MT 2004/D3 - 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

Contents Para

What this Ruling is about 1
Date of effect 6
Background 7
Ruling with Explanation 19
Detailed contents list 419

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 of the ABN Act 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) to provide a record of entities that carry on businesslike activities.

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

[1] Subsection 3(2).

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, the 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 GST, 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.

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]

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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.
[5] See section 5 of the ABN Act and Divisions 63 and 149 of the GST Act.

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 also to 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 also 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, a complying superannuation fund, as well as other superannuation funds, government entities, and non-profit sub-entities are entitled to an ABN as they are taken to be carrying on an enterprise in Australia. This is set out in section 5.

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

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 a 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 the Act to be part of Australia. An example of an installation of this nature would be a gas or oil rig.

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[6] See Goods and Services Tax Determination GSTD 2000/8.
[7] Paragraph 9-20(1)(da) of the GST Act.
[8] Subsection 8(2).
[9] Section 41.

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 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.[10] 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 77 to 81.

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 71 to 76.

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 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.

[10] See section 5.

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 body corporates 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);[11] 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.

32. If an entity is not established under an Act of Parliament or under a statutory procedure of registration, such as the *Corporations Act 2001*, or incorporated under an 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.[12] However it may be possible for a corporation sole to be created by the common

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

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.[13]

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. For example the Public Trustee of Queensland is a corporation sole, see section 8 of the *Public Trustee Act 1978* (Qld).

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 77 to 78). 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, hold property, enter into legal contracts, 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.

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'.

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

40. This definition of partnership is wider than at general law.[14] 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. Neither 'unincorporated association' nor 'body of persons' are defined terms for the purposes of the ABN Act. Therefore these terms take their meaning from the general law. An entity of one of these types consists of a group of persons who associate to achieve a common aim or purpose and who are bound by mutual obligations and rights. These types of entities are not legal persons.

43. Some characteristics of an unincorporated association or body of persons are that:

- 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;
- as a matter of history, there will have been a moment in time when a number of persons combined to form the association;[15] and
- there is a separate bank account and financial records for the association.

Not all of these characteristics need to be present.

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[14] 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*.

[15] See *Conservative and Unionist Central Office v. Burrell (Inspector of Taxes)* [1980] 3 All ER 42 at 58; [1980] STC 4000 at 415 in relation to the first six characteristics. 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.

44. 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, the Lord President, 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*...

45. 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.[16]

46. 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.

47. 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

48. *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.*

49. *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

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

51. *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*.

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

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

52. 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.

53. 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.'

54. 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.[17]

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

55. *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.*

[17] 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?*

56. *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.*

57. *The joint-venture is a non-entity joint-venture. Consequently, the joint venture is not an entity in itself and cannot get an ABN. 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

58. *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.*

59. *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

60. '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.[18]

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 63 to 73.

Superannuation fund

61. 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.

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

62. Section 5 of the ABN Act ensures that all superannuation funds are entitled to an ABN whether or not they are a superannuation fund that has a trustee or a person managing the fund.

Trustee of a trust or superannuation fund

63. A trust and a superannuation fund 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.

64. 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

65. *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.*

66. *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).*

67. *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.*[19]

[19] Subsection 25(2) and Australian Business Number Regulations 1999 regulation 6.

68. 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.[20] 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

69. *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.*

70. *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

71. 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.

72. 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.

73. 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 amount to an enterprise.

[20] Subsection 37(2).

Agent

74. 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.

75. 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 96 to 101.

Other roles

76. 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

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

78. The term 'government entity' is defined in section 41. The GST Act uses the same definition.[21] 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.

[21] Section 195-1 of the GST Act.

Non-profit sub-entity

79. 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.

80. 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.[22]

81. To come within the ABN definition of 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.

Enterprise

82. An entity, other than a Corporations Act company, must carry on an enterprise or be taken to carry on an enterprise in order to be entitled to an ABN.[23] Government entities, superannuation funds and non-profit sub-entities are taken to be carrying on an enterprise.

83. 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 87 to 104.

[22] Section 63-5 of the GST Act.
[23] See section 8. For further information on companies, see paragraph 20.

84. Carrying on an enterprise includes activities done in the commencement or termination of the enterprise. For a discussion of this issues, see paragraphs 105 to 131. What is an enterprise is discussed in paragraphs 132 to 334.

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

85. 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.[24]

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

- 'government entity' – paragraphs 77 to 78;
- 'superannuation fund' – paragraph 61; and
- 'non-profit sub-entity' – paragraphs 79 to 81.

Who is carrying on an enterprise?

87. 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

88. For income tax purposes there are special rules that allow a wholly owned group to form a consolidated group.[25] 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.

89. 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.[26] 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.

[24] Section 5.
[25] See Part 3-90 of the ITAA 1997.
[26] See Divisions 48 and 49 of the GST Act.

90. 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

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

92. *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.*

93. *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.*

94. *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.*

Partnership

95. 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,[27] 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. 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.

[27] 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).

Agency

96. 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.

97. 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 one ABN in respect of the business of being an agent.

98. 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.[28] However, if the entity's agency activities amount to an enterprise (or it is a Corporations Act company) it is also entitled to an ABN in its own right.

Example 8 – agent is not entitled to an ABN

99. *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.*

100. *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.*

[28] 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*.

101. *However Sarah is entitled to an ABN if she is carrying on an enterprise in her own right, for example, if she is a real estate agent.*

Religious practitioner

102. 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.[29]

103. 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

104. 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.[30]

When is an enterprise being carried on?

105. 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 132 to 334.

106. 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.

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[29] See paragraph 38(1)(f).

[30] 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.'

Commencement of an enterprise

107. Activities done by an entity that are preliminary to an enterprise commencing and are part of a process of starting, beginning or bringing into existence an enterprise, are activities in carrying on an enterprise.[31]

108. This legislative definition leads to a broad range of activities being accepted as an enterprise. 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.

109. Feasibility studies and other similar activities conducted by an entity before a business or other enterprise commences may be activities done in carrying on an enterprise. These types of activities may still be considered to be commencement activities even where the eventual enterprise conducted is different from the one originally contemplated.

110. Where the entity conducts a feasibility study or other activities and concludes that the proposed enterprise should not be undertaken but be abandoned, it is a question of fact and degree as to whether the activities undertaken themselves amount to an enterprise. The activities undertaken before it was concluded that the enterprise should not be undertaken may be of such a nature or scale that they can constitute an enterprise in their own right. See in particular activities 'in the form of a business' or 'in the form of an adventure or concern in the nature of trade' (see paragraphs 152 to 307).

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

Example 9 – a feasibility study that is an enterprise

112. *A trust was formed for the purpose of carrying on a business of a particular kind. The trust 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.*

113. *The trust obtained finance and the business was set up. The feasibility study activities are commencement activities and are activities in carrying on an enterprise.*

[31] See the definition of 'carrying on' in section 41.

Example 10 – an activity done in the course of the intended commencement of an enterprise

114. *Albert intends to become self-employed and to run an architectural business from his home. As part of this plan, he purchases a computer, some architectural software, accounting software and some office equipment. He develops a business plan. Albert starts work on converting a room of his house into an office and he also commences to advertise for clients and puts his name in a business directory. He then decides not to proceed with the architectural business.*

115. *The commencement activities undertaken by Albert are not done in the course of carrying on the enterprise as a self-employed architect as that enterprise never came to fruition. It has to be considered whether the activities done by Albert are such that they amount to an enterprise. For a discussion of this aspect, see Example 32 [paragraph 263].*

Example 11 – an unsuccessful tender

116. *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 had premises, employed a consultant and hired staff.*

117. *The VJ Computing Partnership's tender was unsuccessful. The activities undertaken are consequently not done in commencement of an enterprise. The activities should be examined to determine whether they amount to an enterprise in their own right. For a discussion of this aspect, see Example 33 [paragraph 264].*

Example 12 – activities not done in the course of commencement of an enterprise

118. *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 for accounts. Yoko also visits some florist shops while she is interstate on holidays. She then abandons the idea.*

119. *Even if the activities are preparatory to an intended business, they are not done in commencement of an enterprise as the plan is abandoned.*

Example 13 – establishment of a trust is not commencement activity

120. *Luke decides 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.*

121. *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

122. 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. Obligations are satisfied when creditors are paid and loans repaid.

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

124. 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.

125. 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.

126. 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.

127. 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.

128. 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 14 – an enterprise that has not terminated

129. *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 quantity 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 15 – an activity not in the course of the termination of an enterprise

130. *Assuming the same facts as Example 14, 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.*

131. *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?

132. 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.

133. Some activities are specifically excluded from being an enterprise. These are discussed in paragraphs 335 to 417.

134. 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

135. 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.

136. 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.

137. 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.[32] For further discussion on non-profit sub-entities, see paragraphs 79 to 81.

138. 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 71 to 76.

Example 16 – entity with a new enterprise, but one ABN

139. *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*

[32] Section 5.

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.

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

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

142. 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 105 to 131.

Example 17 – activities associated with the sale of real property

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

144. *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.*

145. *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.*

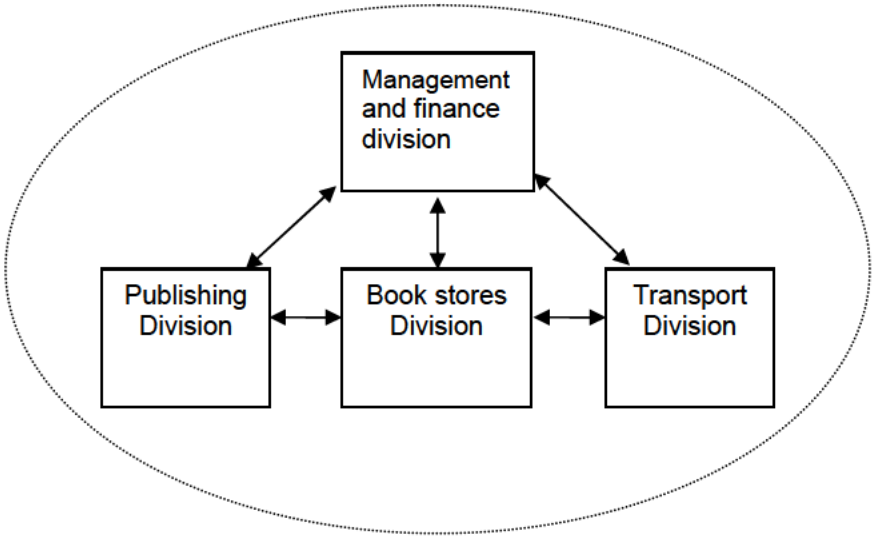
146. If there are a number of separate activities, the entity may be carrying on an enterprise which includes activities that by themselves could amount to smaller enterprises. If that is the case, the following elements are indicators that part of an enterprise may itself be an enterprise:

- 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 18 – overall enterprise

147. *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.*



148. *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 19 – an activity that is an enterprise

149. *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.*

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

151. *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 335 to 417.*

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

152. In accordance with paragraphs 38(1)(a) and (b) an enterprise also includes an activity or series of activities done in the form of a business or in the form of an adventure or concern in the nature of trade.

