectation of profit or gain. Further, activities are also excluded if they are done as a private recreational pursuit or hobby. For a further discussion of the exclusions, see paragraphs 315 to 393.

Example 19 – regular activities done on a small scale that amount to an enterprise

171. *Omar is a self funded retiree. To keep active he has agreed to clean windows on a regular basis at some local shops. He has purchased his own window cleaning equipment. Over the course of a year he expects to earn approximately $3,500 and incur $800 in expenses. The shopkeepers have requested an ABN from Omar as he is not an employee.*

172. *Omar is entitled to an ABN. Although his activities are on a small scale, they are conducted in a businesslike manner. Omar has an expectation of making a profit and the activities are regular and repetitive. Further, the window cleaning activities are not a private recreational pursuit or hobby.*

[48] See also Taxation Ruling TR 2003/4 Income tax: boat hire arrangements, and Taxation Ruling TR 2005/1 Income tax: carrying on business as a professional artist, which consider the issue of carrying on a business in a particular context and can be referred to for further guidance.

[49] See paragraph 77 of TR 97/11 which explains that a business may be carried out in a small way.

Example 20 – one-off activities done on a small scale that amount to an enterprise

173. *Jenna is a maths lecturer at university. She is engaged under contract to edit a maths text book for a publisher. The contract is to deliver a result for a set price of $3,000. Jenna is not an employee of the publisher, nor is she under their direction or control. Only minimal expenses are incurred.*

174. *Jenna is entitled to an ABN. As explained in paragraph 163 the term 'business' has a wide meaning and 'includes any profession, trade, employment, vocation or calling'. In this case Jenna's activities are associated with her profession as a maths lecturer. Also, the activity has some other indicators of a business and she has an expectation of making a profit or gain. It is not done as a private recreational pursuit or hobby.*

Activities done on a small scale that do not amount to an enterprise

175. There are a range of activities that are of such a small scale that they do not amount to an enterprise.[50] As explained in paragraph 169, where activities are conducted on a small scale other indicators become more important in deciding whether they amount to an enterprise. While it is always a question of fact and degree in each particular case, it would be difficult to conclude that activities are an enterprise where they are of a very small size and scale, are carried on in an ad hoc manner, and there is little repetition or regularity.

Example 21 – ad hoc small scale activities that do not amount to an enterprise

176. *Helena lives on a disability pension. As she is fluent in Polish she occasionally translates at a local area health service, for which she receives a small payment. She only performs this service occasionally, as required. Her payments total no more than $300 in any one year.*

177. *Helena is not entitled to an ABN. The scale and nature of her activities are not sufficient to be an enterprise. They are carried on in a very small way and in an ad hoc manner.*

Example 22 – regular small scale activities that do not amount to an enterprise

178. *Geoffrey is a retired electrician who receives the Age Pension. He lives close to the local community hall. In summer he helps out the hall committee by mowing the grounds of the hall and doing light gardening. For these services he receives $650 per year.*

[50] This Ruling does not consider the income tax treatment of such payments.

179. *Geoffrey is not entitled to an ABN. Even though there is some regularity to his activities they are carried on in a very small way. The nature and scale of his activities do not amount to an enterprise.*

Activities of holding companies and other holding entities

180. Even though Corporations Act companies are automatically entitled to an ABN it is relevant to consider whether entities that have the same function as a holding company carry on an enterprise. The discussion may also be useful guidance for holding companies where it is necessary to be carrying on an enterprise to register for GST.

181. An entity that only:

- holds membership interests in other entities and is able to control those entities by virtue of that interest; and/or
- derives income from other entities because it holds membership interests or other securities in those entities,

engages in the same sort of activities as a holding company. There are a number of Australian and overseas cases which touch on the issue of whether such a company is carrying on a business or enterprise. They each turn on their own facts, but in the course of their judgments the courts have discussed the issue of whether the company carries on a business or enterprise. Guidance may be found in those discussions.

182. In *Esquire Nominees Ltd (Trustee of Manolas Trust) v. Federal Commissioner of Taxation*[51] Menzies J, while not being required to decide upon the issue, made the following observation:

> A dividend is payable out of the profits of the company paying it, and, in the case of a holding company, this profit-making business may merely be the receipt of a dividend from another company. It is, for instance, well known that Utah Mining Australia Ltd is presently a holding company and not an operating company. The fact, however, that it simply holds shares in Utah Development Co., an operating company from which it receives dividends which it distributes to its shareholders, does not signify that it does not itself carry on a profit-making business in Australia.

183. In *FC of T v. Total Holdings (Australia) Pty Ltd*[52] the holding company did more than passively own the shares in its subsidiary, it was also involved in borrowing and on-lending funds to its subsidiary. In this case the Commissioner conceded that the activities of the holding company constituted carrying on a business.

[51] (1973) 129 CLR 177 at 221; 73 ATC 4114 at 4123; 4 ATR 75 at 85.
[52] 79 ATC 4279; 9 ATR 885.

184. In *FC of T v. Email Limited*[53] in a joint judgment Hill, Drummond and Sackville JJ stated:

> In arriving at his conclusion the learned primary Judge found that Email was at all material times carrying on a business which his Honour described as 'acting as the holding company of a group of companies'. It was not a merely passive holding company doing nothing but receiving and distributing dividends. Rather it was active in the administration of the affairs of its subsidiaries in various ways. In particular it provided services to its subsidiaries such as management of cash flows, currency fluctuations and interest rate exposure, legal, taxation, internal auditing and accounting services, training, information technology, recruitment and human resources. It provided guarantees for borrowing undertaken by subsidiaries and provided warranties and indemnities on sales of shares or businesses of subsidiaries.

185. In the case of *Spassked Pty Ltd v. Commissioner of Taxation*[54] Hill J and Lander J (Gyles J in agreement) stated:

> It can be accepted that a holding company can itself carry on a business, which may be referred to as the business of a holding company: *Brookton Co-operative Society Ltd v. FCT* (1981) 147 CLR 441 at 469-470; 11 ATR 880 at 898-89; 81 ATC 4346 at 4363. The taxpayer in Total Holdings on the facts of that case was held to carry on such a business. The cases sometimes distinguish between a holding company which is a passive investor, that is to say it does no more than acquire and hold shares in a subsidiary or subsidiary companies and a company the activities of which are properly characterised as a business. That distinction is to be found not only in the context of income tax, but in the context of value added tax where liability turns effectively on whether the taxpayer is carrying on an economic activity such as a business, see for example, *Wellcome Trust Limited* [1996] 2 CMLR 909, *Harnas & Helm CV v. Staatssecretaris van Financien* [1997] 1 CMLR 649. Generally a company which may be referred to as carrying on business as a holding company will be seen to be actively involved in the management of the affairs of its subsidiaries. Active management is not, however, a necessary factual circumstance to permit there to be a finding of business. In *Carapark Holdings Ltd v. FCT* (1967) 115 CLR 653; 14 ATD 402 the taxpayer which was found to be carrying on a business lent money to its subsidiaries and performed 'specific management functions for the group as a whole' which seem to have been primarily, at least, secretarial, budgeting and financial matters (see at CLR 659). An example where an intermediate holding company was held to be carrying on a business is to be found in *FCT v. E A Marr & Sons* (Sales) Ltd (1984) 2 FCR 326; 15 ATR 879; 84 ATC 4580.[55]

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[53] See paragraph 8 in 99 ATC 4868; 42 ATR 698; [1999] FCA 1177.
[54] See paragraph 84 in [2003] FCAFC 282; (2003) 203 ALR 515; 2003 ATC 5099; 54 ATR 546.
[55] See also *Spassked Pty Ltd and Ors v. Federal Commissioner of Taxation* (No. 5) [2003] FCA 84; 2003 ATC 4184; (2003) 52 ATR 337; (2003) 197 ALR 553 at first instance, for a useful summary of cases discussing whether a holding company is carrying on a business.

186. The following two overseas VAT cases may assist even though they consider 'economic activity' rather than 'enterprise'. *Polysar Investments Netherlands BV v. Inspecteur der Invoerrechten en Accijnzen, Arnhem* (Case C-60/90) [1993] BVC 88 considered the activities of a Dutch holding company and whether they constituted carrying out any 'economic activity'. It was found that Polysar's activities did not constitute 'economic activities' and there was discussion of other sorts of activities that may satisfy that test.

187. The second VAT case *is Floridienne SA & Berginvest SA v. Belgian State* (Case C-142/99) [2001] BVC 76. Both companies were holding companies (within a larger group) supplying administrative, accounting and information technology services to their subsidiaries. The main question was the form of their 'economic activity' and the connection between that activity and the dividends and interest they received from subsidiaries. The judgment analysed the passive nature of dividend income from shares. Broadly, it was found that the passive holding of shares did not amount to 'economic activity'. Australian courts may be guided by this approach for ABN and GST purposes in determining whether an entity carries on an enterprise.

188. While these cases may give guidance as to whether the activities of an entity other than a holding company (as companies are entitled to an ABN regardless of activities) are sufficient for it to be considered to be carrying on an enterprise, deciding that question is ultimately a matter of fact having regard to the scale of the activities undertaken, the form of operation of the corporate group and the commercial context in which it occurs.

Example 23 – provision of services by a holding entity that is an enterprise

189. *A unit trust is a holding entity for three wholly owned companies that conduct enterprises in Australia. The trustee of the trust involves itself directly and indirectly in the management of the companies. The trustee also provides accounting services to the companies without prejudice to its rights as a shareholder in the companies.*

190. *No fees are received by the trust for the services provided to the subsidiaries which if provided to an arm's length party would have been capable of being charged for.*

191. *Although no fees are received, the activities still have a commercial basis underlying them. The trust's activities are done in the form of a business. The trustee is carrying on an enterprise by providing management and accounting services to the group and is entitled to an ABN.*

Example 24 – holding entity not carrying on an enterprise

192. *B trust is a holding entity for three companies. The trustee passively holds all shares, is not involved in the running of the companies and provides no services to the group. There are no headquarters of the group but each company provides its own business premises. The trustee for B trust distributes any dividends received to the unit holders. The trustee's activities are not done in the form of a business and it does not carry on an enterprise.*

Example 25 – investment activities that are not an enterprise

193. *A trust is set up in respect of 12,000 blue chip shares and term deposits of $100,000 from which dividends and interest are received. The total portfolio is worth $350,000 to be held for the benefit of the trustee's children and grandchildren. The trustee incurs expenses including bank fees, accountancy fees and brokerage associated with the management of the portfolio. The net income of the trust is distributed to the beneficiaries of the trust. The shares are held for investment purposes.*

194. *Once or twice a year small parcels of underperforming shares in one or two of the companies in the portfolio are sold and the proceeds reinvested in other shares or deposits. The trustee has no other activities.*

195. *The trustee for the trust is not entitled to an ABN. The activities undertaken are insufficient to amount to an enterprise.*[56]

Activities of head companies of consolidated groups

196. For income tax purposes, special rules in Part 3-90 of the ITAA 1997 allow a wholly-owned group with a head company to form a consolidated group (see paragraph 93). A reference to a head company includes a reference to a head company of a multiple entry consolidated (MEC) group, or a provisional head company of a MEC group.

197. A corporate limited partnership as defined in section 94D of the ITAA 1936 can also elect to consolidate a group as it is treated as a company for income tax purposes. The activities of that partnership as a head company need to be considered to ascertain whether the corporate limited partnership as a head company does activities in the form of a business entitling it to an ABN. This is because a corporate limited partnership is not treated as a Corporations Act company for the purposes of the ABN Act.

