

# ***TR 2013/2 - Income tax: school or college building funds***

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! There is a Compendium for this document: **TR 2013/2EC** .

! This document has changed over time. This is a consolidated version of the ruling which was published on *13 February 2013*



## Taxation Ruling

### Income tax: school or college building funds

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#### **ⓘ This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

### What this Ruling is about

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1. This Ruling is about the way in which section 30-15 and Item 2.1.10 of the table in subsection 30-25(1) of the *Income Tax Assessment Act 1997*<sup>1</sup> (Item 2.1.10) apply to persons who make a gift or contribution to a public fund which purports to be a school building fund.<sup>2</sup>

2. This Ruling also considers how Item 2.1.10 applies to a public fund which purports to be a school building fund.

3. In particular, this Ruling discusses factors relevant to determining:

- what a 'school or college' is for the purposes of Item 2.1.10;
- whether a building is 'used as a school or college' by an entity specified in that Item; and
- whether a fund has been established and is being maintained solely for providing money for the acquisition, construction or maintenance of a building used as a school or college.

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<sup>1</sup> All legislative references are to the *Income Tax Assessment Act 1997* unless otherwise indicated.

<sup>2</sup> Such persons are a class of entity for the purposes of paragraph 358-5(1)(a) of Schedule 1 to the *Taxation Administration Act 1953*.

4. This Ruling does not set out what constitutes a gift. That is explained in Taxation Ruling TR 2005/13 *Income tax: tax deductible gifts – what is a gift*.
5. This Ruling does not explain the meaning of ‘public fund’. That is explained in Taxation Ruling TR 95/27 *Income tax: public funds* (see paragraphs 5 to 7 of that Ruling).
6. This Ruling does not address administrative processes relating to the endorsement of a school building fund. This is explained in *GiftPack* (NAT 3132).
7. In this Ruling, unless the context indicates otherwise:
  - the word ‘**school**’ is used to denote ‘school or college’;
  - the phrase ‘**school building fund**’ is used to denote a fund which satisfies the requirements of Item 2.1.10;
  - the word ‘**used**’ denotes ‘used or to be used’;
  - the entities specified in Item 2.1.10 are collectively referred to as ‘**qualifying bodies**’; and
  - a reference to ‘**a fund**’ includes a reference to the fund’s trustee.

## Ruling

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### Legislative framework

8. A gift or contribution to a school building fund is deductible under section 30-15 if:
  - the gift is money or property of the kind covered by column 2 of item 1 of the table in subsection 30-15(1);
  - the value of the gift is \$2 or more;
  - the fund is in Australia;
  - if the property is to be valued by the Commissioner – the requirements in section 30-212 are satisfied;
  - the fund, the entity that legally owns the fund, or the government body constituted by the persons who control the fund, is endorsed under Subdivision 30-BA; and
  - the fund satisfies the requirements of Item 2.1.10 of the table in subsection 30-25(1).
9. In order for a fund to satisfy Item 2.1.10:
  - it must be a public fund established and maintained solely for the purpose of providing money for the acquisition, construction or maintenance of a building used as a school;

- the building must be used as a school by a government, a public authority or a non-profit society or association as described in Item 2.1.10; and
- the fund must be registered<sup>3</sup> under the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act 2012), or not be an ACNC type of entity as defined in the ITAA 1997.

10. The key requirements of Item 2.1.10 considered in this Ruling are as follows:

- there must be a school (see paragraphs 11 to 19 of this Ruling);
- there must be a building (see paragraphs 20 to 24 of this Ruling);
- the building must be used as a school (see paragraphs 25 to 45 of this Ruling);
- the building must be used as a school by a qualifying body (see paragraphs 46 to 52 of this Ruling);
- there must be acquisition, construction or maintenance (see paragraphs 53 to 56 of this Ruling); and
- the fund must be established and maintained for the requisite purpose (see paragraphs 57 to 73 and paragraphs 75 to 89 of this Ruling).

### **There must be a school**

11. In order for Item 2.1.10 to apply, there must be a school or an objective intention to carry on a school.

12. For the purposes of Item 2.1.10, the word 'school' carries its ordinary meaning. It must be both a place of assembly and an educational organisation.