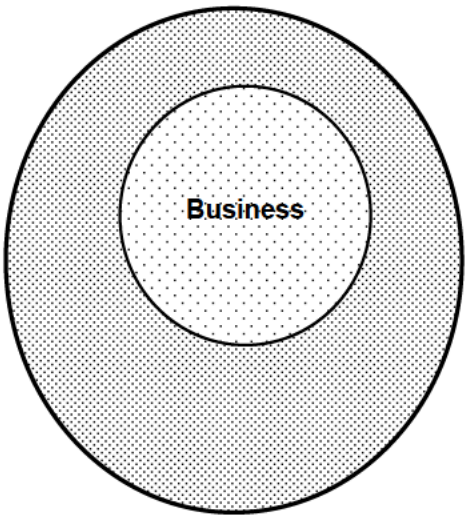
153. The words 'in the form of' broaden the scope of the general concepts of a 'business' and 'an adventure or concern in the nature of trade'. The term 'in the form of' is discussed in paragraphs 192 to 204.

154. The overlap of the concept of a 'business' with the concept of 'in the form of a business' is discussed in paragraphs 156 to 158 and illustrated in Diagrams A and B. The overlap of the concept of 'an adventure or concern in the nature of trade' with the concept of 'in the form of an adventure or concern in the nature of trade' is discussed in paragraphs 159 to 160.

155. 'Business' is discussed in paragraphs 162 to 168 and 'an adventure or concern in the nature of trade' is discussed in paragraphs 169 to 191.

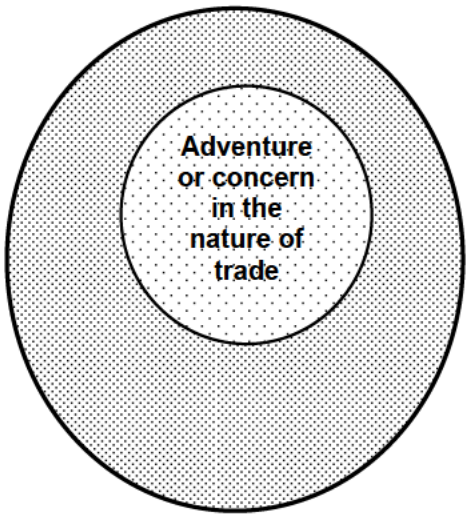
Overlap of concepts

Diagram A



In the form of a business

Diagram B



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

156. Diagram A shows that a 'business' is a subset of 'in the form of a business'. Diagram B shows that 'an adventure or concern in the nature of trade' is a subset of 'in the form of an adventure or concern in the nature of trade'. It is also possible in some cases for Diagram A and Diagram B to intersect.

157. As a business can be viewed as a subset of 'in the form of a business', if the activity or series of activities are sufficient to be considered a business it is not necessary to determine if an activity or series of activities are in the form of a business.

158. It is expected in the majority of cases that entities will be able to readily determine that they are carrying on a business. For example, if the entity is a self-employed carpenter or is running a corner store as a sole trader it would be performing activities that are clearly a business. This means that entities do not need to examine whether their activities are in the form of a business once the activities can be said to actually be a business.

159. A similar concept to that explained in paragraphs 157 and 158 also applies to an activity or series of activities done as an adventure or concern in the nature of trade. This means that an activity or series of activities done as an adventure or concern in the nature of trade will also come within the term 'in the form of an adventure or concern in the nature of trade'.

160. It is also expected in the majority of cases that entities will be able to readily determine that they have entered into a business venture even if it is of an isolated nature. For example, an entity may buy one hundred cartons of whisky at auction to sell at a profit as a one-off deal. In such cases entities do not need to examine whether their activities are in the form of an adventure or concern in the nature of trade once the activities can be said to be an adventure or concern in the nature of trade.

161. An activity or series of activities that are an adventure or concern in the nature of trade may also amount to an activity or series of activities done in the form of a business. This is because an adventure or concern in the nature of trade has many of the characteristics of a business except that it may be an occasional or one-off transaction.

Business

162. An enterprise includes an activity or activities done in the form of a business, see paragraph 38(1)(a).

Definition

163. 'Business' is defined in section 41 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 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.

An adventure or concern in the nature of trade

169. Paragraph 38(1)(b) includes in the definition of 'enterprise' an activity, or series of activities, done in the form of an adventure or concern in the nature of trade. While paragraph 38(1)(a) concerns an activity or series of activities done in the form of a business, paragraph 38(1)(b) covers commercial activities of a trading nature that may or may not amount to activities in the form of a business.

170. Ordinarily, the term 'business' would encompass trade engaged on a regular or continuous basis, while an adventure or concern in the nature of trade may be an occasional or one-off transaction that does not amount to a business but which has the characteristics of a business deal. This is the view of 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).[33]

171. There is no definition of 'an adventure or concern in the nature of trade' in the ABN Act. The concept of 'an adventure or concern in the nature of trade' has arisen in the context of United Kingdom revenue law. Trade commonly means operations of a commercial character where goods or services are provided to customers for reward.

172. An adventure or concern in the nature of trade includes a commercial activity that does not amount to a business. Isolated transactions fall into this category. 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.

Trade

173. United Kingdom law proves a useful starting point when considering the meaning of an adventure or concern in the nature of trade in the ABN Act. 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'[34] in reaching a conclusion on such matters.

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[33] 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 4,467; 41 ATR 413, this analysis of the relevant law was not considered in the appeal.

[34] For example, see *Marson (Inspector of Taxes) v. Morton* [1986] 1 WLR 1343; [1986] STC 463; 59 TC 381.

The subject matter of realisation

174. 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.

175. 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. 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

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

177. 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

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

Supplementary work on or in connection with the property realised

179. 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.

The circumstances that were responsible for the realisation

180. 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

181. 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.

182. Although the intention to make a profit suggests there is trade it is not a prerequisite. Lord Reid said in *Griffiths (Inspector of Taxes) v. J.P. Harrison (Watford) Ltd*:[35]

> Certainly these cases establish that operations of the same kind and carried on in the same way as those which characterise ordinary trading should be held to be trading, though there may be no intention to earn profit or though the transaction may be an isolated one.

183. 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.

184. An example of a case where motive was one of the matters that lead to the conclusion that there 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.

185. In *Wisdom v. Chamberlain*[36] 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

[35] [1963] AC 1 at 14; [1962] 1 All ER 909 at 913; 40 TC 281 at 295.
[36] [1969] 1 All ER 332; [1969] 1 WLR 275; 45 TC 92.

£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

186. 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, see *Johnston v. Heath* [1970] 3 All ER 915; [1970] 1 WLR 1567; [1970] TR 183.

187. 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.

188. Assets can change their character but cannot have a dual character at the same time, see *Simmons (as liquidator of Lionel Simmons Properties) v. Inland Revenue Commissioners* [1980] 2 All ER 798.

189. 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.[37]

Isolated sales or transactions in Australia

190. In Australia, consideration of whether the profit from an isolated sale or transaction is assessable for income tax purposes is not concerned with whether the activity is 'an adventure or concern in the nature of trade', as that phrase does not appear in the income tax legislation. This is because there are specific income tax provisions that include in assessable income the profit made from an isolated transaction.[38] The issue was whether there was 'profit arising from the

[37] 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.

[38] 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 are now generally considered under the capital gains provisions of 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'.

191. Over the years there has been considerable debate in cases as to whether Australian law was different to the United Kingdom in effect (as it obviously was in language), see for example *McClelland v. FC of T*[39] and *FC of T v. Whitfords Beach Pty Ltd*.[40] It is also generally accepted that the interpretation of these provisions in Australian law has shifted over time.[41] While Australian income tax cases in the area provide some assistance in the case of isolated transactions, it is considered that the United Kingdom cases provide the more reliable guide. This is because the United Kingdom courts have specifically considered the concept of an adventure or concern in the nature of trade.

'In the form of'

192. There is little judicial guidance in Australian or the United Kingdom of the phrase 'in the form of'. In the AAT decision *Body Corporate*, *Villa Edgewater Cts 23092 v. F C of T* 2004 ATC 2056; 55 ATR 1162 at paragraph 37 Senior Member B J McCabe considered that the words 'in the form of business' suggests that 'the parliament intended decision-makers to concentrate on whether the activities of the entity are carried on in a businesslike way, rather than on the ends of the activities'.

193. There has been judicial consideration of the term 'in the nature of a business' in *State Authorities Superannuation Board v. Federal Commissioner of Taxation*.[42] The State Authorities Superannuation Board was a body corporate which was constituted under the *Superannuation Act 1916* (NSW). The Board was responsible for administering the State Superannuation Fund of New South Wales. It applied to the Commissioner for exemption from bank account debits tax. The *Bank Accounts Debits Tax Administration Act 1982* (Cth) allowed exemption from the tax by Commonwealth, State or Territory authorities. However, the exemption did not apply to 'a Department, authority, corporation or body the sole or principal function of which is to carry on an activity in the nature of business (whether or not for profit).[43]

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.

[39] (1970) 120 CLR 487; 70 ATC 4115; 2 ATR 21.

[40] (1982) 39 ALR 521; 82 ATC 4031; 12 ATR 692; (1982) 150 CLR 355.

[41] See Parsons, R W 1985, *Income Taxation in Australia: Principles of Income Deductibility and Tax Accounting,* The Law Book Company Limited, Sydney, Chapter 3.

[42] (1988) 85 ALR 125; 89 ATC 4078; 20 ATR 211; (1988) 21 FCR 535.

[43] Subparagraph 3(1)(a)(vii) of the *Bank Accounts Debits Tax Administration Act 1982* (Cth).

194. On appeal the Full Federal Court affirmed that the use of the words 'in the nature of' before 'business' indicated an intention to give a wider meaning than would be the case if the word 'business' was used alone.

195. The court held that, for the activities carried on to be activities 'in the nature of a business', the elements of commercial dealings, including consensual dealings were required. The court also held that the principal activities of the Board were not in the nature of a business even though there were a number of factors in the Board's activities that were suggestive of a business. This was so because the superannuation contributors were bound by statute to contribute and the dealings were therefore not consensual.

196. We consider that the use of the words 'in the form of' before 'business' or 'an adventure or concern in the nature of trade' indicates a wider meaning than if the concepts of 'business' or 'an adventure or concern in the nature of trade' were used by themselves. However, it is our view that the meaning of the words 'in the nature of' a business and the meaning of 'in the form of 'a business are not identical.

197. Given the broad nature of the term 'in the form of', we consider that activities that have the essential appearance or characteristics of a business or an adventure or concern in the nature of trade would be activities in the form of a business or in the form of an adventure or concern in the nature of trade. It is also considered that not all of the main features of a business or an adventure or concern in the nature of trade need to be present. For example activities may not be undertaken with a view to profit yet the entity may still carry on many of the activities of an entity that does conduct an enterprise for profit.

198. We consider that the activities of the State Authorities Superannuation Board would be activities in the form of a business. This is because there were a number of features of the Board's activities that had the appearance or characteristics of a business. These features included that:

- the activities were extensive and continuous;
- the organisation was substantial;
- the assets were held by the Board in its own right;
- the transactions were frequent; and
- some additional services were provided by the Board.

199. However, the use of the term 'in the form of' does not negate a requirement that there be a reasonable expectation of profit or gain for an enterprise involving individuals or a partnership consisting mainly of individuals. This is because paragraph 38(2)(c) excludes from the definition of enterprise an activity or activities by an individual (other than a trustee of charitable fund), or by a partnership (where all or most of the members are individuals) which are without a reasonable

expectation of profit or gain. For a discussion of exclusions from the definition of enterprise, see paragraphs 335 to 417.