[56] This may be contrasted with the situation in *London Australia Investment Co. Ltd. v. Federal Commissioner of Taxation* (1977) 51 ALJR 831; (1977) 15 ALR 203; 77 ATC 4398; (1977) 7 ATR 757; (1977) 138 CLR 106.

198. The choice to consolidate places a number of responsibilities on the head company. These responsibilities may include:

- managing the transfer and utilisation of tax attributes, for example losses, franking credits and foreign tax credits;[57]
- effectively maintaining a common tax accounting period for all its member entities;
- deciding whether to apply the transitional concessions for assets, losses and foreign tax credits available to groups consolidating during the transitional period (1 July 2002 to 30 June 2004);[58]
- notifying the Tax Office of its decision to consolidate;[59]
- determining the group's annual income tax liabilities and lodging a single income tax return;[60]
- managing any ongoing income tax liabilities or income tax obligations and supplying income tax information to the Tax Office when required;[61]
- ensuring that any necessary valuations are obtained for working out the tax cost of assets[62] and to assist in calculating how much of a transferred loss can be utilised;[63]
- calculating, reporting and paying of PAYG instalments;[64]
- notifying the Tax Office about certain events affecting a consolidated group including the entry and exit of subsidiaries;[65]
- managing and implementing tax sharing arrangements;[66]
- seeking funding from subsidiary members through a funding agreement; and
- substantial stewardship duties.

[57] Section 701-1, Division 707, Division 709 and Division 717 of the ITAA 1997.
[58] Divisions 701, 707 and 717 of the *Income Tax (Transitional Provisions) Act 1997.*
[59] Subsection 703-50(1) and 719-50 of the ITAA 1997.
[60] Section 701-1 of the ITAA 1997.
[61] Section 701-1 of the ITAA 1997.
[62] Division 705 of the ITAA 1997.
[63] Section 707-320 of the ITAA 1997.
[64] Section 45-710 of Part 2-10 of Schedule 1 of the TAA 1953.
[65] Sections 703-60 and 719-80 of the ITAA 1997.
[66] Division 721 of the ITAA 1997.

199. While a head company is required by law to undertake a number of activities, there is some doubt as to whether complying with a statutory scheme is of itself sufficient for a company to be considered to be carrying on an enterprise. For example, if a holding company simply prepares a set of consolidated accounts as required by the Australian Securities and Investment Commission (ASIC), that alone is not sufficient for it to be considered to be carrying on an enterprise. Ordinarily it is expected that the regulatory/compliance activities and the general administrative responsibilities of a head company are more extensive because of the particular nature of the head company's operations. These activities are carried out in a businesslike manner and may constitute the carrying on of an enterprise.

200. There are varying degrees to which head companies may carry on activities in relation to their membership in group entities. The extent of those activities will determine whether a head company is carrying on an enterprise. The cases outlined in paragraphs 182 to 187 are equally relevant to the consideration of whether the head company of a consolidated group is carrying on an enterprise.

201. While for the purposes of ABN it is not relevant to consider whether a company is carrying on activities in the form of a business, these cases give guidance as to whether the activities of a corporate limited partnership as a head company are sufficient for them to be in the form of a business.

202. The size of the consolidated group is not determinative. The activities of the head company are the determinative factor. Therefore, if the head company is 'active in the administration of the affairs of its subsidiary members in various ways'[67] and not simply undertaking a bare minimum of activities (for instance it has business premises and provides some services for the group) that would lead to the conclusion that the head company (the corporate limited partnership) is carrying on activities in the form of a business.

203. In determining if an enterprise is carried on it would not matter if the head company engaged external accounting, legal, valuation or other professionals to assist it to carry out its additional activities as long as it took ultimate responsibility for matters such as oversight of their work and payment for their services.

204. Ordinarily the role in the consolidated group and the substantial stewardship duties of a head company would lead to a conclusion that a head company is carrying on an enterprise in the form of a business.

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[67] *Federal Commissioner of Taxation v. Email Limited* 99 ATC 4868; (1999) 42 ATR 698; [1999] FCA 1177, at paragraph 8.

Example 26 – head company carrying on an enterprise

205. *Corporate Limited Partnership No 2 (CLP) and its three wholly-owned subsidiaries form a consolidated group. Each subsidiary is carrying on an enterprise. CLP notifies the Tax Office of the formation of the consolidated group. It obtains any necessary valuations to set the tax cost of the assets involved (where the transitional provisions of adopting existing tax costs have not been utilised, and also for loss utilisation purposes) provides the group's information technology (IT) needs, maintains consolidated accounts and prepares and lodges the income tax return of the consolidated group from those accounts.*

206. *CLP is actively engaged in the administration of its subsidiaries, its activities are done in the form of a business and it is consequently carrying on an enterprise.*

Mutual organisations

207. Organisations or associations whose receipts consist entirely of mutual receipts (that is receipts only from members) have been held not to be carrying on a business but rather carrying on activities that are similar to business activities. In this context, there is an inability to profit because the objective or outcome is not profits for the entity, but rather a desire to cover expenditure and to return any surplus directly or indirectly, sooner or later, to the members.[68] The trading activities of these organisations may amount to activities in the form of a business.

208. Subsection 38(2A) makes it clear that an entity may carry on an enterprise even though it can only make supplies to members of the entity. An identical provision can be found in subsection 9-20(3) of the GST Act. Subsection 38(2A) is also relevant to non-profit clubs and associations.

Non-profit clubs and associations

209. Non-profit clubs and associations are similar to mutual organisations in that their activities may involve trading activities (for example bar facilities of a sporting club) and provision of services to members (and perhaps non-members). The objective or outcome is not to derive profits for distribution but merely to cover expenditure and apply any surplus directly or indirectly, sooner or later, to the benefit of the membership as a whole.

[68] *Fletcher v. Income Tax Commissioner* [1971] 3 All ER 1185.

210. A non-profit club or association might, therefore, conduct activities that are in the form of a business. What is relevant is the nature of the businesslike activities of the organisation, rather than its non-profit status or who it trades with. However, activities may be taken to be an enterprise under one of the other paragraphs of section 38. For example an organisation may be a charitable institution.

Example 27 – activities of a club that amount to an enterprise

211. *A football club has 200 members, most of whom play for the club.*

212. *Membership fees amount to $10,000 per annum. The club attempts to cover its expenditure by running a bar at its clubhouse and this has an annual turnover of $30,000 with a net profit of just over $8,000. The bar is staffed on a voluntary basis and, in addition to beer, wine and spirits, sells some finger food. The club maintains records of its income and expenditure.*

213. *The club's activities are done in a businesslike manner.*

214. *The club is entitled to an ABN on the basis that it is:*

- *an unincorporated association of persons; and*
- *carrying on an enterprise as the activities are done in the form of a business.*

Example 28 – activities of a club that do not amount to an enterprise

215. *A backgammon club has 30 members. The club has rules which the members agree to be bound by.*

216. *As this is a small club the members decided not to pay membership subscriptions. This is because the club's needs can be met by the individual members. Meetings are held at various members' houses to which members bring a light supper. Members supply their own boards. News and items of interest are advised at their meetings and also posted on their website.*

217. *The club is not entitled to an ABN. It is an unincorporated association but the activities done by the members for the club are not carried on in a businesslike manner. The activities are not done in the form of a business and as such there is no enterprise being carried on.*

A body corporate under strata title legislation

218. It was decided in *Body Corporate, Villa Edgewater Cts 23092 v. FC of T* 2004 ATC 2056; 55 ATR 1162 (*Villa Edgewater case*) that a body corporate was carrying on an enterprise as its activities were done in a businesslike manner. The Tribunal observed that an enterprise may still be conducted even though an entity only deals with its own membership.[69] In determining whether an enterprise was being carried out the Tribunal found that it did not matter that many of the activities were provided for in statute and regulations.[70]

219. In the *Villa Edgewater case* the entity was a body corporate registered under a State Act. Its members were the owners of lots in an apartment complex. The Tribunal found that the body corporate provided services for its members and the members made contributions connected with the services. It prepared a budget and spent money. The body corporate had the capacity to enter into contracts with employees and contractors in its own right. It had a managing committee and rules of association and conducted meetings of members to approve certain activities. It had statutory responsibilities with respect to the common areas that it must discharge.[71]

In the form of an adventure or concern in the nature of trade

220. There is no definition of 'in the form of an adventure or concern in the nature of trade' in the ABN Act. However the concept of 'an adventure or concern in the nature of trade' has arisen in the context of Australian and United Kingdom (UK) revenue law. While UK law is of assistance in understanding this concept, it is considered that Australian revenue law and judicial decisions should be the starting point to give it meaning.

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[69] This is the effect of subsection 38(2A) [9-20(3) of the GST Act], see *Body Corporate, Villa Edgewater Cts 23092 v. FC of T* 2004 ATC 2056; 55 ATR 1162 at paragraph 36.
[70] *Body Corporate, Villa Edgewater Cts 23092 v. FC of T* 2004 ATC 2056; 55 ATR 1162 at paragraph 41.
[71] For some further general information concerning bodies corporate see Taxation Ruling IT 2505 Income Tax: bodies corporate constituted under strata title legislation.

221. In Australia, there are specific income tax provisions that include in assessable income the profit made from an isolated transaction. These have been developed from earlier provisions that ensured that 'profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale, or from the carrying on or carrying out of any profit-making undertaking or scheme' was included in a taxpayer's assessable income.[72]

222. Prior to their enactment there was judicial recognition that the profit derived from the sale of property acquired in an isolated transaction for the purpose of profit making by sale was of a revenue nature. Justice Isaacs stated in *Blockey v. FCT* (1923) 31 CLR 503 at pages 508-509; (1923) 29 ALR 79 at 81:

> But if a man, even in a single instance, risks capital in a commercial venture – say, in the purchase of a cargo of sugar or a flock of sheep – for the purpose of profit making by resale and makes profit accordingly, I do not for one moment mean to say he has not received 'income' which is taxable. I intimated during the argument that this is possible; and I leave it open.

223. The term 'profit making undertaking or scheme' like the term 'an adventure or concern in the nature of trade' concerns transactions of a commercial nature which are entered into for profit-making, but are not part of the activities of an on-going business. Both terms require the features of a business deal, see *McClelland v. Federal Commissioner of Taxation*, in which Lord Donovan, delivering the opinion of the majority, said:[73]

> It seems to their Lordships that an 'undertaking or scheme' to produce this result must – at any rate where the transaction is one of acquisition and resale – exhibit features which give it the character of a business deal. It is true that the word 'business' does not appear in the section; but given the premise that the profit produced has to be income in its character their Lordships think the notion of business is implicit in the words 'undertaking or scheme'.

[72] The legislative provisions were paragraph 26(a) and subsection 25A(1) of the ITAA 1936. Paragraph 26(a) of the ITAA 1936 was replaced by section 25A of the ITAA 1936 for sales of property after 23 August 1983. Subsection 25A(1) was a re-enactment of paragraph 26(a). Section 25A of the ITAA 1936 only applies to acquisitions of property up to 19 September 1985. Sales of property acquired on or after that date may be considered under the capital gains provisions of the ITAA 1997. Section 15-15 of the ITAA 1997 which incorporates part of section 25A can also apply to sales of property. Subsection 15-15(1) includes in assessable income profit arising from the carrying on or carrying out of a profit-making undertaking or plan. However section 15-15 does not apply if the profit-making undertaking or plan involves the sale of property which was acquired on or after 20 September 1985. In addition section 15-15 does not apply if the profit is assessable as ordinary income under section 6-5 of the ITAA 1997.

[73] (1970) 120 CLR 487 at 495; 70 ATC 4115 at 4,120; 2 ATR 21 at 26-27.