### ***Place of assembly***

13. In order for there to be a school for the purposes of Item 2.1.10, there must be one or more buildings where people come together in order to be instructed in an area of knowledge.

### ***Educational organisation***

14. In order for there to be a school for the purposes of Item 2.1.10, there must also be an educational organisation which:

- has a distinct identity; and

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<sup>3</sup> Column 1 of the table in subsection 25-5(5) of the ACNC Act 2012 lists the types of entities which must be registered.

- provides regular, ongoing and systematic instruction in a course of non-recreational education.

15. In this Ruling, such an organisation is referred to as a **school organisation**.

### *Distinct identity*

16. A school organisation must have its own distinct identity. It will ordinarily have its own name. It will ordinarily be an institution in its own right, being an organisation which:

- is established for the promotion, pursuit and achievement of one or more defined purposes;
- has a quality of permanence; and
- has a governing body which controls its affairs.

### *Regular, ongoing and systematic instruction in a course of non-recreational education*

17. For the purposes of Item 2.1.10, a school is an organisation whose primary function or essential purpose is the provision of regular, ongoing and systematic instruction in a course of education.

18. The presence of the following factors indicate that an organisation is providing instruction as a school for the purposes of Item 2.1.10:

- a set curriculum;
- instruction or training provided by suitably qualified persons;
- the enrolment of students;
- some form of assessment and correction; and
- the creation of a qualification or status which is recognised outside of the organisation.

19. The instruction provided by a school must not be, or must not be more than incidentally, recreational in character.

### **There must be a building**

20. For Item 2.1.10 to apply there must be a building or an objective intention to acquire or construct a building.

### **Ordinary meaning**

21. For the purposes of Item 2.1.10 the word 'building' carries its ordinary meaning. A building is a permanent structure, roofed and usually with walls and flooring, that provides protection from the elements.

22. A permanent structure such as a covered outdoor learning area is capable of being a building even though it does not have walls. Such a structure must be fixed to the ground and have a roof.

### ***Part of a building***

23. A part of a building is itself a building for the purposes of Item 2.1.10 where:

- it is a permanent, fixed and structurally delineated part of the building; and
- it is capable of being made the subject of a separately identifiable legal or equitable interest (see further, paragraph 51 of this Ruling).

### ***Fixtures***

24. For the purposes of Item 2.1.10 a building includes fixtures which become a permanent addition to a building.

### **The building must be used as a school**

25. In order for Item 2.1.10 to apply there must be a building used as a school or an objective intention for a building to be used as a school.

26. A building is 'used as a school' for the purposes of Item 2.1.10 where:

- it is used to provide instruction of the kind described in paragraphs 13 to 19 of this Ruling; and
- the extent and character of that use is such that the building can be described as 'used as a school' as a matter of ordinary language.

27. A building is also 'used as a school' for the purposes of Item 2.1.10 where its use is incidental to the provision of instruction in a building which satisfies paragraph 26 of this Ruling; see paragraphs 42 to 45 of this Ruling.

28. A building which is used as a school for the purposes of Item 2.1.10 is referred to as a '**school building**' in this Ruling.

29. For the purposes of this Ruling:

- the **school use** of a building refers to the use of the building to provide instruction of the kind described in paragraphs 13 to 19 of this Ruling or for purposes which are incidental to that use; and
- the **non-school use** of a building refers to use of a building which is not school use.

***General principles***

30. A weighing of various factors is required to determine whether a building has the character of a school building.

31. In order for a building to be a school building its school use must be substantial.

32. A building will not be regarded as a school building where its non-school use is of such kind, frequency or relative magnitude as to preclude the conclusion that the building has the character of a school building.

33. In characterising a building as one that is 'used as a school', any other use must not materially limit, detract from or otherwise be incompatible with the provision of instruction of the kind described in paragraphs 13 to 19 of this Ruling.

34. Other factors which are relevant to determining whether a building is used as a school include:

- the amount of time the building is put to school use relative to the amount of time it is put to non-school use;
- the number of people involved in the school use of the building relative to the number involved in its non-school use;
- the physical area of the building put to school use relative to the physical area put to non-school use; and
- the extent to which the building has been adapted or modified in order to accommodate its school or non-school use.