Alternative view

200. There is an alternative view that 'in the form of' adds nothing to the statutory definition of enterprise in any real or practical sense. Accordingly, as a matter of statutory interpretation under this view, the words 'in the form of' would not be given any meaning or effect. The result of such a view would be that, in reading the definition of enterprise, the word 'as' should be substituted for 'in the form of' where those words appear in paragraphs (a), (b) and (c) of subsection 38(1). The outcome would be that there is no wider meaning to be found in the words 'in the form of'.

201. We do not accept this view. There are a number of cases involving statutory interpretation which support the approach that, prima facie, all the words of a statute should be given meaning and effect. In *Commonwealth v. Baume* (1905) 2 CLR 405 Griffith CJ stated at 414:

> In *The King v. Berchet* [44] a case decided in 1688, it was said to be a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void or insignificant, if by any other construction they may all be made useful and pertinent.

202. This principle and the reasoning in Baume was most recently cited and affirmed by the High Court in *Project Blue Sky Inc v. Australian Broadcasting Authority*.[45]

203. Further, the *State Authorities Superannuation Board case* (see paragraph 193 above) in both the original decision and on appeal confirmed that the addition of the words, 'in the nature of' indicated, 'an intention on the part of the draftsman to cast his net much more widely than would have been the case if he had limited the expression to the carrying on of a business'.[46]

204. The weight of authority aligns with the approach taken in the Ruling, which is to give meaning to the phrase, 'in the form of' rather than to read it down as having no practical meaning.

Isolated transactions and sales of real property

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

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[44] 1 Show.,106.
[45] 194 CLR 355; [1998] HCA 28; (1998) 153 ALR 490, at paragraph 71. See also *Chief Executive Officer of Customs v. Adelaide Brighton Cement Ltd* [2004] FCAFC 183 and *Commissioner of Stamp Duties (N.S.W.) v. Permanent Trustee Co. Ltd*. 87 ATC 4670; (1987) 19 ATR 74; (1987) 9 NSWLR 719).
[46] (1988) 85 ALR 125 at 138; 89 ATC 4078 at 4088; 20 ATR 211 at 222; (1988) 21 FCR 535 at 547.

Activities that are an adventure or concern in the nature of trade

206. Where land is sold that was purchased with a view to resale at a profit, we consider this to be an adventure or concern in the nature of trade. 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 activities of this nature meet the criteria to be an adventure or concern in the nature of trade. For further information on an adventure or concern in the nature of trade, see paragraphs 169 to 191.

Examples of the subdivision of land that is an adventure or concern in the nature of trade

Example 20

207. *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 blocks at a profit. They carry out their plan and sell both blocks of land at a profit.*

208. *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 21

209. *Tobias finds an ocean front block of land for sale in a well known beachside town. He devises a plan to enable him to afford to purchase the land and live there. He decides to purchase the land and to build a duplex. He plans to sell one of the units 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.*

210. *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.*

211. *Tobias is entitled to an ABN in respect of the subdivision. His activities have the appearance of a business deal. They are an adventure or concern in the nature of trade.*

212. *Further, there is a reasonable expectation of profit or gain (see paragraphs 389 to 414) as his plan has enabled him to be able to keep and live in one of the units.*

*Activities **in the form of** an adventure or concern in the nature of trade*

213. There are transactions that may not amount to an adventure or concern in the nature of trade. However, in some cases they may still exhibit many of the characteristics of a business or trade deal and appear to fall within the broader meaning of 'in the form of an adventure or concern in the nature of trade'.

214. This may occur if land, although not acquired for resale at a profit, becomes the subject of a subdivision involving activities such as detailed planning, earthworks, drainage, the provision of access as well as marketing and selling activities. For example, people who have lived for some time on larger blocks of land on the fringes of towns may now, as a result of urban sprawl, find themselves on property with changed zoning and increasing valuations. As work and family circumstances change they may wish to sell and instead of simply selling the land as is, the owners may choose to capitalise on the changed circumstances and initiate a small subdivision to maximise the value they realise from the sale.

215. If there is a subdivision of land which is not substantial (as a rule of thumb say less than 10 blocks) and has only required minimal activities to meet council requirements and to sell the subdivided land, we will accept that these activities may not be in the form of an adventure or concern in the nature of trade.[47] Such minimal activities could include:

- surveying the land;
- lodging plans with the local council;
- obtaining the council's consent for the subdivision;
- the provision of access, drainage, water meters, electricity and telephone to the subdivided blocks of land; and
- arranging for a real estate agent to market and sell the subdivided land.

216. It is important to note that the rule of thumb cannot apply if:

- the land is bought with the intention to resell at a profit, see paragraph 206; or
- there is further development by way of building on the land.

Where providing access requires significant activity to be undertaken (say, major road or bridgeworks), it is a question of fact and degree as to whether the activities amount to an enterprise.

[47] The rule of thumb is only useful for ABN and GST purposes. It does not have any application for income tax law.

217. Further the rule of thumb does not apply in any circumstances where the entity has been involved in an ongoing subdivision or a series of subdivisions which over a period of time result in more than nine blocks.

218. However, each situation should be examined on a case by case basis. Whether an enterprise is being conducted will be a question of fact having regard to all of the relevant circumstances including the nature and degree of activities undertaken. The rule of thumb can only be taken as a guide and advice can be sought from the Tax Office if an entity has doubts about the correct treatment of a particular transaction.

Examples of the subdivision of land that is in the form of an adventure or concern in the nature of trade

Example 22

219. *Rowan and Claire have lived on a semi-rural 30 hectare property for the last 10 years. They decide to subdivide part of this property.*

220. *They arrange for a development application to be lodged with the local council. Rowan and Claire obtain approval from the council to subdivide the land into 16 blocks and obtain a loan in order to finance the development.*

221. *Rowan and Claire arrange for the land to be surveyed and for developmental work to be undertaken. The work consists of; earthworks to level some of the blocks, the making of roads and drainage, and the provision of water meters, electricity and telephone to each block. They engage the local real estate agent to market and arrange to sell the blocks of land on their behalf. Rowan and Claire make a profit on the sale of the land.*

222. *Rowan and Claire are entitled to an ABN on the basis that the activity that they undertake is in the form of an adventure or concern in the nature of trade. We consider the subdivision to be substantial enough to be an enterprise as it requires a higher level of activities (acquisition of finance, making of roads and drainage, and the provision of services) than a simple subdivision.*

Example 23

223. *Sean inherits a 500 hectare property from his parents. He decides not to retain it. Instead he decides to subdivide the property into one hectare lots and sell these.*

224. *He hires a surveyor to survey the 500 hectare property to establish how many hectare lots it can be subdivided into. Sean then approaches the local shire council and is advised that he may subdivide his property into one hectare lots.*

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

- *the making of new sealed roads within the subdivision;*
- *the provision of electricity and telephone services to the new lots;*
- *the provision of culverts and other storm water drainage works; and*
- *the transfer of a parcel of land to the shire council for park purposes.*

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

227. *Sean then retains a project manager who arranges for all survey and subdivisional works to be carried out. Contractors are engaged to put in the culverts, complete all the necessary drainage works and install the electricity and telephone services. Sean carries out only those works required by the shire council as part of its development consent.*

228. *Sean 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.*

229. *Sean is entitled to an ABN on the basis that the sale is more than a mere disposal or simple sale of his assets. Sean's activities:*

- *amount to activities in the form of an adventure or concern in the nature of trade or they may be of an adventure or concern in the nature of trade, see paragraphs 169 to 191; and*
- *there is a reasonable expectation of profit or gain.*

Depending on the scale and degree of activities, these activities may also be considered to be carrying on a business or in the form of a business, see discussion on the overlap of concepts paragraphs 156 to 161.

Example 24

230. *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.*

231. *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.*

232. *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.*

233. *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. Further they had a reasonable expectation of profit or gain. The activities are in the form of an adventure or concern in the nature or trade or they may be an adventure or concern in the nature of trade.*

234. *Even though Prakash and Indira have been involved in a small subdivision there is no need to consider whether their activities come within the rule of thumb explained in paragraphs 215 to 217. This is because the rule of thumb does not cover situations where there are building activities. The rule of thumb can only be considered where minimal activities are undertaken.*

Examples of the subdivision of land that is not in the form of an adventure or concern in the nature of trade

Example 25

235. *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.*

236. *Astrid and Bruno arrange for the approval of the subdivision through the council, and for the land to be surveyed with the title of the land to be transferred to Greta. She pays for all the costs of the subdivision and the cost of her new house.*

237. *Astrid and Bruno are not entitled to an ABN in respect of the subdivision. It is no more than a simple sale without any commercial aspects. The subdivision was part of a private or domestic arrangement to provide a house for their daughter. It is therefore not an activity that is in the form of an adventure or concern in the nature of trade and an enterprise.*

Example 26

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

239. *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.*

240. *Ursula and Gerald 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 no more than a simple sale. The only work to prepare the land for sale was to organise the subdivision of the land in order to allow the sale and transfer of title to take place. It is therefore not an activity that is in the form of an adventure or concern in the nature of trade and an enterprise.*

Example 27

241. *For a number of years Elsie and Karin have owned acreage which they now decide to sell. They purchased the land for keeping their horses. They rode their horses on their land and in pony club events. Elsie and Karin receive advice from the local real estate agent that it would be easier to sell the land if it was subdivided into smaller blocks.*

242. *Elsie and Karin arrange for a development application to be lodged with the local council. They obtain approval from the council 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 existing facilities such as electricity but it requires the provision of water meters and telephone. Consequently, only minimal work is required to subdivide the land. They engage a local real estate agent to arrange to sell the blocks of land.*

243. *Elsie and Karin are not entitled to an ABN. It is a simple sale involving minimal work to subdivide the land. The sale is therefore not considered to be an activity that is in the form of an adventure or concern in the nature of trade and an enterprise.*

Example 28

244. *Francesca has lived on a large suburban block for a number of years. She decides to subdivide the block.*

245. *Francesca puts in a development application with the local council. To enable the subdivision to take place Francesca has to move her house to the back of the block. An easement will need to be created along the side of the land to allow Francesca to access her block.*

246. *The subdivision is approved and Francesca arranges for the land to be surveyed. She arranges with a local solicitor for the title to the land to be adjusted to reflect the change. Francesca also arranges for her house to be moved and for the local real estate agent to sell the front block of land.*

247. *Francesca is not entitled to an ABN. Despite the move of the house the sale of the subdivision is no more than a simple sale. The move of the house was to enable the block of land to be subdivided. Therefore the sale is not an activity that is in the form of an adventure or concern in the nature of trade.*

Activities done on a small scale may amount to an enterprise

248. As a business can be carried on in a small way so also can an enterprise be carried on in a small way.[48] The size or scale of the activity although important is not a determinative test of itself as to whether the entity's activities amount to an enterprise. However, the larger the scale of activities the more likely it is that the activities are a business or are in the form of a business. If the activities are carried on in a small way other indicators may be more important in determining whether the activities amount to a business or are in the form of a business.

249. An individual who is in full-time employment or a retiree with self-funded superannuation may operate a small business or carry on activities in the form of a business and therefore be entitled to an ABN. This is notwithstanding that subsection 38(2)(a) which excludes from the definition of enterprise an activity or activities a person carries on as an employee; or which is in connection with earning certain withholding payments.

250. The definition of enterprise excludes some activities that would, if they had not been excluded, have to be considered in determining whether the entity that undertook the activities was carrying on an enterprise. Activities are excluded from the definition of enterprise if they are carried on by an individual or a partnership that mainly consists of 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 335 to 417.