224. A similar view was expressed by Foster J in *AB v. FC of T* 97 ATC 4945 at 4961; 37 ATR 225 at 242 where he said:

> See also the discussion in R W Parsons, Income Taxation in Australia, The Law Book Company Limited, Sydney, 1985, p 159-63 in which the learned author expresses the view that 'an adventure in the nature of trade' is equivalent to an 'isolated business venture' as opposed to a continuing business. I respectfully agree. I also accept that such a transaction must 'exhibit features which give it the character of a business deal' (McClelland v. FC T (1970) 120 CLR 487 at 495; 2 ATR 21 at 26; 70 ATC 4115 at 4120).[74]

225. The commercial nature of an adventure or concern in the nature of trade can also be shown from the following passage by Gibbs J in *Federal Commissioner of Taxation v. NF Williams*:[75]

> Turning now to the Commissioner's argument that the case comes within s 25(1) of the Act, it seems to me that the co-owners did no more than realise their asset in an ordinary and prudent way. There are no circumstances that could enable it to be said that in so doing they carried on a business or engaged in an adventure in the nature of trade. The Commissioner placed some reliance upon the decision of the House of Lords in *Edwards (Inspector of Taxes) v. Bairstow*, [1956] AC 14; [1955] 3 All ER 48. That case shows that the fact that a transaction is an isolated one does not necessarily prevent it from being an adventure in the nature of trade, but it has otherwise little bearing on the present question. There the taxpayers bought machinery with the intention, not to use or hold it, but to resell it quickly and make a profit on the deal (see at [1956] AC, pp. 36-37; [1955] 3 All ER, p. 58). The transaction was a commercial one, and nothing but a commercial one, from beginning to end. The case is thus quite distinguishable from the present, where it is impossible to say that the taxpayer began an adventure in the nature of trade when she received her interest in the land. The proceeds which the taxpayer derived from the sale were not income within the ordinary understanding of the term.

226. Income Tax Ruling TR 92/3 sets out our views of the general principles and factors that have been considered in determining whether an isolated transaction is of a revenue nature.

227. The meaning of the phrase, 'in the form of an adventure or concern in the nature of trade'[76] has at its foundation the concept of 'an adventure or concern in the nature of trade' which is discussed above.

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[74] Although the decision in *AB v. FC of T* was later successfully appealed in the Full Federal Court in the case of *Glennan v. FC of T* 99 ATC 4467; 41 ATR 413 this analysis of the relevant law was not considered in the appeal.

[75] 72 ATC 4188 at 4195 to 4196; (1972) 46 ALJR 611 at 616; (1972) 3 ATR 283 at 292; (1972) 127 CLR 226 at 250.

[76] Paragraph 38(1)(b).

228. We do not believe that, in any practical sense, the phrase 'in the form of an adventure or concern in the nature of trade' is wider than 'an adventure or concern in the nature of trade'. The underlying concept of an adventure or concern in the nature of trade does not logically lend itself, in any meaningful way, to being broadened. An activity is either an adventure or concern in the nature of trade or it is not.

Characteristics of trade, including the 'badges of trade'

229. Trade takes its ordinary meaning. This term was described by Bowen CJ in *Re Ku-ring-gai Co-operative Building Society (No. 12) Ltd* as meaning:[77]

> The word 'trade' is used with its accepted English meaning: traffic by way of sale of exchange or commercial dealing (*Commissioners of Taxation v. Kirk* (1900) AC 588, at p 592 per Lord Davey; *W. & A. McArthur Ltd. v. State of Queensland* (1920) 28 CLR 530). The commercial character of trade was mentioned more recently by Lord Reid in *Ransom v. Higgs* (1974) 1 WLR 1594. His Lordship there said: 'As an ordinary word in the English language 'trade' has or has had a variety of meanings or shades of meaning. Leaving aside obsolete or rare usage it is sometimes used to denote any mercantile operation but is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services (1974) 1 WLR, at p 1600'. Moreover, the word covers intangibles, such as banking transactions, as well as the movement of goods and persons, for historically its use has been founded upon the elements of use, regularity and course of conduct (*Bank of New South Wales v. Commonwealth* (1948) 76 CLR 1, at p 381).

230. An adventure or concern in the nature of trade includes a commercial activity that does not amount to a business but which has the characteristics of a business deal. Such transactions are of a revenue nature. However, the sale of the family home, car and other private assets are not, in the absence of other factors, adventures or concerns in the nature of trade. The fact that the asset is sold at a profit does not, of itself, result in the activity being commercial in nature.

231. The (Radcliffe) Royal Commission on the Taxation of Profits and Income (UK) in 1954 identified six badges or identifying features of trade. The United Kingdom courts have seen the 'badges of trade' as providing 'common sense guidance'[78] in reaching a conclusion on such matters.

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[77] (1978) 36 FLR 134 at 139; (1978) 22 ALR 621 at 625.
[78] For example, see *Marson (Inspector of Taxes) v. Morton* [1986] 1 WLR 1343; [1986] STC 463; 59 TC 381.

232. The badges of trade have also been referred to by the High Court in *FCT v. Myer Emporium Ltd* [79]and more recently by the Full Federal Court in the decision in *Puzey v. Federal Commissioner of Taxation*.[80]

The subject matter of realisation

233. This badge of trade considers the form and the quantity of property acquired. If the property provides either an income or personal enjoyment to the owner it is more likely to be an investment than a trading asset. A work of art is an example of an asset that may provide personal enjoyment. The purchase of a single work of art to display in a person's home can be contrasted to the purchase of a large quantity of goods. In the case of *Rutledge v. The Commissioners of Inland Revenue* 14 TC 490 the purchase of one million rolls of toilet paper by a money-lender on business abroad and the subsequent sale of them on his return home were held to be an adventure in the nature of trade.

234. In the case of *Commissioners of Inland Revenue v. Fraser* 24 TC 498 a woodcutter, purchased a large quantity of whisky in bond for £400 with the sole object of resale at a profit.[81] The purchase and sales took place through an agent. He had no special knowledge of the whisky trade and had not previously traded in whisky. Lord Normand at 502-503, said:

> But the purchaser of a large quantity of a commodity like whisky, greatly in excess of what could be used by himself, his family and friends, a commodity which yields no pride of possession, which cannot be turned to account except by a process of realisation, I can scarcely consider to be other than an adventurer in a transaction in the nature of a trade;… Most important of all, the actual dealings of the Respondent with the whisky were exactly of the kind that take place in ordinary trade.

The length of period of ownership

235. A trading asset is generally dealt with or traded within a short time after acquisition.

[79] (1987) 61 ALJR 270; (1987) 71 ALR 28; (1987) 87 ATC 4363; (1987) 18 ATR 693; (1987) 163 CLR 199.
[80] 2003 ATC 4782 (see the joint judgment of Hill and Carr JJ at 4792); (2003) 201 ALR 302 at 313-314; 53 ATR 614 at 624; (2003) 131 FCR 244 at 257.
[81] See also the case of *Martin v. Lowry; Martin v. Commissioners of Inland Revenue* [1927] AC 312; 11 TC 297 which was similarly decided. It involved the purchase and sale of 44 million yards of war surplus linen.

236. An example is the case of *Edwards (Inspector of Taxes) v. Bairstow and Another* [1956] AC 14; 36 TC 207; [1955] 3 All ER 48; [1955] 3 WLR 410; [1955] TR 209 where the taxpayers purchased a complete cotton spinning plant in 1946 with the object of selling it as quickly as possible at a profit. They had no intention of holding it by using it as an income producing asset and it was not purchased for their pleasure or enjoyment. It was eventually sold in five separate lots over a fifteen month period.

The frequency or number of similar transactions

237. The greater the frequency of similar transactions the greater the likelihood of trade.

Supplementary work on or in connection with the property realised

238. Improving property beyond preparing an asset for sale, to bring it into a more marketable condition and gain a better price suggests an element of trade.[82]

The circumstances that were responsible for the realisation

239. Trade involves operations of a commercial character. As assets can be sold for reasons other than trade, the circumstances behind the sale need to be considered. For example, a quick resale may have occurred as a result of sudden financial difficulties.

Motive

240. If the activities on an objective assessment have the characteristics of trade, the person's motive is not relevant. It is relevant in those cases where the evidence is not conclusive. An intention to resell at the time of acquisition may be an indicator of the resale being an adventure or concern in the nature of trade.

241. Motive is also important in cases if there is a change in character of the asset. For example, a trading asset becoming an investment asset when the person decides to keep the asset, either for income producing purposes or personal enjoyment.

[82] See for example, *Cape Brandy Syndicate v. CIR* 12 TC 358 [1921] 1 KB 64 where the taxpayers blended a quantity of brandy they had bought with French brandy before selling it. This was an additional factor indicating that they had undertaken a trading transaction. This decision was affirmed on appeal, see [1921] 2 KB 403.

242. An example of a case where motive was one of the matters that lead to the conclusion that there was an adventure or concern in the nature of trade is *Johnston v. Heath* [1970] 3 All ER 915; [1970] 1 WLR 1567; [1970] TR 183. Heath was offered non-income producing land that had planning permission but had not been developed because of drainage difficulties. He had insufficient funds to purchase the land and his intention was to resell the land as soon as possible after acquisition. The lack of funds was not an obstacle to the purchase, as Heath found a buyer for the land before he contracted to buy it from the original owner. The land was purchased and sold.

243. In *Wisdom v. Chamberlain*[83] Wisdom had assets worth between £150,000 and £200,000 and was concerned about a devaluation in sterling. His accountant considered that silver bullion would be a suitable hedge against devaluation. Silver bullion of £200,000 was eventually purchased using borrowed funds rather than realising existing assets. The devaluation did not occur and a profit of £48,000, after deducting interest of £7,000, was made on disposal of the silver bullion. There was a transaction entered into on a short-term basis for the purpose of making a profit out of the purchase and sale of a commodity. If Wisdom had disposed of his existing investment assets to finance the purchase then the case may have been different. The purchase of the silver bullion may then have been an investment transaction rather than a trading transaction.

Trade v. investment assets

244. United Kingdom cases categorise assets as either trading assets or investment assets. Assets purchased with the intention of holding them for a reasonable period of time, to be held as income producing assets or to be held for the pleasure or enjoyment of the person, are more likely not to be purchased for trading purposes.[84]

245. Examples of investment assets are rental properties, business plant and machinery, the family home, family cars and other private assets. The mere disposal of investment assets does not amount to trade.

246. Assets can change their character but cannot have a dual character at the same time.[85]

247. Investment assets such as business plant and machinery are used by entities in carrying on a business. The purchase and disposal of those types of assets is ordinarily considered not to be an adventure or concern in the nature of trade for UK income tax purposes.[86]

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[83] [1969] 1 All ER 332; [1969] 1 WLR 275; 45 TC 92.
[84] *Johnston v. Heath* [1970] 3 All ER 915; [1970] 1 WLR 1567; [1970] TR 183.
[85] *Simmons (as liquidator of Lionel Simmons Properties) v. Inland Revenue Commissioners* [1980] 2 All ER 798.
[86] Note however that where a pre-existing enterprise exists for GST purposes, the supply of investment assets or non-trading assets would still form part of the enterprise activities, see section 9-5 of the GST Act.

Isolated transactions and sales of real property

248. The question of whether an entity is carrying on an enterprise often arises where there are 'one-offs' or isolated real property transactions.

249. The issue to be decided is whether the activities are an enterprise in that they are of a revenue nature as they are considered to be activities of carrying on a business or an adventure or concern in the nature of trade (profit making undertaking or scheme) as opposed to the mere realisation of a capital asset. (In an income tax context a number of public rulings have issued outlining relevant factors and principles from judicial decisions. See, for example, TR 92/3, TD 92/124, TD 92/125, TD 92/126, TD 92/127 and TD 92/128.)