35. Where a qualifying body carries on a school organisation and also acts in one or more other capacities (for example as a church), it is necessary to have regard to the extent to which the school organisation is able to control the use of the building. While regard must also be had to the actual use of the building, the inability of the school organisation to control the use of the building is an indication that the building is not used as a school.

***To be used as a school***

36. Where a building is being acquired or constructed, it is necessary to determine whether it is 'to be used' as a school. A building meets this requirement where it will have the character of a school building for the purposes of paragraphs 26 to 28 of this Ruling.

37. A building's character is determined on an objective basis, having regard to all of the surrounding circumstances. The physical attributes of a building are an important and potentially decisive indication of whether the building has or will have the character of a school building.

38. In considering the physical attributes of a building it is necessary to have regard to the extent to which the building has been specifically designed or materially adapted to enable, support or facilitate its non-school use.

39. A building will not be a school building where it has been designed or adapted in a manner which prevents it from being regarded as a school as a matter of ordinary language.

40. A building may be a school building despite having a design feature or adaptation which enables, supports or facilitates the non-school use of the building. However, a school building fund cannot provide money in respect of acquisition or construction which relates to the building's non-school use; see further paragraph 70 of this Ruling.

41. Where a qualifying body carries on a school organisation and also acts in one or more other capacities (for example as a church), it is necessary to have regard to the extent to which the school organisation will be able to control the use of the building. It may be inferred that a building being acquired or constructed is not a school building where a person, organisation or institution outside of the school organisation will be able to determine how the building is used.

### ***Incidental buildings***

42. A building which is not used to provide instruction of the kind described in paragraphs 13 to 19 of this Ruling is also used or to be used as a school where:

- its actual or intended use is incidental to the provision of instruction in one or more school buildings; and
- it can be regarded as being 'used as a school' as a matter of ordinary language when considered in conjunction with those buildings.

43. A building's use is incidental to the provision of instruction in a school building where it is used together with the school building, but in a manner which is ancillary or subordinate to it.

44. In determining whether a building's use is incidental to the provision of instruction in a school building, regard is had to the nature and scale of the uses to which the building is or will be put, as well as its physical characteristics.

45. In determining whether a building of this kind can be characterised as a school building when considered in conjunction with one or more other buildings, it is necessary to have regard to the extent of its non-school use. Such a building is not a school building where its non-school use prevents it from being regarded as being used as a school as a matter of ordinary language.

## **The building must be used as a school by a qualifying body**

46. Item 2.1.10 requires a building to be used or be objectively intended to be used as a school by a qualifying body.

### ***Qualifying body***

47. In particular, Item 2.1.10 requires that the use of a building as a school be by a government, a public authority, or a society or association which is carried on otherwise than for the purposes of profit or gain to its members.

48. One or more trustees do not, as such, constitute a society or association. However, where trustees carrying on a school act for and according to the purposes of a society or association, that society or association may be regarded as carrying on the school through the trustees.

### ***Use by a qualifying body***

49. In order for a qualifying body to use a building as a school the body must:

- carry on the school as an organisation;
- control the use of the building; and
- use the building in the provision of instruction of the kind described in paragraphs 13 to 19 of this Ruling.

50. Whether a qualifying body carries on a school is to be determined by reference to the constituent and governing documentation of the body and its actual activities and operations.

51. A qualifying body controls the use of a building for the purposes of this Ruling where it has the ability to determine how the building will be used. This ability will arise from a legal or equitable interest in the building held by the qualifying body, its members or an entity which the qualifying body controls. See further, paragraph 54 of this Ruling.

52. Accordingly, a qualifying body does not use a building as a school merely because a third party provides access to the building for purposes which are beneficial to the operation of a school carried on by the body.

## **There must be acquisition, construction or maintenance**

53. In order for Item 2.1.10 to apply an entity must acquire, construct or maintain a building or have an objective intention to do so.

54. A building is acquired for the purposes of Item 2.1.10 where:

- an entity obtains ownership of a legal or equitable interest in a building (including a leasehold interest); and
- that interest is sufficient to enable the entity to control the building's use.

55. A building is constructed for the purposes of Item 2.1.10 where it is formed or put together. However, an entity must obtain a legal or equitable interest in the building which is sufficient to enable it to control the building's use.