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

Example 29 – activities done on a small scale that amount to an enterprise

251. *Omar is a self funded retiree. To keep active he has secured some window cleaning on a regular basis from 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.*

252. *Omar is carrying on an enterprise and is entitled to an ABN. Although the activities are on a small scale, some of the indicators of a business are present. Omar has an expectation of making a profit, the activities are regular and repetitive and they are done in a businesslike manner.*

253. *Omar is not an employee of the shopkeepers. Further, the window cleaning activities are not done as a private recreational pursuit or hobby and there is a reasonable expectation of profit or gain.*

254. *Activities performed as an employee, private recreational pursuits or hobbies as well as activities of an individual without a reasonable expectation of a profit or gain are specifically excluded from the definition of enterprise, see paragraphs 335 to 414.*

Example 30 – activities that are done in the form of a business

255. *Troy is a sales assistant. Prior to becoming a sales assistant, he worked as a car detailer. In order to earn some extra money he does some car detailing for friends, acquaintances and people they recommend. He does not advertise his services and relies on word of mouth for work. Troy is happy to limit the work he does because he does not want his car detailing work to take up too much time as he enjoys an active social life.*

256. *Troy does the car detailing in his home garage. He keeps records of the cars he has detailed. He ensures that he charges his clients a sufficient amount to cover the materials he uses and to ensure that there is a moderate profit for him.*

257. *The car detailing activities done by Troy have some of the indicators of a business present. They are carried out within Troy's expertise, he keeps records and Troy has an expectation of making a profit. It is considered that the activities meet the broader test of being in the form of a business and as such is an enterprise.*

258. *In addition, the activities are not done as a private recreational pursuit or hobby and there is a reasonable expectation of profit or gain.*

Example 31 – activities done on a one-off small scale that amount to an enterprise

259. *Jenna is a maths teacher. She is also engaged under contract solely to do a final edit of a maths text book for a publisher. The contract is to deliver a result for a set price of $1,400. Jenna is not under the direction or control of the publisher in doing the work. No expenses were incurred by Jenna.*

260. *The activity is not performed by Jenna as an employee of the publisher. The activity has some of the indicators of a business such as being carried out within her professional expertise, in a businesslike manner and with an expectation of making a profit or gain. This is an activity done in the form of a business.*

261. *Further, the activity is not done as a private recreational pursuit or hobby and there is a reasonable expectation of profit or gain.*

262. *Jenna is carrying on an enterprise and is entitled to an ABN.*

Continuing examples concerning activities that may have led to an on-going enterprise

Example 32 – continuing Example 10 [paragraph 114]

263. *The facts are those in Example 10. The activities undertaken by Albert for the purpose of becoming a self-employed architect may themselves amount to an enterprise. The activities that Albert actually undertook were systematic and organised in a businesslike manner. The activities would be considered to be activities done in the form of a business unless an exclusion applies. For a discussion of this aspect, see Example 51 (paragraph 400).*

Example 33 – continuing Example 11 [paragraph 116]

264. *The facts are those in Example 11. VJ Computing Partnership never commenced the enterprise of supplying the organisation with computer services. In putting together the tender, a number of activities were undertaken including market research and investigations into the most economical way to supply the computer services. The tender was unsuccessful.*

265. *The activities satisfy many of the indicators for carrying on a business. They were commercial in nature. They were undertaken in a businesslike manner, the activities were organised and systematic, records were kept and the partners had relevant knowledge and skills.*

266. *The activities would be considered to be activities done in the form of a business unless an exclusion applies. For a discussion of this aspect, see Example 52 [paragraph 402].*

Activities of holding companies and other holding entities

267. 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 enterprise to register for GST.

268. 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.

269. *In Esquire Nominees Ltd (Trustee of Manolas Trust) v. Federal Commissioner of Taxation*[49] 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.

270. *In FC of T v. Total Holdings (Australia) Pty Ltd*[50] 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.

271. In *F C of T v. Email Limited*[51] 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

[49] (1973) 129 CLR 177 at 221; 73 ATC 4114 at 4123; 4 ATR 75 at 85.
[50] 79 ATC 4279; 9 ATR 885.
[51] See paragraph 8 in 99 ATC 4868; 42 ATR 698; [1999] FCA 1177.

> 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.

272. In the case of *Spassked Pty Ltd v. Commissioner of Taxation*[52] *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.[53]

273. 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.

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[52] See paragraph 84 in [2003] FCAFC 282; (2003) 203 ALR 515; 2003 ATC 5099; 54 ATR 546.

[53] 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.

274. 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.

275. 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 34 – provision of services by a holding entity that is an enterprise

276. *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.*

277. *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.*

278. *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 35 – holding entity not carrying on an enterprise

279. *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 36 – investment activities are not done in the form of a business

280. *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.*

281. *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.*

282. *The trustee for the trust is not entitled to an ABN as it is not carrying on an enterprise. There are no activities done in the form of a business or in the form of an adventure or concern in the nature of trade.*[54]

Activities of head companies of consolidated groups

283. 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 88). 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.

284. 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.

285. 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;[55]
- effectively maintaining a common tax accounting period for all its member entities;

[54] 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.
[55] Section 701-1, Div 707, Div 709, Div 717 ITAA 1997.

- 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);[56]
- notifying the Tax Office of its decision to consolidate;[57]
- determining the group's annual income tax liabilities and lodging a single income tax return;[58]
- managing any ongoing income tax liabilities or income tax obligations and supplying income tax information to the Tax Office when required;[59]
- ensuring that any necessary valuations are obtained for working out the tax cost of assets[60] and to assist in calculating how much of a transferred loss can be utilised;[61]
- calculating, reporting and paying of PAYG instalments;[62]
- notifying the Tax Office about certain events affecting a consolidated group including the entry and exit of subsidiaries;[63]
- managing and implementing tax sharing arrangements;[64]
- seeking funding from subsidiary members through a funding agreement; and
- substantial stewardship duties.

286. 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.

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

287. 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 269 to 274 above are equally relevant to the consideration of whether the head company of a consolidated group is carrying on an enterprise.

288. 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.

289. 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'[65] 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.

290. 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.

291. 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.

Example 37 – Head company carrying on an enterprise

292. *Corporate Limited Partnership No 2 (CLP) and its three wholly-owned subsidiaries form a consolidated group. The subsidiaries are 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 IT needs, maintains consolidated accounts and prepares and lodges the income tax return of the consolidated group from those accounts.*

293. *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.*

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

Mutual organisations

294. 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 or an adventure or concern in the nature of trade 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.[66] The trading activities of these organisations amount to activities in the form of a business.

295. Subsection 38(2A) makes it clear that an entity can carry on an enterprise in the form of a business or in the form of an adventure or concern in the nature of trade even though it may 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

296. 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. However, 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.

297. A non-profit club or association might, therefore, have activities that would be categorised as either a business or an adventure or concern in the nature of trade but, due to lack of some commercial characteristics such as the intention to profit, is not. The activities of these non-profit clubs or associations can be in the form of a business or in the form of an adventure or concern in the nature of trade for the purposes of subsection 38(1) as they are carried out in a businesslike manner and they have the essential appearance of a business.

298. A non-profit club or association may also carry on an enterprise even though its activities are not done in the form of a business or in the form of an adventure or concern in the nature of trade. Activities may be deemed to be an enterprise activity under one of the other paragraphs of section 38. For example a club may be a charitable institution.

Example 38 – activities of a club that is an enterprise

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

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

300. *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.*

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

302. *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 39 – activities of a club that is not an enterprise

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

304. *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.*

305. *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.*

Body corporates under strata title legislation

306. It was decided in *Body Corporate, Villa Edgewater Cts 23092 v. F C 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.[67] 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.[68]

307. 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

[67] This is effect of subsection 38(2A) [9-20(3) of the GST Act], see *Body Corporate, Villa Edgewater Cts 23092 v. F C of T* 2004 ATC 2056; 55 ATR 1162 at paragraph 36.
[68] *Body Corporate, Villa Edgewater Cts 23092 v. F C of T* 2004 ATC 2056; 55 ATR 1162 at paragraph 41.

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.

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

Lease, licence or other grant of an interest in property as an enterprise

308. 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. For further discussion of the term 'in the form of', see paragraphs 192 to 204 and 312 to 313.

309. 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.

Regular or continuous basis

310. 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.

311. 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). This exclusion is discussed in paragraphs 389 to 414. 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 43 paragraph 324).

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

312. In paragraphs 38(1)(a) and (b), the use of the phrase 'in the form of' brings into the definition of 'enterprise', activities that do not amount to a business or to an adventure or concern in the nature of trade. Something less than a business, for example, can be an enterprise as defined.

313. In paragraph 38(1)(c) the terms 'a lease, licence or other grant of an interest in property' have their normal meaning. The phrase 'in the form of' makes the terms take on a meaning beyond their ordinary meaning. However the phrase 'other grant of an interest' is also considered to cover interests in property that are not a lease or licence. Essentially the terms 'lease', 'licence' or 'other grant of an interest in property' are considered to cover most interests in property that can be created.

Example 40 – ad hoc rental of property that is not on a regular nor continuous basis

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

315. *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.*

316. *Brian and Joan have entered into a tax law partnership. Neither Brian nor Joan is entitled to an ABN. This is because the leasing of the holiday home is neither on a regular nor on a continuous basis.*

317. *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 (paragraph 38(2)(c)). See paragraphs 389 to 414 for further information about paragraph 38(2)(c).*

Example 41 – property rented o a regular basis

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

319. *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.*

320. *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 42 – camping spot rented on a regular basis

321. *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.*

322. *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.*

323. *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 43 – use of property on a continuous basis which is an enterprise

324. *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.*

325. *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. However, it does not pay any other rental to Verity.*

326. *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. This is because she will benefit from the increase in the value of the property on sale due to the farming activities being carried on by the partnership and the improvements made on the land.*

Example 44 – use of property on a continuous basis which is not an enterprise

327. *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.*

328. *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

329. 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.

330. 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.

331. 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.

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

333. 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.

334. 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?

335. It can be seen from the discussion in paragraphs 105 to 334 that the scope of enterprise is very wide. Enterprise encompasses activities that ordinarily would amount to a business, or an adventure or concern in the nature of trade. Further, the range of activities that amount to an enterprise is expanded by including activities that are in the form of a business or in the form of an adventure or concern in the nature of trade. This means that enterprise encompasses

activities that have the appearance or characteristics of a business or an adventure or concern in the nature of trade.

336. Enterprise is further expanded to include an activity or activities done on a regular or continuous basis in the form of a lease, licence or other grant of an interest in property. These terms are considered to cover most interests in property that can be created.

337. The effect of having a wide definition of enterprise is that activities that are not of a commercial nature or are done by an employee may be included in this definition. To ensure that these types of activities are not included in the definition of enterprise there are a number of exclusions in subsection 38(2). Excluded from the definition of enterprise 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) applies).

338. Activities may be excluded from the definition of enterprise by more than one of the exclusions. For instance a private recreational pursuit may be undertaken in a businesslike manner and as a result may come within the definition of an activity or activities done in the form of a business or the form of an adventure or concern in the nature of trade, see Example 49 *[paragraph 381]*. However, this activity or activities would be excluded from the definition of enterprise because they are a private recreational pursuit or hobby. The same activity or activities may also be excluded because there is no reasonable expectation of a profit or gain.

339. 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 in the form of 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

340. Activities done by a person as an employee (see paragraphs 341 to 346) or in connection with earning certain withholding payments (see paragraphs 347 to 348) 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 349 to 370.