250. The cases of *Statham & Anor v. Federal Commissioner of Taxation*[87] (*Statham*) and *Casimaty v. FC of T*[88] (*Casimaty*) provide some guidance on when activities to subdivide land amount to a business or a profit-making undertaking or scheme. In these cases, farm land was subdivided and sold. Minimal development work was undertaken to meet council requirements and to improve the presentation of certain allotments. On the particular facts of these cases the courts held that the sales were a mere realisation of a capital asset.

251. From the *Statham* and *Casimaty* cases a list of factors can be ascertained that provide assistance in determining whether activities are a business or an adventure or concern in the nature of trade (a profit-making undertaking or scheme being the Australian equivalent, see paragraphs 221 to 228). If several of these factors are present it may be an indication that a business or an adventure or concern in the nature of trade is being carried on. These factors are as follows:[89]

- there is a change of purpose for which the land is held;
- additional land is acquired to be added to the original parcel of land;
- the parcel of land is brought into account as a business asset;
- there is a coherent plan for the subdivision of the land;
- there is a business organisation – for example a manager, office and letterhead;
- borrowed funds financed the acquisition or subdivision;
- interest on money borrowed to defray subdivisional costs was claimed as a business expense;

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[87] 89 ATC 4070; 20 ATR 228.
[88] 97 ATC 5135; (1997) 151 ALR 242; 37 ATR 358.
[89] *Statham & Anor v. Federal Commissioner of Taxation* 89 ATC 4070 at 4076-4077; 20 ATR 228 at 235-236 and *Cassimaty v. FC of T* 97 ATC 5135 at 5151-5152; 151 ALR 242 at 261-262; 37 ATR 358 at 375-377.

- there is a level of development of the land beyond that necessary to secure council approval for the subdivision; and
- buildings have been erected on the land.

252. In determining whether activities relating to isolated transactions are an enterprise or are the mere realisation of a capital asset, it is necessary to examine the facts and circumstances of each particular case. This may require a consideration of the factors outlined above, however there may also be other relevant factors that need to be weighed up as part of the process of reaching an overall conclusion. No single factor will be determinative rather it will be a combination of factors that will lead to a conclusion as to the character of the activities.

253. No two cases are likely to be exactly the same. For instance while the conclusions reached in the *Statham* and *Casimaty* cases were similar, different facts and factors were considered to reach the respective conclusions.

254. The case of *Marson (H M Inspector of Taxes) v. Morton and Others*[90] describes the process of reaching a conclusion in cases involving isolated transactions. After listing the factors that have been taken into account by courts in other cases, including the badges of trade, Sir Nicolas Browne-Wilkinson V-C stated that:[91]

> I emphasise again that the matters I have mentioned are not a comprehensive list and no single item is in any way decisive. I believe that in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question – and for this purpose it is no bad thing to go back to the words of the statute – was this an adventure in the nature of trade?

Similarly, Foster J in *AB v. FC of T* observed:[92]

> It is clear in my view, that before the label 'adventure in the nature of trade' can be applied it is necessary to isolate with clarity the particular matters which are the subject of its application…Accepting as I do, that the phrase means 'an isolated business venture' questions must be asked as to what was the venture and what gave it its commercial character.

255. We recognise that in some cases practical difficulties may arise in deciding whether the activities involved in a particular subdivision amount to an enterprise. The question is necessarily one of fact and degree. As outlined above, it requires a careful weighing of the various factors and exercising judgment in the light of decided case law and commercial experience. If an entity is experiencing practical difficulty reaching a decision they can seek advice from the Tax Office.

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[90] [1986] 1 WLR 1343; [1986] STC 463; 59 TC 381.
[91] [1986] 1 WLR 1343 at 1349; [1986] STC 463 at 391; 59 TC 381 at 392.
[92] 97 ATC 4945 at 4961.

Land bought with the intention of resale

256. Where land is sold that was purchased with a view to resale at a profit, we consider these activities to be an enterprise. This would be so whether the land was sold as it was when it was purchased or whether it was subdivided before sale. This is because the activities are business activities or activities in the conduct of a profit making undertaking or scheme and therefore an adventure or concern in the nature of trade.

Examples of subdivisions of land that are enterprises

Example 29

257. *Stefan and Krysia discover that the local council has recently changed its by-laws to allow for smaller lots in the area. They decide to take advantage of the by-law change. They purchase a block of land with the intention to subdivide it into two lots and to sell the lots at a profit. They carry out their plan and sell both lots of land at a profit.*

258. *Stefan and Krysia are entitled to an ABN in respect of the subdivision on the basis that their activities are an enterprise being an adventure or concern in the nature of trade. Their activities are planned and carried out in a businesslike manner.*

Example 30

259. *Tobias finds an ocean front block of land for sale in a popular beachside town. He devises a plan to enable him to afford to live there. He decides to purchase the land and to build a duplex. He plans to sell one of the units and retain and live in the other. The object of his plan is to enable him to obtain private residential premises in an area that would otherwise be unaffordable for him.*

260. *Tobias carries out his plan. He purchases the land, and lodges the necessary development application with the local council. The development application is approved by the council, Tobias engages a builder and has the duplex built. He sells one unit, and lives in the other.*

261. *Tobias is entitled to an ABN. His intentions and activities have the appearance of a business deal. They are an enterprise.*

262. *Further, there is a reasonable expectation of profit or gain (see paragraphs 364 to 390) as his plan has enabled him to be able to keep and live in one of the units.*

Example 31

263. *Steven buys a 100 hectare property. He believes that the property may be suitable to be developed as a resort. After investigation he decides that it would be more profitable to subdivide and sell the property. He decides to subdivide the property into one hectare lots and sell these.*

264. *He engages a town planner and a surveyor to survey the 100 hectare property and to establish how many hectare lots it can be subdivided into. Steven then approaches the local shire council and is advised that he may subdivide his property into 65 one hectare lots.*

265. *However, Steven must satisfy various shire council conditions if he wishes to obtain development approval. They are:*

- *the making of new sealed roads with kerbing and channelling within the subdivision;*
- *the provision of water, electricity and telephone services to the new lots;*
- *the provision of culverts and other storm water drainage works; and*
- *the transfer of certain areas of land to the shire council for parks, environmental and other public purposes.*

266. *Steven consults his accountant and legal advisers. Together they prepare a comprehensive business plan for the project. They approach a commercial lender to arrange a substantial loan, secured by the property, to cover all development costs and related expenses.*

267. *After gaining development approval from the council, Steven then engages a project manager who arranges for all the survey and subdivisional works to be carried out. Contractors are engaged to put in the roads, complete all the necessary drainage works and install the water, electricity and telephone services.*

268. *Steven also investigates a marketing strategy that will provide the best return for his project. Sales agents are retained to carry out the marketing program which involves a comprehensive advertising campaign using a promotional estate name, 'Bush Turkey Hill'.*

269. *Steven is entitled to an ABN on the basis that the subdivision is an enterprise and it is more than a mere realisation of a capital asset. Significant factors that are relevant which lead to this conclusion are as follows:*

- *there is a change of purpose for which the whole property is held;*
- *there a comprehensive plan for the development of the property;*

- *the subdivision is developed in a businesslike manner for example there is a project manager, significant development costs, a comprehensive marketing campaign including an estate name for the land; and*
- *a substantial loan has been taken out to finance the development.*

Example 32

270. *Prakash and Indira have lived in the same house on a large block of land for a number of years. They decide that they would like to move from the area and develop a plan to maximise the sale proceeds from their land.*

271. *They consider their best course of action is to demolish their house, subdivide their land into two blocks and to build a new house on each block.*

272. *Prakash and Indira lodge the necessary development application with the local council and receive approval for their plan. They arrange for:*

- *their house to be demolished;*
- *the land to be subdivided;*
- *a builder to be engaged;*
- *two houses to be built;*
- *water meters, telephone and electricity to be supplied to the new houses; and*
- *a real estate agent to market and sell the houses.*

273. *Prakash and Indira carry out their plan and make a profit. They are entitled to an ABN in respect of the subdivision on the basis that their activities go beyond the minimal activities needed to sell the subdivided land. The activities are an enterprise as a number of activities have been undertaken which involved the demolition of their house, subdivision of the land and the building of new houses.*

Examples of subdivisions of land that are not enterprises

Example 33

274. *Astrid and Bruno live on a large suburban block. The council has recently changed their by-laws to allow for smaller lots in their area. They decide to subdivide their land to allow their only child, Greta, to build a house in which to live.*

275. *They arrange for the approval of the subdivision through the council, for the land to be surveyed and for the title of the new block to be transferred to Greta. She pays for all the costs of the subdivision and the cost of her new house.*

276. *Astrid and Bruno have not carried on an enterprise and are not entitled to an ABN in respect of the subdivision. It is a subdivision without any commercial aspects and is part of a private or domestic arrangement to provide a house for their daughter.*

Example 34

277. *Ursula and Gerald live on a 2.5 hectare lot that they have owned for 30 years.*

278. *They decide to sell part of the land and apply to subdivide the land into two 1.25 hectare lots. The survey and subdivision are approved. They retain the subdivided lot containing their house and the other is sold.*

279. *Ursula and Gerald are not carrying on an enterprise and are not entitled to an ABN in respect of the subdivision as the subdivision and sale are a way of disposing of some of the land on which their home is situated. It is the mere realisation of a capital asset.*

Example 35

280. *A number of years ago Elsie and Karin purchased some acreage on which to keep their horses, which they rode on weekends. Karin now accepts a job overseas and they decide to sell the land.*

281. *They put the land on the market with little success. The local real estate agent then advises that it would be easier to sell the land if it was subdivided into smaller lots. They arrange for a development application to be lodged with the local council and obtain approval to subdivide the land into nine lots. Elsie and Karin arrange for the land to be surveyed. The land has a road running along its boundary and has some existing services such as electricity. Only minimal activity is required to subdivide the land.*

282. *Elsie and Karin are not entitled to an ABN. The sale is not considered to be an enterprise and is the mere realisation of a capital asset.*

Example 36

283. *Oliver and Eloise have lived on a rural property, Flat Out for the last 30 years. They live a self-sufficient lifestyle. As a result of a number of circumstances including their advancing years, Oliver's deteriorating health, growing debt and drought conditions they decide to sell.*

284. *Oliver and Eloise put Flat Out on the market and are unable to find any buyers. They then receive advice from the real estate agent that they may be able to sell smaller portions of it. They initially arrange for council approval to subdivide part of Flat Out into 13 lots. They undertake the minimal amount of work necessary and sell the lots. They continue to live on the remaining part of their property.*

285. *A few years later Oliver and Eloise decide to sell some more land to meet their increasing debt obligations. They arrange for council approval to subdivide another part of Flat Out into four lots. Again they undertake the minimal amount of work necessary to enable the lots to be subdivided and arrange for the real estate agent to sell these lots.*

286. *Three years later Oliver's and Eloise's personal and financial circumstances are such that they again decide to sell some more land. They arrange for further council approval to subdivide part of their remaining property into three lots. Again they undertake the minimal amount of work necessary to enable the lots to be sold and arrange for the real estate agent to sell the lots.*

287. *Over the years involved Oliver and Eloise have subdivided 30% of Flat Out. They continue to live on the remaining part of their property.*

288. *Oliver and Eloise are not entitled to an ABN as they are not carrying on an enterprise. They are merely realising a capital asset. In this example the following factors are relevant:*

- *There is no change of purpose of object with which the land is held – it has remained their home.*
- *There is no coherent plan for the subdivision of the land – the subdivision has been undertaken in a piecemeal fashion as circumstances change.*
- *A minimal amount of work has been undertaken in order to prepare the land for sale. There has been no building on the subdivided land. The only work undertaken was that necessary to secure approval by the council for the subdivision.*

On a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property

In the form of a lease, licence or other grant of an interest in property as an enterprise

289. Paragraph 38(1)(c) includes in the definition of an 'enterprise', 'an activity, or a series of activities, done on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property'. The paragraph does not cover trading in the assets but rather the activity of a lessor or grantor of the interest in the property.