Activities done as an employee

341. An individual who performs activities as an employee is not carrying on an enterprise in relation to those activities. The activities undertaken by an individual 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 paragraph 38(2).[69]

Meaning of employee

342. '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.

343. For a discussion on what is meant by an employee, reference should be made to Taxation Ruling TR 2000/14. As this Ruling does not add to or change the discussion in TR 2000/14 it can be referred to for a fuller discussion on the meaning of 'employee'.

344. Paragraph 14 of TR 2000/14 commences the discussion on the meaning of 'employee' by stating:

> Where section 12-35 of Schedule 1 of the TAA refers to an employee, the reference is to an employee at common law. The relationship between an employer and an employee is a contractual one. It is often referred to as a contract **of service** (or, in the past, as a master/servant relationship). Such a relationship is typically contrasted with the independent contractor/principal relationship that, at law, is referred to as a contract **for services**. An independent contractor typically contracts to achieve a result whereas an employee contracts to provide his or her labour (typically to enable the **employer** to achieve a result). An independent contractor works in his or her own business (or on his or her own account) while an employee works in the service of the employer.

345. There is no single objective test that will indicate whether or not an individual is an employee. As TR 2000/14 states, it is necessary to examine all the terms of the contract in each case, to determine whether on balance the person is working in the service of another or is working on his or her own behalf.[70] The courts have identified various features as indicators of whether a contract is one

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[69] 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.'
[70] See paragraph 22 of TR 2000/14.

of service or for service. In TR 2000/14 the key indicators set out and discussed are:

- whether control is exercised over the manner in which the work was performed;
- whether the substance of the contract is to achieve a specified result;
- whether there is an unlimited power to delegate;
- whether the worker bears little or no risk of the costs arising out of injury or defect in carrying out their work;
- conditions of engagement (for example provision of benefits such as annual, sick and long service leave); and
- working on one's own account or in the business of the payer – the 'integration' test.

346. 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.

Activities done as a withholding payment earner

347. 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).

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

349. 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).

350. 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.

351. 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. 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.[71] 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 348.

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

352. 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.

353. 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

[71] 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*.

course of a person's employment regard must be had to the general nature, terms and circumstances of the employment.[72]

354. 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.[73]

355. 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.

356. The meaning of 'in connection with' was referred to in *Our Town F M Pty Ltd v. Australian Broadcasting Tribunal* (No 1) (Our Town FM case).[74] In that case the Federal Court considered paragraph 5(1)(b) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). That section 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:[75]

> 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.

357. *Re Nanaimo Community Hotel Ltd* [1944] 4 DLR 638 was discussed by Wilcox J in the Our Town FM case.[76] In the *Re Nanaimo Community Hotel case* the court considered the words 'jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act'. McFarlene J stated at [1944] 4 DLR 639:

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[72] *Hatzimanolis v. A.N.I. Corporation Ltd* (1992) 173 CLR 473 at 484; 106 ALR 611 at 618; 66 ALJR 365 at 369.
[73] *Henderson v. Commissioner of Railways (W.A.)* (1937) 58 CLR 281 at 294.
[74] (1987) 16 FCR 465; 77 ALR 577; (1987) 2 BR 151.
[75] See 16 FCR 479; 77 ALR 591-592; (1987) 2 BR 166-167.
[76] (1987) 16 FCR 465 at 480; 77 ALR 577 at 592; (1987) 2 BR 151 at 167.

> 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.[77]

358. As previously mentioned in the *Villa Edgewater case*,[78] 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.

359. 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.[79]

360. Guidance can be obtained from the court decisions discussed in paragraphs 353 to 359 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.

361. 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

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[77] The statement was upheld on appeal, see *Re Nanaimo Community Hotel Ltd* [1945] 3 DLR 225.
[78] *Body Corporate, Villa Edgewater Cts 23092 v. F C of T* 2004 ATC 2056; 55 ATR 1162
[79] 2004 ATC 2056 at paragraph 34.

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 45 – sole practitioner accountant

362. *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.*

363. *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.*

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

Example 46 – position accepted in connection with an enterprise

365. *Lara is a partner of Portia and Associates, a legal firm. She specialises in litigation work and regularly represents clients in a number of courts and tribunals. She applied for and was successful in obtaining a part-time position on a tribunal. She was appointed to the position because she was a practicing solicitor, had a specialised knowledge of the law administered by the tribunal and had extensive experience as an advocate. She developed the skills necessary for the position on the tribunal through her work with Portia and Associates.*

366. *The payments from the tribunal to Lara 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.*

367. *The exception to the exclusion in paragraph 38(2)(a) applies. This is because the appointment was made because of Lara's position as a practicing solicitor in a legal firm. She had developed the skills necessary for this position as a result of the expertise she acquired in working at Portia and Associates. The activity as a tribunal member is in connection with her activities as a partner in the legal firm.*

Example 47 – position accepted not in connection with an enterprise

368. *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.

369. *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.*

370. *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

371. Under paragraph 38(2)(b) 'enterprise' does not include an activity, or series of activities, done 'as a private recreational pursuit or hobby'. What activities are considered to be a private recreational pursuit or hobby are discussed in paragraphs 373 to 376.

372. An activity or series of activities done in the form of a business or in the form of an adventure or concern in the nature of trade is an enterprise. If however, any activities that may be considered to be an enterprise because they fall within the meaning of the phrase 'in the form of' are done as a private recreational pursuit or hobby they will nevertheless not be an enterprise because of this specific exclusion.

Meaning of private recreational pursuit or hobby

373. There are no statutory definitions of 'private recreational pursuit' or 'hobby'. These terms therefore take their 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'.

374. The nature of a private recreational pursuit or hobby has been considered in a *New Zealand GST case*. In Case N27 (1991) 13 NZTC 3,229, Bathgate DJ described a private recreational pursuit, at 3,240, 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

375. 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.

376. 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.

A hobby can become a business and an enterprise

377. 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.

378. A hobby can turn into a business and therefore also an enterprise as the nature and extent of the activities change. The change 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 48 – recreational pursuit or hobby

379. *Lucinda is a public servant who spends some of her leisure time producing clay pots and other products. She has her own kiln in which she fires her creations and produces a saleable product. Lucinda occasionally sells her clay products at a friend's stall at a weekend market. These are popular and she is able to cover some of her costs.*

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

- *the activity is a hobby; or*
- *it is an activity undertaken without a reasonable expectation of profit or gain (see paragraphs 389 to 414 for a discussion of this aspect).*

Example 49 – hobby in the form of a business

381. *Theo devotes a lot of his time to stamp collecting. He has a large and valuable stamp collection.*

382. *He specialises in stamps from the Pacific Islands and is considered to be an expert in this area. Theo regularly imports stamps from these countries and he tries to obtain the rarest stamps.*

383. *Theo has catalogued his entire stamp collection. He regularly consults stamp catalogues so that he can keep an up to date record of the value of his stamps.*

384. *He exhibits his stamps at shows and frequently wins prizes. From time to time Theo sells a few of his stamps for a profit. He keeps a record of the costs of his stamps and how much he has received on sale.*

385. *Theo is not a stamp dealer but it could be considered that he undertakes activities in the form of a business. He carries out his stamp collecting activities in a businesslike manner. His activities are regular, systematic, he keeps extensive records of his collection and he makes some profits. However, Theo would not be entitled to an ABN because the activities are undertaken as a hobby. It is possible however for a hobby to become a business, see paragraphs 377 to 378 and Example 50 [paragraph 386].*

Example 50 – hobby becomes a business

386. *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.*

387. *She starts to design and produce party and wedding invitations for her friends. Her designs prove to be extremely popular. She receives requests for other types of work. Calligraphy soon occupies all*

of Mariam's spare time. She gives up her job as a teacher. Mariam sets up and works in a studio producing a variety of work.

388. *At the time she gives up her teaching and sets up a studio Mariam is entitled to an ABN as she is now carrying on a business.*

Individuals or partnerships without a reasonable expectation of profit or gain

389. 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.

390. An activity or activities that come within paragraphs 38(1)(a) and (b) may be excluded by this exception. This is because an enterprise includes 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 as discussed in paragraphs 152 to 307. The use of the phrase 'in the form of' expands the meaning of business or an adventure or concern in the nature of trade. This means that activities which are undertaken where there is no reasonable prospect of a profit or gain may come within paragraphs 38(1)(a) and (b).

391. Also, an activity or activities that come within paragraph 38(1)(c) (lease, licence or other grant of an interest in property) may be excluded by this exception. This exception will apply where there is no reasonable expectation of profit or gain from a lease, licence or other grant of property made by an individual (but not a trustee of a charitable trust) or a partnership where all or most of the members are individuals.

392. 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 in that capacity.

Meaning of individual and partnership

393. 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

394. 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.

395. 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.[80] 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.'

396. The test is an objective one.[81] 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.

397. For the purposes of determining whether, objectively, if there is a reasonable expectation of profit or gain, the fact that year after year an overall loss is made after taking into account all losses and outgoings is one factor that may indicate that there is no reasonable expectation of profit or gain.

Partnership and reasonable expectation

398. 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'.[82] The second limb of the definition extends partnership for taxation purposes to include persons in receipt of income jointly.

399. As previously discussed, the test of 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

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[80] 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.

[81] 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.

[82] 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.

activities. Unless there is a change in how the activities are carried out there is not a reasonable expectation of profit.

Continuing examples concerning activities that may have led to an on-going enterprise

Example 51 – continuing Examples 10 and 32 [paragraphs 114 and 263]

400. *The facts are those in Examples 10 and 32; the architectural business that Albert intends to run from his home does not eventuate. The purchases for the proposed business, the advertisements for clients and work on converting a room of his house into an office are not commencement activities as the enterprise did not come into existence. The activities may however amount to an enterprise in their own right. This is because they are done in a businesslike manner with records kept and a plan for the activities. They are activities in the form of a business provided there is a reasonable expectation of profit or gain.*

401. *However, Albert's activities are such that there is no reasonable expectation of profit or gain. In this case Albert abandoned the project because objectively the business would not be profitable. The preparatory activities are not in themselves potentially profitable nor would they provide a gain. Albert is not entitled to an ABN.*

Example 52 – continuing Examples 11 and 33 [paragraphs 116 and 264]

402. *The facts are those in Examples 11 and 33; VJ Computing Partnership never commenced the enterprise of supplying the organisation with computer services. In putting together the tender a number of activities were undertaken including market research and investigations into the most economical way to supply the computer services. The tender was unsuccessful.*

403. *The activities may satisfy many of the indicators of carrying on a business. They were undertaken in a businesslike manner, the activity was organised and systematic, records were kept and the partners had relevant knowledge and skills.*

404. *The activities could be considered to be activities done in the form of a business. The VJ Computing Partnership is entitled to an ABN. After an objective assessment, having regard to all the circumstances including 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 accepted that there is a reasonable expectation of profit or gain.*

Examples concerning partnerships

Example 53

405. *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.*

406. *Michael and his father-in-law would be 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 54

407. *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.*

408. *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.*

409. *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 stallions' services to other breeders. They also plan to sell the foals produced to the general public through yearling sales. Sophie sets up and maintains records of their project.*

410. *The partnership would be entitled to an ABN on the basis that its activities would 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 55

411. *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.*

412. *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.*

413. *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.*

414. *They would not be 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

415. 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 applies).

416. 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.