290. The term 'property' covers all types of property. It includes tangible assets such as land, cars and boats. It also includes intangible assets such as copyright and patents.

291. We do not believe that, in any practical sense, 'in the form of a lease, licence or other grant of an interest in property' is wider than 'a lease, licence or other grant of an interest in property'. The phrase 'in the form of' does not broaden the meaning of 'lease, licence or other grant of an interest property'. This is because leases and licences are longstanding, well understood legal concepts. In addition the terms 'lease, licence or other grant of an interest in property' encompass all activities that are directed to the exploitation of property rights. Further expansion of these concepts is unnecessary as the phrase 'other grant of an interest' is a broad term that covers interests in property that are not a lease or licence.

Regular or continuous basis

292. To be an enterprise the grant of a lease, licence or other grant of an interest in property must be done on a regular or continuous basis. The grant need not be done on both a regular and a continuous basis. An activity will be 'continuous' if there is no significant cessation or interruption to the activity. An activity is 'regular' if it is repeated at reasonably proximate intervals. The intervals need not be fixed. Whether an activity is repeated over time on a regular basis is a question of fact and degree.

293. A gratuitous lease, licence or other grant of an interest in property made by an individual (other than a trustee of a charitable trust) or a partnership where all or most of the partners are individuals will not, by itself, amount to an enterprise. It should have a commercial basis underlying it. This is because there needs to be a reasonable expectation of profit or gain for an enterprise carried on by an individual (other than a trustee of a charitable trust) or a partnership (where all or most of the members are individuals), see paragraph 38(2)(c). However, where there is a reasonable expectation of profit or gain by the individual or partnership a gratuitous lease, licence or other grant of an interest in property may amount to an enterprise, (see Example 40, paragraphs 304 to 306).

Example 37 – ad hoc rental of property that is not on a regular nor continuous basis

294. *Brian and Joan have a holiday home at a well-known beach side destination.*

295. *They use the holiday home extensively for family purposes but, on occasions, they let it out for a limited period of time to cover costs such as rates and taxes and ongoing maintenance costs. The extent of the leasing is never more than a few weeks, spread over the year on an ad hoc basis.*

296. *Brian and Joan have entered into a tax law partnership. The partnership of Brian and Joan is not entitled to an ABN. This is because the leasing of the holiday home is neither on a regular nor on a continuous basis.*

297. *The activity may also not qualify as an enterprise on the basis that the activities are carried on by a partnership (for tax purposes) where the members are individuals and there is no reasonable expectation of profit or gain.*

Example 38 – property rented on a regular basis

298. *Natasha owns a property in Winterville. The country town is a popular destination with visitors during holiday periods.*

299. *There is a barn on Natasha's property which she rents out each Easter, and for four weeks at Christmas as well as the two weeks in June when the picnic races are held. The barn is rented for storage purposes by stallholders who visit the town at these times of year. She charges her tenants a commercial rental. She rents out the barn at this time of the year because this is when the town receives the most visitors. The rest of the time the barn is empty. She makes a profit from the rental.*

300. *Natasha is entitled to an ABN because the use of the barn is on a regular basis. The barn is rented at fixed times being, Easter, picnic race time and Christmas. Further there is a reasonable expectation of profit or gain.*

Example 39 – camping spot rented on a regular basis

301. *Duncan owns an acreage property in the country. His property is adjacent to a popular national park. There is an ideal spot on the property for camping near a creek.*

302. *Duncan places a sign on the main road advertising the camping spot for short term lease to tourists. The camping spot is also used at times by his friends and relatives at no charge but the camping spot is leased out for a fee on average about 20 weeks of the year. There is a reasonable expectation of profit or gain.*

303. *The activities carried out by Duncan are regular and involve the leasing of property for a profit. Duncan is carrying on an enterprise in respect of the leasing activities.*

Example 40 – use of property on a continuous basis which is an enterprise

304. *Verity owns a farming property. She is unable to farm the property herself. She allows the land to be farmed by a partnership comprising members of her family apart from herself. The understanding between the parties is that the partnership can farm the property for a period of ten years and that Verity will retain any capital improvements made to the farm.*

305. *The partnership puts up fences, applies fertiliser and installs irrigation, erects hail netting and plants fruit trees. The partnership also pays the rates, the electricity for the farm and the insurance on the farm buildings. Verity is entitled to a share of the fruit crop each year.*

306. *Verity is entitled to an ABN. She has granted a licence on a continuous basis to the partnership to farm the land. Verity has a reasonable expectation of profit or gain.*

Example 41 – use of property on a continuous basis which is not an enterprise

307. *Klara owns acreage and allows her neighbour to permanently agist a couple of mares on part of her land. She only charges a small amount for the agistment because her neighbour is a very good friend. Klara receives $20 per month agistment fees but this is insufficient to cover the costs of the rates for this part of the land.*

308. *Klara is not entitled to an ABN. She has granted a licence on a continuous basis for the neighbour's horse to graze on her property. However, the activity will not qualify as an enterprise on the basis that there is no reasonable expectation of profit or gain under paragraph 38(2)(c).*

The Commonwealth, a State or Territory, or a body corporate, or corporation sole, established for a public purpose

309. Paragraph 38(1)(g) includes as an enterprise any activity or series of activities done by the Crown in the right of the Commonwealth, a State or a Territory.

310. Paragraph 38(1)(g) also includes as an enterprise any activity or series of activities by either a body corporate or a corporation sole, established for a public purpose. The 'public purpose' test is limited to bodies corporate or corporations sole established under a law of the Commonwealth, a State or a Territory.

311. The term 'public purpose' is not defined in the ABN Act. However, in the Butterworths Australian Legal Dictionary the term is defined as:

> Purposes relating to the public interest or for the public benefit. The term 'public purposes' is wider than 'government purposes': *Australian Tape Manufacturers Assn Ltd v. Commonwealth* (1993) 176 CLR 480; 112 ALR 53 at 61. Accordingly, it is sufficient if the purpose is one which benefits a select group or groups in the public interest such as the relief of necessitous farmers (*Attorney-General (NSW) v. Homebush Flour Mills Ltd* (1937) 56 CLR 390), or the compensation of relevant copyright owners (*Australian Tape Manufacturers Assn Ltd v. Commonwealth* (1993) 176 CLR 480 at 505; 112 ALR 53), rather than the public generally.

312. Thus, the activities done by the entity must be for the benefit of the public generally or an identifiable section of the public.

313. However, it is necessary that the body corporate or corporation sole must be established with the requisite purpose in mind. If the entity is established for the requisite purpose, any activity by the entity is sufficient to satisfy the terms of the provision.

314. If the body corporate or corporation sole is not established for a public purpose, it may still be carrying on an enterprise by satisfying one of the other criteria for being an enterprise in subsection 38(1).

What activities are excluded from being an enterprise?

315. It can be seen from the discussion in paragraphs 139 to 314 that the definition of enterprise is wide. However, there are some specific statutory exclusions within this definition. Excluded are activities done:

(a) by a person as an employee or in connection with earning withholding payments covered by subsection 38(3) (unless done in supplying services as the holder of an office that the person has accepted in the course of, or in connection with, an activity, or series of activities, of a kind mentioned in subsection 38(1));

(b) as a private recreational pursuit or hobby;

(c) by an individual (other than a trustee of a charitable fund), or a partnership (all or most of the members of which are individuals), without a reasonable expectation of profit or gain; or

(d) as a member of a local governing body established by or under a State Law or Territory law (except a local governing body to which subsection 12-45(3) in Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) applies).

316. Activities may be excluded from the definition of enterprise by more than one of the exclusions. Activities may be excluded from the definition of enterprise because they are a private recreational pursuit or hobby. The same activities may also be excluded because there is no reasonable expectation of profit or gain.

317. Decision trees showing the relationship between the provisions are contained in Appendix 1. Decision Tree 1 is used where an entity wishes to test if it is carrying on an activity in the form of a business or an adventure or concern in the nature of trade and to determine if it is entitled to an ABN. Decision Tree 2 is used by an entity that has leased or granted a licence or other grant of an interest in property and wishes to determine if it is entitled to an ABN.

Activities done as an employee and activities done as a withholding payment earner

318. Activities done by a person as an employee (see paragraphs 319 to 325) or in connection with earning certain withholding payments (see paragraphs 326 to 327) are excluded from the definition of enterprise. In certain circumstances these activities may be enterprise activities and this exception to the exclusion is discussed in paragraphs 328 to 350.

Activities done as an employee

319. An individual who performs activities as an employee is not carrying on an enterprise in relation to those activities. The activities undertaken are the activities of the entity to which that individual provides work or services. This is made clear by the note to paragraph 38(2).[93] However an individual who is an employee may operate a separate enterprise and be entitled to an ABN in respect of that enterprise.

Meaning of employee

320. 'Employee' means employee at common law. Each individual contract must be examined in order to determine whether the person is engaged as an employee or as an independent contactor.

321. For a discussion on what is meant by an employee, reference should be made to Taxation Ruling TR 2005/16 Income Tax: Pay As You Go – withholding from payments to employees. As this Ruling does not add to or change the discussion in TR 2005/16 it can be referred to for a fuller discussion on the meaning of 'employee'.

[93] The note states 'Acts done as mentioned in paragraph (a) will still form part of the activities of the enterprise to which the person provides work or services'.

322. Paragraph 7 of TR 2005/16 explains that:

> Whether a person is an employee of another is a question of fact to be determined by examining the terms and circumstances of the contract between them having regard to the key indicators expressed in the relevant case law. Defining the contractual relationship is often a process of examining a number of factors and evaluating those factors within the context of the relationship between the parties. No one indicator of itself is determinative of that relationship. The totality of the relationship between the parties must be considered.

323. As stated above there is no single objective test that will indicate whether or not an individual is an employee. TR 2005/16 explains that:

> …… the totality of the relationship between the parties must be considered to determine whether, on balance, the worker is an employee or independent contractor.[94]

324. The courts have identified various features as indicators of whether a relationship is that of an employee or independent contractor. In TR 2005/16 the key indicators set out and discussed are:

- whether control is exercised over the manner in which the work was performed;
- whether the worker operates on their own account or in the business of the payer;
- whether the substance of the contract is to achieve a specified result;
- whether the work can be delegated or subcontracted;
- whether the worker bears little or no risk of the costs arising out of injury or defect in carrying out their work; and
- whether the worker provides their own tools and equipment and pays business expenses.

325. How the parties characterise their relationship is not decisive. The whole of the circumstances including any written agreement between the parties are examined to determine whether an individual is an employee within the common law meaning of that term. No one factor is decisive. A consideration of all the relevant circumstances can lead to a conclusion that an individual is an employee notwithstanding a description in a contract characterising the individual as an independent contractor.

[94] At paragraph 18.

Activities done as a withholding payment earner

326. Under paragraph 38(2)(a) 'enterprise' also does not include an activity, or series of activities, done by a person in connection with earning withholding payments covered by subsection 38(3).

327. Withholding payments covered by subsection 38(3) are those contained in any of the provisions in Schedule 1 to the TAA 1953 listed in the table.

Withholding payment covered		
Item	Provision	Subject matter
1	Section 12-35	Payment to employee
2	Section 12-40	Payment to company director
3	Section 12-45	Payment to office holder
4	Section 12-60	Payment under labour hire arrangement, or specified by regulations

Exception to the exclusion

328. The exclusion from being an enterprise does not apply if the activity or activities are done in supplying services as the holder of an office that the withholding payment earner has accepted in the course of or in connection with an activity or series of activities of the kind mentioned in subsection 38(1).

329. The exception to the exclusion will apply where a person has accepted an appointment as a holder of an office and supplies services in the course of or in connection with:

- that person's own enterprise as a sole trader;
- the enterprise of a partnership of which the individual is a partner;
- the enterprise of a trust of which the person is a trustee; or
- the enterprise of an employer of which the person is an employee.

330. Holders of an office are those included in items 2 and 3 of the table in subsection 38(3). These are company directors and office holders under section 12-45 of Schedule 1 to the TAA 1953. Office holders include members of Parliament, statutory office holders, members of the Defence Force or police forces, common law office holders and some members of local governing bodies.[95] However, it is statutory office holders that are the most likely to accept an appointment in the course of or in connection with an enterprise. The table in subsection 38(3) is set out in paragraph 327.

'In the course of' or 'in connection with'

331. Whether an activity or activities done in supplying services as the holder of an office has occurred 'in the course of' or 'in connection with' an enterprise must be determined after considering all the facts and circumstances surrounding the activity. 'In the course of' and 'in connection with' are not defined terms and therefore take their ordinary meaning, however these terms have been considered by the courts in relation to legislation other than the ABN Act.

332. The closest consideration of whether a position is accepted in the course of an enterprise is in relation to workers' compensation matters. In these cases, the courts have considered whether an incident has occurred in the course of a person's employment. It has been held that in determining whether something has occurred in the course of a person's employment regard must be had to the general nature, terms and circumstances of the employment.[96]

333. To be in the course of a person's employment the activity must be part of the person's service to the employer. The service includes not only the actual performance of the work but also doing whatever is incidental to the performance of the work.[97]

334. The courts consider that the words 'in connection with' have a wide meaning but are to be interpreted in the context of the statute in which they are contained. Davies J stated in *Hatfield v. Health Insurance Commission* (1987) 15 FCR 487 at 491; 77 ALR 103 at 106-107:

> Expressions such as 'relating to', 'in relation to', 'in connection with' and 'in respect of' are commonly found in legislation but invariably raise problems of statutory interpretation. They are terms which fluctuate in operation from statute to statute…
>
> The terms may have a very wide operation but they do not usually carry the widest possible ambit for they are subject to the context in which they are used, to the words with which they are associated and to the object or purpose of the statutory provision in which they appear.

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[95] For further information on office holders see Taxation Ruling TR 2002/21 Income tax: Pay As You Go (PAYG) Withholding from salary, wages, commissions, bonuses or allowances paid to office holders.

[96] *Hatzimanolis v. ANI Corporation Ltd* (1992) 173 CLR 473 at 484; 106 ALR 611 at 618; 66 ALJR 365 at 369.

[97] *Henderson v. Commissioner of Railways (W.A.)* (1937) 58 CLR 281 at 294.

335. The meaning of 'in connection with' was referred to in *Our Town FM Pty Ltd v. Australian Broadcasting Tribunal (No. 1)* (*Our Town FM case*).[98] In that case the Federal Court considered paragraph 5(1)(b) of the *Administrative Decisions (Judicial Review) Act 1977*. That paragraph prescribed as a ground of review, 'that procedures that were required by law to be observed in connection with the making of a decision were not observed'. In considering the meaning of the words 'in connection with' Wilcox J stated:[99]

> The words 'in connection with' have a wide connotation, requiring merely a relation between one thing and another. They do not necessarily require a causal relationship between the two things: see *Commissioner for Superannuation v. Miller* (1958) 8 FCR 153 at 154, 160, 163. They may be used to describe a relationship with a contemplated future event: see *Koppen v. Commissioner for Community Relation*s (1986) 11 FCR 360 at 364 and *Johnson v. Johnson* [1952] P 47 at 50-51.

336. Wilcox J also referred to *Re Nanaimo Community Hotel Ltd* [1944] 4 DLR 638 (Nanaimo) in the Our Town FM case.[100] In Nanaimo, the court considered the words 'jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act' and McFarlene J stated (at 639):

> One of the very generally accepted meanings of 'connection' is 'relation between things one of which is bound up with or involved in another' or, again 'having to do with'. The words include matters occurring prior to as well as subsequent to or consequent upon so long as they are related to the principal thing. The phrase 'having to do with' perhaps gives as good a suggestion of the meaning as could be had.[101]

337. As previously mentioned in the *Villa Edgewater case*,[102] Senior Member B J McCabe was required to decide whether, in accordance with section 9-15 of the GST Act, contributions made by lot owners to the body corporate were payments in connection with a supply of anything. The Senior Member found that the contributions were payments. In considering the issue of whether the contributions were 'in connection' with a supply he relied on two cases. At paragraph 34 he stated:

> The High Court made clear in *Berry v. Federal Commissioner of Taxation* (1953) 89 CLR 653 that a payment may be made in connection with something even though the payment is not in return for that thing: per Kitto J at 657 to 659. So long as the payment is related to or has to do with a contemplated event or outcome, that will be enough: see *Claremont Petroleum NL v. Cummings* (1992) 110 ALR 239 at 280 per Wilcox J.

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[98] (1987) 16 FCR 465; 77 ALR 577; (1987) 2 BR 151.
[99] See 16 FCR 465 at 479; 77 ALR 577 at 591-592; (1987) 2 BR 151 at 166-167.
[100] (1987) 16 FCR 465 at 480; 77 ALR 577 at 592; (1987) 2 BR 151 at 167.
[101] The statement was upheld on appeal, see *Re Nanaimo Community Hotel Ltd* [1945] 3 DLR 225.
[102] *Body Corporate, Villa Edgewater Cts 23092 v. FC of T* 2004 ATC 2056; 55 ATR 1162.

338. The Senior Member found that the contributions were made in connection with the services (for example cleaning, and expenditure on capital repairs) provided by the body corporate. He considered that the connection was made through the budgets for the administration and sinking funds issued each year. The budgets identified the anticipated expenditures and determined the amount of contribution required from lot-owners to fund those expenditures.[103]

339. Guidance can be obtained from the court decisions discussed in paragraphs 334 to 337 above in determining whether an activity or activities are done in supplying services as the holder of an office that has been accepted 'in the course of' or 'in connection with' an enterprise. For the activity or activities to be in the course of a person's enterprise the activity or activities need to be performed as part of or incidental to the enterprise activities. For an activity or activities to be in connection with a person's enterprise there has to be an association or relationship with the activities of that enterprise.

340. No one fact or circumstance will determine the issue and an examination of the relationship between the actual accepted position and the enterprise in which the individual works is required. One consideration may be the final outcome in relation to the receipts from the activity. If the receipts become part of the enterprise's funds and are treated in a like manner to other ordinary receipts it may be considered that the activity occurs in the course of the entity's enterprise. If the funds are received and retained by the individual it can be considered that the activity did not occur 'in the course' of or 'in connection with' the enterprise. Another consideration may be the subject matter or area of business activity of the enterprise, and its correlation with the activities of the relevant position.

Example 42 – sole practitioner accountant

341. *John, an accountant, is a sole practitioner. He has accepted a directorship of one of his clients' companies. The appointment was only made because of his accountancy business connections with the company. John is paid director's fees.*

342. *John is entitled to an ABN in respect of his accountancy practice and the director's fees are received in respect of supplying services as the holder of an office that John has accepted in connection with his business.*

343. *The activity of acting as a director is an activity of John's accounting enterprise and is not excluded by paragraph 38(2)(a).*

[103] 2004 ATC 2056 at paragraph 34.

Example 43 – position accepted in connection with an enterprise

344. *Annabelle is a partner of Just, Ice and Associates, a prominent law firm specialising in commercial law. She has obtained a directorship on the board of one of her client's, a large mining company. She was appointed to the position because of the prominence of Just, Ice and Associates, her expertise in commercial law especially mining law and her knowledge of the company's business activities and corporate direction.*

345. *The partnership agreement of Just, Ice and Associates requires that any fees received as a director be paid into the partnership. A portion of these fees are then included in the income of each partner.*

346. *The payments from the mining company to Annabelle are withholding payments to a company director covered by item 2 of the table in subsection 38(3). Therefore these activities are excluded from being enterprise activities unless the exception to the exclusion in paragraph 38(2)(a) applies.*

347. *The exception to the exclusion in paragraph 38(2)(a) applies. This is because the appointment was made because of Annabelle's position as a commercial lawyer in a prominent law firm and her knowledge of the company's business. Further the treatment of the fees is another factor establishing the connection between the position and the law firm. The fees become part of the ordinary receipts of the partnership and are split amongst all the practitioners.*

Example 44 – position accepted not in connection with an enterprise

348. *Michaela is a member of a medical practice. In her spare time she has developed a strong interest in environmental issues. She is a member of a number of environmental groups and has been prominent in the local community because of her research of a number of environmental issues. As a result of her interest in environmental issues she secures an appointment to a statutory office in an environmental agency.*

349. *The payments from the agency to Michaela are withholding payments to an office holder covered by subsection 38(3). Therefore these activities are excluded from being enterprise activities unless the exception to the exclusion in paragraph 38(2)(a) applies.*

350. *The exception to the exclusion in paragraph 38(2)(a) does not apply because:*

- *the appointment was not made because of Michaela's position in a medical practice. The appointment was a result of her personal involvement and achievement in environmental issues. Her activity as an office holder in the agency is not in the course of or in connection with her activities as a member of a medical practice; and*

- *her activity as an office holder does not amount to an enterprise in its own right nor is it a part of another enterprise conducted by Michaela*.

Private recreational pursuit or hobby

351. Under paragraph 38(2)(b) enterprise does not include an activity, or series of activities, done 'as a private recreational pursuit or hobby'. There is no statutory definition of this term. A useful starting point is its ordinary meaning. The Macquarie Dictionary defines hobby to be 'a spare time activity or pastime, etc., pursued for pleasure or recreation' and 'recreation' to have a number of meanings including 'refreshment by means of some pastime, agreeable exercise, or the like' and 'a pastime, diversion, exercise, or other resource affording relaxation and enjoyment'.

352. The nature of a private recreational pursuit or hobby has been considered in a New Zealand GST case. In *Case N27* (1991) 13 NZTC 3229, Bathgate DJ described a private recreational pursuit, at 3240, to be 'in essence, a private pastime or pursuit carried on for the personal refreshment, pleasure or recreation of the person (or persons) concerned'.

Indicators of private recreational pursuit or hobby

353. Whether an activity is a private recreational pursuit or hobby is a question of fact. There are a number of indicators that are relevant to determining whether the activities amount to a private recreational pursuit or hobby. Paragraph 87 of TR 97/11 lists the following indicators:

- it is evident that the taxpayer does not intend to make a profit from the activity;
- losses are incurred because the activity is motivated by personal pleasure and not to make a profit and there is no plan in place to show how a profit can be made;
- the transaction is isolated and there is no repetition or regularity of sales;
- any activity is not carried on in the same manner as a normal, ordinary business activity;
- there is no system to allow a profit to be produced in the conduct of the activity;
- the activity is carried on a small scale;
- there is an intention by the taxpayer to carry on a hobby, a recreation or a sport rather than a business; and
- any produce is sold to friends and relatives and not to the public at large.