417. The exception does not apply to members of a local governing body to which subsection 12-45(3) in Schedule 1 to the TAA 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

418. We invite you to comment on this draft Miscellaneous Taxation Ruling. Please forward your comments to the contact officer by the due date.

Due date:	**11 February 2005**
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Detailed contents list

419. Below is a detailed contents list for this Miscellaneous Taxation Ruling:

	Paragraph
What this Ruling is about	**1**
Date of effect	**6**
Background	**7**
Policy intent	7
The registration process	11
Definitions	16
Entity	16
Enterprise	17
Ruling with Explanation	**19**
Entitlement to an ABN	19
What is an entity for ABN purposes?	24
Individual	27
Body corporate	28
Corporation sole	33

Body politic 36
Partnership 39
Any other unincorporated association or body of persons 42
Example 1 – unincorporated association of persons 48
Example 2 – expense sharing arrangement that does not amount to an unincorporated association of persons 50
Exclusion to any other unincorporated association or body of persons – non-entity joint venture 52
Example 3 – non-entity joint venture not entitled to an ABN 55
Example 4 – an entity that is not a non-entity joint venture 58
Trust 60
Superannuation fund 61
Trustee of a trust or superannuation fund 63
Example 5 – role of trustee 65
Example 6 – change of trustee 69
Multiple Roles 71
Trustee 71
Agent 74
Other roles 76
The ABN Act applies as if an entity exists 77
Government entities 77
Non-profit sub-entity 79
Enterprise 82
Government entities, superannuation funds and non-profit sub-entities 85
Who is carrying on an enterprise? 87
Groups of entities 88
Example 7 – more than one enterprise carried on by a consolidated group 91
Partnership 95
Agency 96
Example 8 – agent is not entitled to an ABN 99
Religious Practitioner 102
Employee 104
When is an enterprise being carried on? 105
Commencement of an enterprise 107

Example 9 – a feasibility study that is an enterprise 112
Example 10 – an activity done in the course of the intended commencement of an enterprise 114
Example 11 – an unsuccessful tender 116
Example 12 – activities not done in the course of commencement of an enterprise 118
Example 13 – establishment of a trust is not commencement activity 120
Termination of an enterprise 122
Example 14 – an enterprise that has not terminated 129
Example 15 – an activity not in the course of the termination of an enterprise 130
What is an enterprise for ABN purposes? 132
Activity, or series of activities 135
Example 16 – entity with a new enterprise, but one ABN 139
Example 17 – activities associated with the sale of real property 143
Example 18 – overall enterprise 147
Example 19 – an activity that is an enterprise 149
In the form of a business or in the form of an adventure or concern in the nature of trade 152
Overlap of concepts 156
Business 162
Definition 163
Indicators of a business 166
An adventure or concern in the nature of trade 169
Trade 173
The subject matter of realisation 174
The length of period of ownership 176
The frequency or number of similar transactions 178
Supplementary work on or in connection with the property realised 179
The circumstances that were responsible for the realisation 180
Motive 181
Trade v. investment assets 186
Isolated sales or transactions in Australia 190
'In the form of' 192

Alternative view 200
Isolated transactions and sales of real property 205
Activities that are an adventure or concern in the nature of trade 206
Examples of the Subdivision of land that is an adventure or concern in the nature of trade 207
Example 20 207
Example 21 209
*Activities **in the form of** an adventure or concern in the nature of trade* 213
Examples of the subdivision of land that is in the form of an adventure or concern in the nature of trade 219
Example 22 219
Example 23 223
Example 24 230
Examples of the subdivision of land that is not in the form of an adventure or concern in the nature of trade 235
Example 25 235
Example 26 238
Example 27 241
Example 28 244
Activities done on a small scale may amount to an enterprise 248
Example 29 – activities done on a small scale that amount to an enterprise 251
Example 30 – activities that are done in the form of a business 255
Example 31 – activities done on a one-off small scale that amount to an enterprise 259
Continuing examples concerning activities that may have led to an on-going enterprise 263
Example 32 – continuing Example 10 263
Example 33 – continuing Example 11 264
Activities of holding companies and other holding entities 267
Example 34 – provision of services by a holding entity that is an enterprise 276
Example 35 – holding entity not carrying on an enterprise 279

Example 36 – investment activities are not done in the form of a business 280
Activities of head companies of consolidated groups 283
Example 37 – Head company carrying on an enterprise 292
Mutual organisations 294
Non-profit clubs and associations 296
Example 38 – activities of a club that is an enterprise 299
Example 39 – activities of a club that is not an enterprise 303
Body corporates under strata title legislation 306
On a regular or continuous basis, in the form of a lease, licence or other grant of interest in property 308
Lease, licence or other grant of interest in property as an enterprise 308
Regular or continuous basis 310
In the form of a lease, licence or other grant of interest in a property 312
Example 40 – ad hoc rental of property that is not on a regular nor continuous basis 314
Example 41 318
Example 42 321
Example 43 – use of property on a continuous basis which is an enterprise 324
Example 44 – use of property on a continuous basis which is not an enterprise 327
The Commonwealth, a State or Territory, or a body corporate, or corporation sole, established for a public purpose 329
What activities are excluded from being an enterprise? 335
Activities done as an employee and activities done as a withholding payment earner 340
Activities done as an employee 341
Meaning of employee 342
Activities done as a withholding payment earner 347
Exception to the exclusion 349
'In the course of' or 'in connection with' 352
Example 45 – sole practitioner accountant 362
Example 46 – position accepted in connection with an enterprise 365
Example 47 – position accepted not in connection with an enterprise 368

Private recreational pursuit or hobby 371
Meaning of private recreational pursuit or hobby 373
Indicators of private recreational pursuit or hobby 375
A hobby can become a business and an enterprise 377
Example 48 – recreational pursuit or hobby 379
Example 49 – hobby in the form of a business 381
Example 50 – hobby becomes a business 386
Individuals or partnerships without a reasonable expectation of profit or gain 389
Meaning of individual and partnership 393
Reasonable expectation 394
Partnership and reasonable expectation 398
Continuing examples concerning activities that may have led to an on-going enterprise 400
Example 51 – continuing Examples 10 and 32 400
Example 52 – continuing Examples 11 and 33 402
Examples concerning partnerships 405
Example 53 405
Example 54 407
Example 55 411
Members of local governing bodies 415
Your comments **418**
Detailed contents list **419**
Appendix 1 – Decision Tree 1 – Are you carrying on an enterprise? paragraphs 38(1)(a) and (b) Page 83
Appendix 1 – Decision Tree 2 – Are you carrying on an enterprise? paragraphs 38(1)(c) Page 84
Appendix 2 – Comparison between MT 2004/D3 and MT 2000/1 Page 85

Commissioner of Taxation
15 December 2004

Previous draft:

Not previously released in draft form

Related Rulings/Determinations:

IT 2505; TR 97/11; TR 1999/13, TR 2000/14; TR 2002/21; 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

Legislative references:

- ANTS(ABN)A 5
- ANTS(ABN)A 5A
- ANTS(ABN)A 8
- ANTS(ABN)A 8(1)
- ANTS(ABN)A 8(1)(a)
- ANTS(ABN)A 8(1)(b)
- ANTS(ABN)A 8(2)
- ANTS(ABN)A 14
- ANTS(ABN)A 15
- ANTS(ABN)A 18
- ANTS(ABN)A 25(2)
- ANTS(ABN)A 26
- ANTS(ABN)A 28(2)
- ANTS(ABN)A 37
- ANTS(ABN)A 37(1)
- ANTS(ABN)A 37(1)(a)
- ANTS(ABN)A 37(1)(b)
- ANTS(ABN)A 37(1)(c)
- ANTS(ABN)A 37(1)(d)
- ANTS(ABN)A 37(1)(e)
- ANTS(ABN)A 37(1A)
- ANTS(ABN)A 37(2)
- ANTS(ABN)A 37(3)
- ANTS(ABN)A 38
- ANTS(ABN)A 38(1)
- ANTS(ABN)A 38(1)(a)
- ANTS(ABN)A 38(1)(b)
- ANTS(ABN)A 38(1)(c)

- ANTS(ABN)A 38(1)(d)
- ANTS(ABN)A 38(1)(e)
- ANTS(ABN)A 38(1)(f)
- ANTS(ABN)A 38(1)(g)
- ANTS(ABN)A 38(2)
- ANTS(ABN)A 38(2)(a)
- ANTS(ABN)A 38(2)(b)
- ANTS(ABN)A 38(2)(c)
- ANTS(ABN)A 38(2)(d)
- ANTS(ABN)A 38(2A)
- ANTS(ABN)A 38(3)
- ANTS(ABN)A 41
- ANTS(GST)A 9-5
- ANTS(GST)A 9-10
- ANTS(GST)A 9-20
- ANTS(GST)A 9-20(1)(da)
- ANTS(GST)A 9-20(3)
- ANTS(GST)A 25-10(2)
- ANTS(GST)A Div 48
- ANTS(GST)A Div 49
- ANTS(GST)A Div 57
- ANTS(GST)A Div 63
- ANTS(GST)A 63-5
- ANTS(GST)A Div 149
- ANTS(GST)A 184-1
- ANTS(GST)A 195-1
- ITAA 1936 6(1)
- ITAA 1936 25A)
- ITAA 1936 25A(1)
- ITAA 1936 26(a)
- ITAA 1936 94D
- ITAA 1997 15-15
- ITAA 1997 15-15(1)
- ITAA 1997 Subdiv 30-B
- ITAA 1997 Pt 3-90
- ITAA 1997 Div 701
- ITAA 1997 701-1
- ITAA 1997 703-50(1)
- ITAA 1997 703-60
- ITAA 1997 Div 705
- ITAA 1997 Div 707
- ITAA 1997 707-320
- ITAA 1997 Div 709
- ITAA 1997 Div 717
- ITAA 1997 719-50
- ITAA 1997 719-80
- ITAA 1997 Div 721
- ITAA 1997 960-100
- ITAA 1997 995-1
- TAA 1953 Sch 1 12-35
- TAA 1953 Sch 1 12-40
- TAA 1953 Sch 1 12-45
- TAA 1953 Sch 1 12-45(3)
- TAA 1953 Sch 1 12-60
- TAA 1953 Sch 1 Pt 2-10 45-710
- Administration Decisions (Judicial Review) Act 1977 5(1)(b)
- Anglican Church of Australia (Bodies Corporate) Act 1938 (NSW)
- Associations Incorporation Act 1987 (WA)
- Baptist Union Incorporation Act 1919 (NSW)
- Bank Accounts Debits Tax Administration Act 1982
- Bank Accounts Debits Tax Administration Act 1982 3(1)(a)(vii)
- City of Brisbane Act 1924 (Qld)
- Companies (Consolidation) Act 1908
- Conveyancing and Law of Property Act 1884 (Tas)
- Customs Act 1901 5C
- Corporations Act 2001
- Local Government Act 1993 (Qld)
- Partnership Act (ACT) 1963 6(1)
- Partnership Act (NSW) 1892 1(1)
- Partnership Act (NT) 5(1)
- Partnership Act (Qld) 1891 5(1)
- Partnership Act (SA) 1891 1(1)
- Partnership Act 1891 (TAS) 6(1)
- Partnership Act 1958 (Vic) 5(1)
- Partnership Act 1958 (Vic) 84
- Partnership Act 1895 (WA) 7(1)
- Public Trustee Act 1913 (NSW)
- Public Trustee Act 1978 (Qld) 8
- Superannuation Act 1916 (NSW)
- Superannuation Industry (Supervision) Act 1993 10
- Australian Business Number Regulations 1999 6