354. As this Ruling does not add to or change the discussion in TR 97/11 on hobbies and what is considered to be carrying on a business, TR 97/11 can be referred to for a fuller discussion on whether a particular activity is a private recreational pursuit or hobby.[104]

355. A hobby, even a substantial one, is not an activity or series of activities carried on as a business. As stated by Bowen CJ and Franki J in *Ferguson v. FC of T* (1979) 26 ALR 307 at 311; (1979) 37 FLR 310 at 314; 79 ATC 4261 at 4265; 9 ATR 873 at 877:

> …if what he is doing is more properly described as the pursuit of a hobby or recreation or an addiction to a sport, he will not be held to be carrying on a business, even though his operations are fairly substantial.

A private recreational pursuit or hobby that is not an enterprise

Example 45 – recreational pursuit or hobby

356. *Lucinda is a public servant who relaxes by producing clay pots and other products for herself, her friends and family. She has a small kiln at home in which she fires her creations. Lucinda occasionally sells some of her clay products at a friend's stall at a weekend market. These are popular and she is able to recover some of her costs, though she does not keep any detailed records.*

357. *Lucinda is not entitled to an ABN on the basis that:*

- *the activity is a private recreational pursuit or hobby; and*
- *it is undertaken without a reasonable expectation of profit or gain.*

Example 46 – horseracing carried on as a recreational pursuit or hobby

358. *Fletcher is a keen follower of horseracing. After discussing his interest with workmates over the years, Xavier, Helen and Max agree to form a syndicate with him and buy a thoroughbred with a view to racing it. They each contribute $5,000 and purchase Knightmare at auction. They engage a trainer. The syndicate contributes further amounts as needed and after preparation Knightmare commences racing. The syndicate members keenly follow her preparation and all attend the course whenever she runs. The rest of the workplace also follows her progress and it is a regular topic at work gatherings.*

359. *The syndicate is not entitled to an ABN. Having regard to the factors listed in paragraph 353 above and even though the syndicate members have outlaid what they consider to be significant funds, it is considered that these activities are a private recreational pursuit or a hobby.*

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[104] See also TR 2005/1 Income tax: carrying on business as a professional artist which considers the distinction between a hobby and a business for artists.

A hobby can become a business and therefore an enterprise

360. A hobby can turn into a business and therefore also an enterprise as the nature and extent of the activities change. This would be reflected in changes to the indicators of private recreational pursuits and hobbies. For example, there may be an increase in the scale of the activities, the introduction of businesslike systems, an intention to make a profit and a move away from a private pastime.

Example 47 – hobby becomes a business

361. *Mariam is a teacher who decides to take up calligraphy as a hobby. She attends classes and discovers that she has a real talent for this art form.*

362. *She starts to design and produce party and wedding invitations for her friends, without charge. Her designs prove to be extremely popular and she receives requests for other types of work. These activities soon occupy all of Mariam's spare time. She gives up her job as a teacher, sets up a studio and works full time producing a variety of work for sale.*

363. *Mariam is entitled to an ABN as she is carrying on a business.*

Individuals or partnerships without a reasonable expectation of profit or gain

364. Under paragraph 38(2)(c) 'enterprise' does not include an activity, or series of activities, done by an individual (other than a trustee of a charitable fund) or a partnership (all or most of the members of which are individuals) without a reasonable expectation of profit or gain.

365. An activity or activities that come within paragraphs 38(1)(a) and (b) may be excluded by this exception (that is, an activity or activities done in the form of a business or in the form of an adventure or concern in the nature of trade). Further, an activity or activities that come within paragraph 38(1)(c) (lease, licence or other grant of an interest in property) may also be excluded by this exception.

366. Where an individual is a trustee of a charitable trust, then the requirement for a reasonable expectation of profit or gain does not apply to the individual acting in that capacity.

Meaning of individual and partnership

367. The words 'individual' and 'partnership' are defined in section 41. An 'individual' means 'a natural person' and 'partnership' takes the meaning given by section 995-1 of the ITAA 1997. That section defines a partnership to mean 'an association of persons carrying on business as partners or in receipt of ordinary income or statutory income jointly, but does not include a company'. For a further explanation of the meaning of partnership, see paragraphs 39 to 41.

Reasonable expectation

368. The reasonable expectation of a profit or gain is not limited to an expectation for the current year or to specific years and may cover a number of periods. Profits or gains are unlikely in the short term for some activities, such as forestry, but expected over the long term. However, the period to be covered by the test must be relevant to the nature of the activity undertaken.

369. The phrase 'reasonable expectation of profit or gain' is not defined in the ABN Act. However, the phrase 'reasonable expectation' has been considered in a number of cases.[105] In *News Corporation Ltd v. National Companies and Securities Commission* (1984) 57 ALR 550 at 561; (1984) 5 FCR 88 at 101, Woodward J said 'a reasonable expectation of an event requires more than a possibility, risk or chance of the event occurring'.

370. The test is an objective one.[106] This means that the determination of whether there is a reasonable expectation is not solely based on the subjective view of the individual concerned. It is determined by whether a reasonable person looking at all the circumstances would come to the conclusion that there is a reasonable expectation of a profit or gain.

371. For the purposes of determining whether, objectively, there is a reasonable expectation of profit or gain, the fact that year after year an overall loss has been made is one factor that may indicate that there is no reasonable expectation of profit or gain.

[105] See also *FC of T v. Peabody* (1994) 181 CLR 359; (1994) 123 ALR 451; 28 ATR 344; 94 ATC 4663; (1994) 68 ALJR 680; (1995) 23 ABLR 68.
[106] See also *FC of T v. Arklay* (1989) 22 FCR 298; (1989) 85 ALR 368; (1989) 20 ATR 276; 89 ATC 4563 and *Eastern Nitrogen Ltd v. FC of T* [1999] FCA 1536; 99 ATC 5163; (1999) 43 ATR 112.

Partnership and reasonable expectation

372. As explained in paragraph 40, the first limb of the definition of partnership reflects the definition contained in State and Territory partnership Acts. This reflects the general law definition of a partnership, which is 'the relation which subsists between persons carrying on a business in common with a view to profit'.[107] The second limb of the definition extends partnership for taxation purposes to include persons in receipt of income jointly.

373. As previously discussed, the test to determine whether there is a reasonable expectation of profit or gain is an objective one. For partnerships under the general law there will be a view to or expectation of profit by the partners. Although the subjective purpose of each partner may be relevant, the test is an objective one looking at the partnership as a whole and taking into account all relevant matters. This means that despite a subjective view or expectation by partners of a profit, the activities of the partnership may not, as a result of this exclusion, be an enterprise. This will occur where the enterprise is conducted in a manner where objectively the outgoings are, in all likelihood, always going to be greater than the income made from the activities. Unless there is a change in how the activities are carried out there is not a reasonable expectation of profit or gain.

Example 48 – activities that do not have a reasonable expectation of profit or gain

374. *Miranda is employed full time as a travel agent and in her spare time on the week-ends she sells products on a party plan.*

375. *Miranda mainly demonstrates these products in the homes of her friends and relatives and their acquaintances. She also buys these products at a discount for her own use.*

376. *Miranda incurs a number of expenses. These include the costs associated with the use of her car, mobile/home telephone, internet and home computer. After working out her expenses Miranda has made a loss of $1,500 for the year. Over the previous three years she has made similar losses.*

377. *Miranda enjoys her job as a travel agent and intends to keep working full time. Consequently she is unable to devote any extra time to selling these products. Also she has no plans to change the way she operates.*

378. *Miranda is not entitled to an ABN. Objectively, in light of the scale and nature of her operations and previous results, there is no reasonable expectation of her making a profit or gain.*

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[107] The general law definition is set out in the partnership act of each state and territory as follows: subsection 7(1) WA, subsection 5(1) Qld, subsection 5(1) Vic, subsection 1(1) SA, subsection 1(1) NSW, subsection 6(1) ACT, subsection 6(1) Tas, subsection 5(1) NT. This definition is adopted from the common law.

Example 49 – commencement activities have a reasonable expectation of profit or gain

379. *Victoria and Jacques (from Example 10, paragraphs 123 to 124) have many years experience in the information technology industry. They entered into a partnership agreement forming VJ Computing Partnership for the purpose of supplying computer services to a large organisation. They put together a tender for a significant value for that supply. In putting together the tender a number of activities were undertaken. The partnership undertook market research and investigated the most economical way to supply the computer services. They rented premises, bought hardware and software, employed a consultant and hired staff. The VJ Computing Partnership's tender was ultimately unsuccessful.*

380. *VJ Computing Partnership is entitled to an ABN. It is accepted that they are conducting an enterprise. This is because their activities are considered to be commencement activities and, having regard to the scale and nature of these activities, the partnership had a reasonable expectation of profit or gain. There was genuine business activity and a serious endeavour to win the tender, which would have led to an ongoing enterprise. The partnership had to decide their eligibility to register for an ABN early in the tender process.*

Examples concerning partnerships

Example 50

381. *Michael, a public servant, is made redundant in his employment. With his redundancy payment, he purchases half of his father-in-law's 200 hectare farm, including some farm equipment. While the 200 hectares has consistently made profits, the 100 hectare lot is uneconomical in its own right and he and his father-in-law continue to farm both lots jointly, sharing in any profits. Prior to making the purchase, Michael had lived with his wife on her father's property and helped him operate the farm on weekends and during holiday breaks. In order to prepare him for this, he completed a distance learning course in farm management at an agricultural college.*

382. *Michael and his father-in-law are entitled to an ABN as a partnership on the basis that the activity would constitute a business activity and, because of the circumstances preceding and following the purchase of the property, the activity would be classified as one with a reasonable expectation of profit or gain.*

Example 51

383. *Silvio, an experienced horse breeder decides to go into business as he believes he can make more money by working for himself. He has seen a property which would make an ideal stud farm, however he does not have sufficient finances to undertake the project himself. He approaches his friends Claude and Sophie for assistance.*

384. *Claude agrees to provide some finance as he thinks that it will be a good money making opportunity. He will provide some accountancy skills and will also help out on the farm at week-ends because he likes country life. Sophie also agrees to provide finance, mainly because she loves horses. The three of them form a partnership.*

385. *The three partners buy the property. Silvio works full time on the property and Claude works there on the week-ends. Using Silvio's expertise they buy 20 quality brood mares and 4 stallions. They plan to sell the foals produced to the general public through yearling sales. They plan to also sell the stallions' services to other breeders. Sophie sets up and maintains appropriate records of their project.*

386. *The partnership is entitled to an ABN on the basis that its activities constitute a business. The partnership would not be viewed as one without a reasonable expectation of profit or gain. This is because it has been set up in a businesslike manner and amongst other relevant factors is of sufficient size to be profitable.*

Example 52

387. *Sasha and Sebastian live on a sheep station. They decide to breed kelpies so they purchase 3 females and 1 male, construct some kennels and breeding boxes and read some books on breeding dogs. Sasha and Sebastian do not develop a business plan and only keep some basic records of their breeding activities.*

388. *When the pups are born they sell some of them to their friends and neighbours. However, they are unable to sell all of the pups and some are given away. There is a shortfall between the amount received on sale of the pups and the costs of vet fees and other costs of maintaining the dogs.*

389. *Sasha and Sebastian are unable to increase the time or money they spend on their dog breeding activities. Over the next couple of years they continue to make losses.*

390. *They are not entitled to an ABN. Even if their activities are considered to be in the form of a business (which is unlikely) it could not be considered that they have a reasonable expectation of profit or gain. The reasons for this view include:*

- *the activities are not of a sufficient size to be profitable;*
- *the activities are not organised in a businesslike manner;*
- *there is a lack of expertise in breeding dogs; and*
- *there is no marketing of the dogs to the general public*.

Members of local governing bodies

391. Under paragraph 38(2)(d) 'enterprise' does not include an activity, or series of activities, done as a member of a local governing body established by or under a State law or Territory law (except a local governing body to which subsection 12-45(3) in Schedule 1 to the TAA 1953 applies).

392. A 'local governing body' is usually a municipal or shire council. State or Territory laws, such as the *Local Government Act 1993* (Qld), establish most councils.

393. The exception does not apply to members of a local governing body to which subsection 12-45(3) in Schedule 1 to the TAA 1953 applies. That subsection is a part of the PAYG withholding provisions. If a local government body wants to be part of the PAYG system, it can pass a special resolution to become an 'eligible local governing body' for the purposes of the PAYG provisions. When this has been done, all the payments made to members of the eligible body are payments subject to PAYG withholding. This makes the members office holders and brings their activities within the activities covered by paragraph 38(2)(a) and they are excluded from enterprise activities.

Your comments

394. We invite you to comment on this draft Miscellaneous Taxation Ruling. Please forward your comments to the contact officer by the due date. (Note: The Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel. The Tax Office may use a sanitised version (names and identifying information removed) of the compendium in providing its responses to persons providing comments. Please advise if you do not want your comments included in a sanitised compendium.)

Due date:	**10 February 2006**
Contact officer:	**Sheree Clancy** **Gus Falkenhagen**
E-mail address:	**sheree.clancy@ato.gov.au** **gus.falkenhagen@ato.gov.au**
Telephone:	**(07) 3213 6205** **(07) 3213 6029**
Facsimile:	**(07) 3213 5599**
Address:	**Sheree Clancy** **Australian Taxation Office** **GPO BOX 920** **Brisbane QLD 4001**

Detailed contents list

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Related Rulings/Determinations:

IT 2505; TR 92/3; TR 97/11; TR 2002/21; TR 2003/4; TR 2005/1; TR 2005/16; TD 92/124; TD 92/125; TD 92/126; TD 92/127; TD 92/128; GSTD 2000/8; GSTR 2000/37; GSTR 2003/13; GSTR 2004/2; GSTR 2004/6

Previous Rulings/Determinations:

MT 2000/1

Subject references:

- ABN
- activity or series of activities
- adventure or concern in the nature of trade
- agent
- Australian business number
- Australian Business Register
- body corporate
- body of persons
- body politic
- business
- business association
- carrying on an enterprise
- charitable fund
- charitable institution
- company director
- consolidated group
- corporation sole
- Corporations Act company
- eligible local governing body
- employee
- enterprise
- entity
- government entity
- GST groups
- head company
- hobby
- indicators of a business
- indicators of a hobby
- individual
- in the form of
- isolated transactions
- investment assets
- lease, licence or other grant of interest in property
- local governing body
- mutual organisations
- non-entity joint venture
- non-profit clubs and associations
- non-profit sub-entity
- office holder
- other unincorporated associations or body of persons
- partnership
- pay as you go
- PAYG
- PAYG withholding
- private assets
- private recreational pursuit or hobby
- public purpose
- real property
- reasonable expectation of profit or gain
- regular or continuous basis
- religious institution
- religious practitioners
- superannuation fund
- supplies connected with Australia
- trade
- trust
- trustee of a trust
- trustee of a superannuation fund
- unincorporated association
- unique business identifier
- withholding payments

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- ANTS(ABN)A 1999 38(1)
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- ANTS(ABN)A 1999 38(1)(f)
- ANTS(ABN)A 1999 38(1)(g)
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- ANTS(ABN)A 1999 38(2A)
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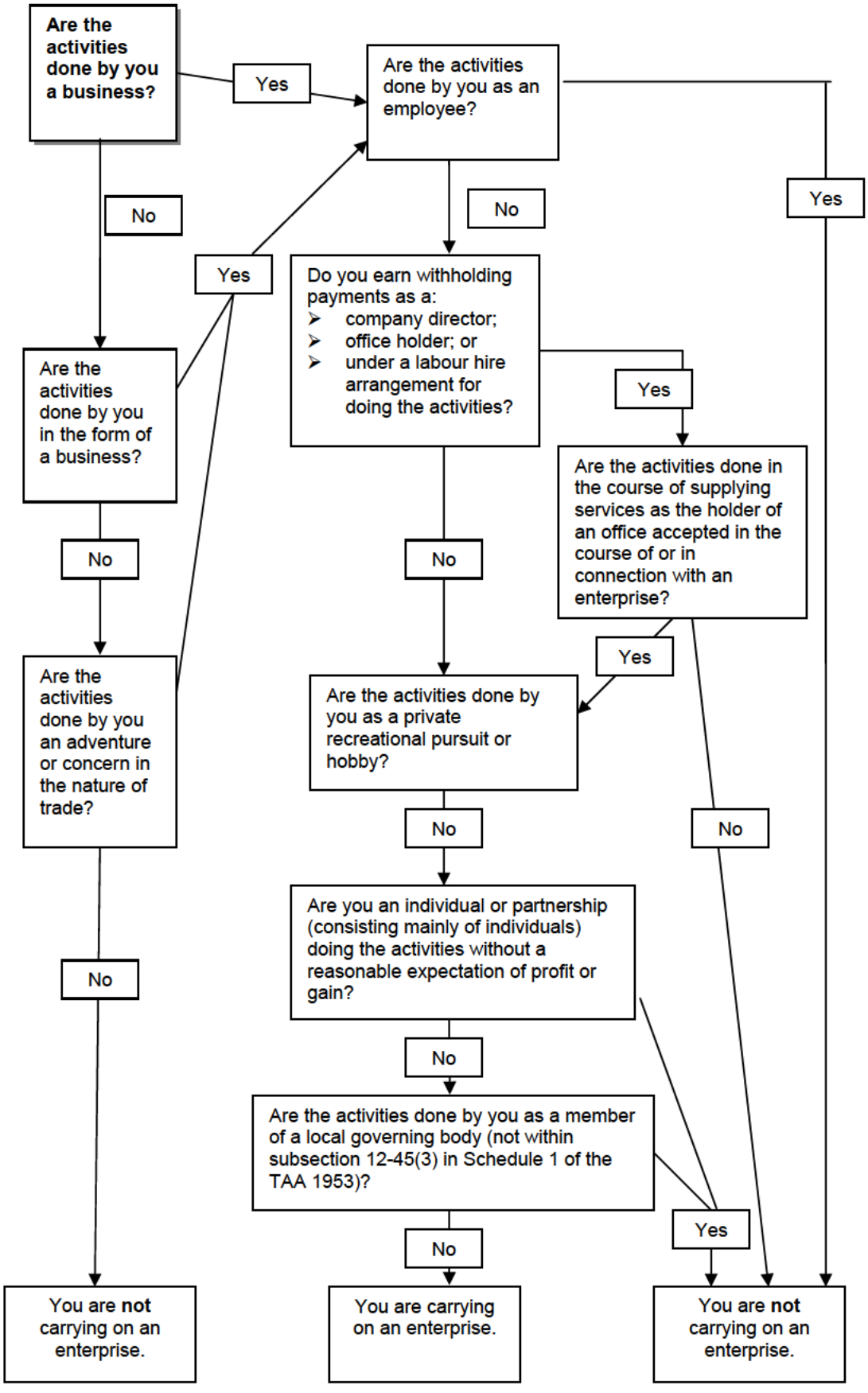
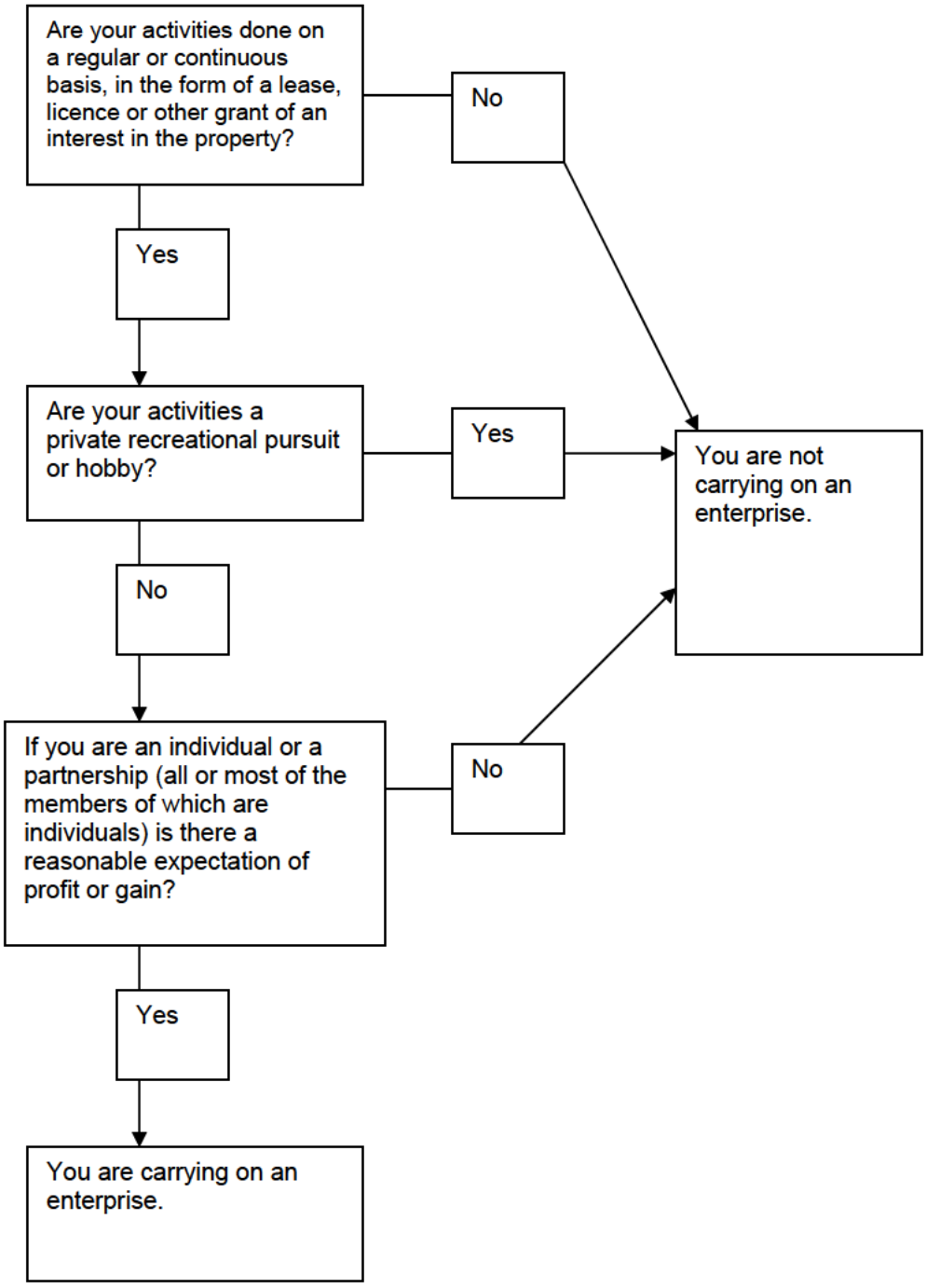
~~ course or furtherance of enterprise

APPENDIX 1
Decision Tree 1
Are you carrying on an enterprise? – paragraphs 38(1)(a) and (b)



Decision Tree 2
Are you carrying on an enterprise? – paragraph 38(1)(c)