Case references:

- AB v. FC of T 97 ATC 4945; 37 ATR 225
- Bank of New South Wales v. Commonwealth (1948) 76 CLR 1; [1948] 2 ALR 89
- Body Corporate, Villa Edgewater Cts 23092 v. F C of T 2004 ATC 2056; 55 ATR 1162
- Cameron v. Hogan (1934) 51 CLR 358
- Chief Executive Officer of Customs v. Adelaide Brighton Cement Ltd [2004] FCAFC 183
- Commissioners of Inland Revenue v. Fraser 24 TC 498

- Commissioner of Stamp Duties (N.S.W.) v. Permanent Trustee Co. Ltd. 87 ATC 4670; (1987) 19 ATR 74; (1987) 9 NSWLR 719)
- Commonwealth v. Baume (1905) 2 CLR 405
- Conservative and Unionist Central Office v. Burrell (Inspector of Taxes) [1980] 3 All ER 42; [1980] STC 400
- 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.
- Case N27 (1991) 13 NZTC 3229
- Eastern Nitrogen Ltd v. FC of T [1999] FCA 1536, 99 ATC 5163; 43 ATR 112
- 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
- Esquire Nominees Ltd (Trustee of Manolas Trust) v. Federal Commissioner of Taxation (1973) 129 CLR 177 73 ATC 4114; 4 ATR 75
- FC of T v. Arklay (1989) 85 ALR 368; 89 ATC 4563; 20 ATR 276
- FC of T v. Email Limited 99 ATC 4868; 42 ATR 698; [1999] FCA 1177
- FC of T v. Peabody (1994) 181 CLR 359; (1994) 123 ALR 451; 94 ATC 4663; 28 ATR 344; (1994) 68 ALJR 680; (1995) 23 ABLR 68
- FC of T v. Total Holdings (Australia) Pty Ltd 79 ATC 4279; 9 ATR 885
- FC of T v. Whitfords Beach Pty Ltd (1982) 39 ALR 521; 82 ATC 4031; 12 ATR 692; (1982) 150 CLR 355
- Ferguson v. FC of T (1979) 37 FLR 310; 79 ATC 4261; 9 ATR 873
- Fletcher v. Income Tax Commissioner (1971) 3 All ER 1185
- Floridienne SA & Berginvest SA v. Belgian State (Case C-142/99) [2001] BVC 76
- Glennan v. FC of T 99 ATC 4,467; 41 ATR 413
- Griffiths (Inspector of Taxes) v. J.P. Harrison (Watford) Ltd. [1963] AC 1; [1962] 1 All ER 909; 40 TC 281
- Hatfield v. Health Insurance Commission (1987) 15 FCR 487
- Hatzimanolis v. ANI Corporation Ltd (1992) 173 CLR 473; 106 ALR 611; 66 ALJR 365
- Henderson v. Commissioner of Railways (W.A.) (1937) 58 CLR 281
- Johnston v. Heath [1970] 3 All ER 915; [1970] 1 WLR 1567; [1970] TR 183
- 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
- Marson (Inspector of Taxes) v. Morton [1986] 1 WLR 1343; [1986] STC 463; 59 TC 381
- McClelland v. FC of T (1970) 120 CLR 487; 70 ATC 4115; 2 ATR 21
- Newcastle Stereo Radio Pty Ltd v. ABT (1987) 16 FCR 480; 77 ALR 592; (1987) 2 BR 167
- News Corporation Ltd v. National Companies and Securities Commission (1984) 57 ALR 550; (1984) 5 FCR 88
- Our Town F M Pty Ltd v. ABT (1987) 16 FCR 480; 77 ALR 592; (1987) 2 BR 167
- Our Town F M Pty Ltd v. Australian Broadcasting Tribunal (No. 1) (1987) 16 FCR 465; 77 ALR 577; (1987) 2 BR 151
- Polysar Investments Netherlands BV v. Inspecteur der Invoerrechten en Accijnzen, Arnhem (Case C-60/90) [1993] BVC 88
- Project Blue Sky Inc v. Australian Broadcasting Authority 194 CLR 355; [1998] HCA 28; (1998) 153 ALR 490
- Re Nanaimo Community Hotel Ltd [1944] 4 DLR 638
- Re Nanaimo Community Hotel Ltd [1945] 3 DLR 225
- Rutledge v. The Commissioners of Inland Revenue 14 TC 490
- Simmons (as liquidator of Lionel Simmons Properties) v. Inland

Revenue Commissioners [1980] 2 All ER 798
- Spassked Pty Ltd v. Commissioner of Taxation [2003] FCAFC 282; (2003) 203 ALR 515; 2003 ATC 5099; 54 ATR 546
- Spassked Pty Ltd and Ors v. Federal Commissioner of Taxation (No. 5) [2003] FCA 84; 2003 ATC 4184; 52 ATR 337; (2003) 197 ALR 553
- State Authorities Superannuation Board v. Federal Commissioner of Taxation (1988) 85 ALR 125; 89 ATC 4078; 20 ATR 211; (1988) 21 FCR 535
- Twycross and other v. Potts and another (1928) SC 633
- Wisdom v. Chamberlain [1969] 1 All ER 332; [1969] 1 WLR 275; 45 TC 92

Other references:
- Butterworths Australian Legal Dictionary
- Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998
- Explanatory Memorandum to the Indirect Tax Legislation Bill 2000
- Ford, HAJ and Lee, WA, 1996, Principles of the Law of Trusts, 3rd edn, LBC Information Services, Sydney
- The Macquarie Dictionary Revised 3rd edition
- Parsons, R W 1985, Income Taxation in Australia: Principles of Income Deductibility and Tax Accounting, The Law Book Company Limited, Sydney

ATO references

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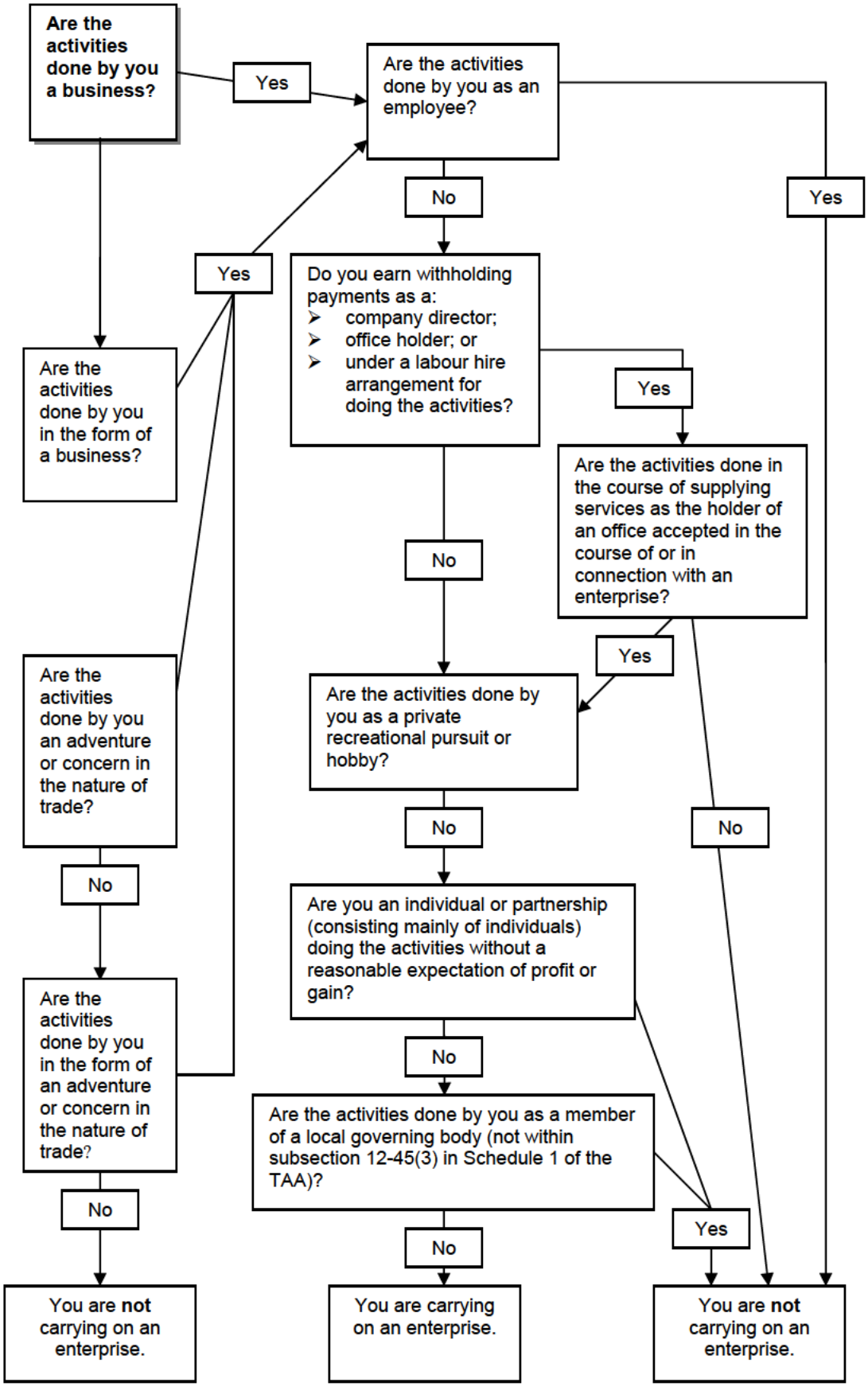
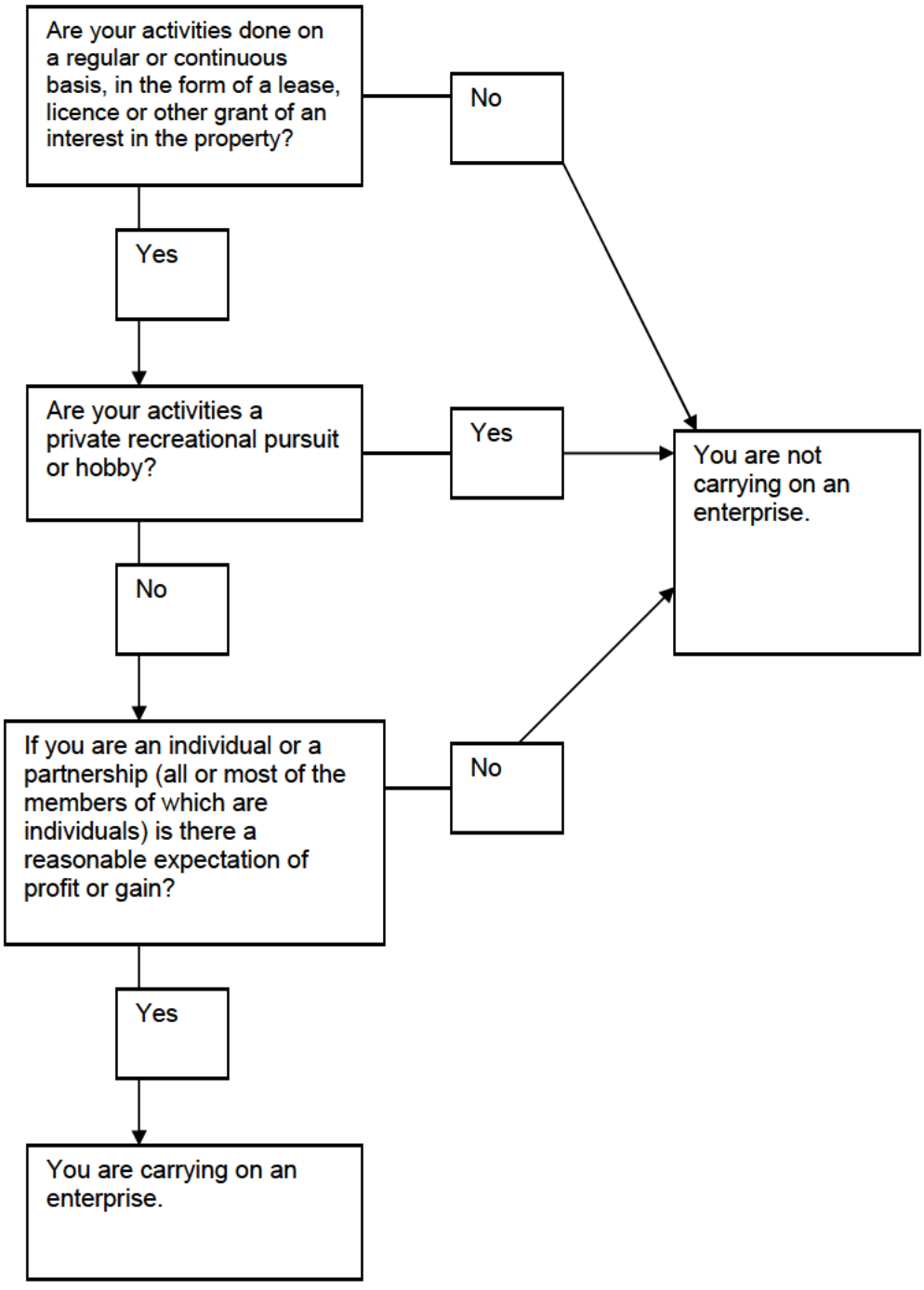
APPENDIX 1
Decision Tree 1
Are you carrying on an enterprise? – paragraphs 38(1)(a) and (b)



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



Appendix 2 – Comparison between MT 2004/D3 and MT 2000/1

MT 2000/1 was issued in May 2000. Since that time, there have been amendments to the ABN Act which are not reflected in that Ruling. As a result of a continuing review of public rulings to monitor their technical accuracy and practical application, we identified the need to deal with other issues and to provide further explanation in relation to some aspects of the Ruling. We also decided to increase the number of examples and thereby provide guidance in the practical application of the law. Due to the number of changes, together with the major restructuring needed, MT 2000/1 is being rewritten. When MT 2004/D3 is finalised MT 2000/1 will be withdrawn.

Set out below is a table comparing the paragraphs of MT 2004/D3 with the closest equivalent paragraphs in MT 2000/1. Certain paragraphs from draft Ruling MT 2004/D3 have not been mentioned because they either are introductory in nature or because there is no material change to the information contained in MT 2000/1.

Topic in MT 2004/D3	Paragraphs in MT 2004/D3	Paragraphs in MT 2000/1
What this Ruling is about	1-5	1, 3-5, 85
Date of effect	6	6
Background – Policy intent	7-10	7
Background – The registration process	11-15	2
Definitions – Entity	16	No equivalent
Definitions – Enterprise	17-18	No equivalent
Entitlement to an ABN	19-23	8, 55
What is an entity for ABN purposes?	24-26	9
Individual	27	32
Body corporate	28-32	33-38, 43
Corporation sole	33-35	33-35, 39-40
Body politic	36-38	33-35, 41-42
Partnership	39-41	44
Any other unincorporated association or body of persons	42-47	45-46, 47
Example 1	48-49	Example 2

Topic in MT 2004/D3	Paragraphs in MT 2004/D3	Paragraphs in MT 2000/1
Example 2	50-51	No equivalent
Exclusion to any other unincorporated association or body of persons – non-entity joint venture	52-54	No equivalent
Example 3	55-57	No equivalent
Example 4	58-59	No equivalent
Trust	60	No equivalent
Superannuation fund	61-62	48
Trustee of a trust or superannuation fund	63-64, 68	49-51
Example 5	65-67	No equivalent
Example 6	69-70	No equivalent
Multiple Roles – Trustee	71-73	11, Example 14
Multiple Roles – Agent	74-75	No equivalent
Multiple Roles – Other roles	76	No equivalent
The ABN Act applies as if an entity exists – Government entities	77-78	52
The ABN Act applies as if an entity exists – Non-profit sub-entity	79-81	53
Enterprise	82-84	No equivalent
Government entities, superannuation funds and non-profit sub-entities	85-86	48, 52-53
Who is carrying on an enterprise?	87	No equivalent
Who is carrying on an enterprise? – Groups of entities	88-90	No equivalent

Topic in MT 2004/D3	Paragraphs in MT 2004/D3	Paragraphs in MT 2000/1
Example 7	91-94	No equivalent
Who is carrying on an enterprise? – Partnership	95	No equivalent
Who is carrying on an enterprise? – Agency	96-98	13
Example 8	99-101	No equivalent
Who is carrying on an enterprise? – Religious Practitioner	102-103	No equivalent
Who is carrying on an enterprise? – Employee	104	No equivalent
When is an enterprise being carried on?	105-106	15
When is an enterprise being carried on? – Commencement of an enterprise	107-111	No equivalent
Example 9	112-113	No equivalent
Example 10	114-115	No equivalent
Example 11	116-117	No equivalent
Example 12	118-119	No equivalent
Example 13	120-121	No equivalent
When is an enterprise being carried on? – Termination of an enterprise	122-128	No equivalent
Example 14	129	No equivalent
Example 15	130-131	No equivalent
What is an enterprise for ABN purposes?	132-134	15-16
Activity, or series of activities	135-138,141-142,146	12, 20, 56-58
Example 16	139-140	No equivalent

Topic in MT 2004/D3	Paragraphs in MT 2004/D3	Paragraphs in MT 2000/1
Example 17	143-145	No equivalent
Example 18	147-148	No equivalent
Example 19	149-151	Example 4
In the form of a business or in the form of an adventure or concern in the nature of trade	152-155	No equivalent
Overlap of concepts	156-161	No equivalent
Business	162	21, 59
Business – Definition	163-165	22, 60-62
Business – Indicators of a business	166-168	23, 63
An adventure or concern in the nature of trade	169-172	24, 64-67, 74
An adventure or concern in the nature of trade – Trade	173	68
An adventure or concern in the nature of trade – The subject matter of realisation	174-175	72
An adventure or concern in the nature of trade – The length of period of ownership	176-177	72
An adventure or concern in the nature of trade – The frequency or number of similar transactions	178	No equivalent
An adventure or concern in the nature of trade – Supplementary work on or in connection with the property realised	179	No equivalent
An adventure or concern in the nature of trade – The circumstances that were responsible for the realisation	180	No equivalent

Topic in MT 2004/D3	Paragraphs in MT 2004/D3	Paragraphs in MT 2000/1
An adventure or concern in the nature of trade – Motive	181-185	72
An adventure or concern in the nature of trade – Trade v. investment assets	186-189	25, 69-71
An adventure or concern in the nature of trade – Isolated sales or transactions in Australia	190-191	No equivalent
'In the form of'	192-199	26-27, 75-78
'In the form of' – Alternative view	200-204	No equivalent
Isolated transactions and sales of real property	205	No equivalent
Activities that are an adventure or concern in the nature of trade	206	No equivalent
Example 20	207-208	No equivalent
Example 21	209-212	No equivalent
Activities *in the form of* an adventure or concern in the nature of trade	213-218	Examples 11 and 12
Example 22	219-222	No equivalent
Example 23	223-229	No equivalent
Example 24	230-234	No equivalent
Example 25	235-237	No equivalent
Example 26	238-240	No equivalent
Example 27	241-243	No equivalent
Example 28	244-247	No equivalent
Activities done on a small scale may amount to an enterprise	248-250	No equivalent

Topic in MT 2004/D3	Paragraphs in MT 2004/D3	Paragraphs in MT 2000/1
Example 29	251-254	No equivalent
Example 30	255-258	No equivalent
Example 31	259-262	No equivalent
Example 32	263	No equivalent
Example 33	264-266	No equivalent
Activities of holding companies and other holding entities	267-275	Examples 8 and 9
Example 34	276-278	No equivalent
Example 35	279	No equivalent
Example 36	280-282	No equivalent
Activities of head companies of consolidated groups	283-291	No equivalent
Example 37	292-293	No equivalent
Mutual organisations	294-295	19, 79-80
Non-profit clubs and associations	296-298	81-83
Example 38	299-302	Example 15
Example 39	303-305	No equivalent
Body corporates under strata title legislation	306-307	No equivalent
On a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property – Lease, licence or other grant of an interest in property as an enterprise	308-309	84

Topic in MT 2004/D3	Paragraphs in MT 2004/D3	Paragraphs in MT 2000/1
On a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property – Regular or continuous basis	310-311	28, 86
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	312-313	87-88
Example 40	314-317	Example 16
Example 41	318-320	No equivalent
Example 42	321-323	No equivalent
Example 43	324-326	No equivalent
Example 44	327-328	No equivalent
The Commonwealth, a State or Territory, or a body corporate, or corporation sole, established for a public purpose	329-334	29, 89-92
What activities are excluded from being an enterprise?	335-339	17
Activities done as an employee and activities done as a withholding payment earner	340	No equivalent
Activities done as an employee and activities done as a withholding payment earner – Activities done as an employee	341	No equivalent

Topic in MT 2004/D3	Paragraphs in MT 2004/D3	Paragraphs in MT 2000/1
Activities done as an employee and activities done as a withholding payment earner – Meaning of employee	342-346	93
Activities done as an employee and activities done as a withholding payment earner – Activities done as a withholding payment earner	347-348	18
Activities done as an employee and activities done as a withholding payment earner – Exception to the exclusion	349-351	94
Activities done as an employee and activities done as a withholding payment earner – 'In the course of' or 'in connection with'	352-361	No equivalent
Example 45	362-364	Example 18
Example 46	365-367	No equivalent
Example 47	368-370	No equivalent
Private recreational pursuit or hobby	371-372	99
Private recreational pursuit or hobby – Meaning of private recreational pursuit or hobby	373-374	97-98
Private recreational pursuit or hobby – Indicators of private recreational pursuit or hobby	375-376	95-96, 101
Private recreational pursuit or hobby – A hobby can become a business and an enterprise	377-378	100,102
Example 48	379-380	Example 19
Example 49	381-385	No equivalent

Topic in MT 2004/D3	Paragraphs in MT 2004/D3	Paragraphs in MT 2000/1
Example 50	386-388	No equivalent
Individuals or partnerships without a reasonable expectation of profit or gain	389-392	103
Individuals or partnerships without a reasonable expectation of profit or gain – Meaning of individual and partnership	393	104
Individuals or partnerships without a reasonable expectation of profit or gain – Reasonable expectation	394-397	30-31, 105-107
Individuals or partnerships without a reasonable expectation of profit or gain – Partnership and reasonable expectation	398-399	No equivalent
Example 51	400-401	No equivalent
Example 52	402-404	No equivalent
Example 53	405-406	Example 20
Example 54	407-410	No equivalent
Example 55	411-414	No equivalent
Members of local governing bodies	415-417	108-110
Appendix 1 Decision Tree 1		No equivalent
Appendix 1 Decision Tree 2		No equivalent