56. A building is maintained for the purposes of Item 2.1.10 where action is taken to keep it in proper or good condition.

**The fund must be established and maintained for the requisite purpose**

57. Item 2.1.10 requires a school building fund to be established and maintained solely in order to provide money for particular purposes. This requirement is referred to as the '**sole purpose test**' in this Ruling.

***Requisite purpose***

58. The sole purpose test requires a school building fund to be established and maintained solely to provide money for the acquisition, construction or maintenance of a building used as a school by a qualifying body.

59. The word 'solely' refers to the purposes or objects for which the fund is established and maintained. It is a question of fact whether a fund is established and maintained solely to provide money for the requisite purpose.

60. A fund will not satisfy the sole purpose test if it is established or maintained for the purpose of, or for purposes which include, providing money to acquire, construct, or maintain a building:

- that is not used or objectively intended to be used as a school to any extent; or
- that is not used or objectively intended to be used by a qualifying body.

61. A fund will only satisfy the sole purpose test where it is established and maintained to provide money for the purpose of both:

- acquiring, constructing or maintaining a building which is a school building for the purposes of paragraphs 26 to 28 of this Ruling; and
- putting that building to school use.

62. Accordingly, a fund will not satisfy the sole purpose test where it is established or maintained to provide money for the purpose, or for purposes which include, the non-school use of a building. This is the case, even though the building may be a school building.

### ***Determining purpose***

63. The purposes of the fund are determined on an objective basis, having regard to all of the surrounding circumstances, including the constituent documents of the fund and what money is actually provided for.

### ***Constituent documents***

64. A fund will not satisfy the sole purpose test where its constituent documents indicate that it has a purpose other than to provide money for the acquisition, construction or maintenance of a school building for school use.

### ***What money is provided for***

65. Inferences about the fund's purposes may be drawn from what the fund provides money for.

66. Such inferences are drawn at the time the fund provides the money, or incurs an obligation to provide it, if earlier.

67. Where a fund provides money to acquire or construct a building, the fund's objective purpose is characterised by reference to how the outlay relates to the building's intended use.

68. Where a fund provides money to maintain a building, the fund's objective purpose is characterised by reference to the use of the building giving rise to the outlay.

69. A provision of money in respect of acquisition, construction or maintenance costs will not cause a fund to breach the sole purpose test where it can be reasonably explained solely by reference to the current or intended school use of a school building.

70. A provision of money will give rise to an inference that a fund was not established or is not being maintained for the requisite purpose where it can only be explained by the non-school use of a building and its amount is material. This would occur where:

- money is provided to acquire or construct a design feature or adaptation to a building which is explicable only by the building's intended non-school use; or
- money is provided to maintain a building which is explicable only by the building's non-school use, and the fund is not promptly reimbursed for the amount provided

71. A provision of money will give rise to an inference that a fund was not established or is not being maintained for the requisite purpose where its amount is disproportionate to the present and future needs of the relevant school.

72. It will be inferred that a fund was not established or is not being maintained for the requisite purpose where it provides money in respect of acquisition, construction or maintenance which exceeds an amount which could reasonably be expected to be provided between parties dealing at arm's length.

73. It will be inferred that a fund was not established or is not being maintained for the requisite purpose where it provides money in order to obtain consideration from a qualifying body or to enable another entity to obtain such consideration.

#### *Other matters*

74. Other matters which are relevant to a determination of the purposes of a fund are set out in paragraphs 75 to 89 of this Ruling.

#### **Fund administration**

75. Where the relevant endorsed entity is not the gift deductible school building fund itself, it must maintain a separate gift fund for donations and contributions to the school building fund.

#### ***Payments into a school building fund***

76. A school building fund can only include amounts which are objectively intended to enable or facilitate the provision of money for the acquisition, construction or maintenance of a school building for the purposes of its school use.

77. Payments into a school building fund may include:

- donations or contributions of money or other property;
- amounts paid to reimburse the fund for costs associated with the non-school use of a school building (see paragraph 85 of this Ruling); and
- capital and income relating to investments which are permitted by the sole purpose test – see paragraph 87 of this Ruling.

78. All donations to a school building fund must go into the fund, whether directly or via a holding account on trust and on a strictly temporary basis.

***Disbursements from a school building fund***

79. A school building fund can only disburse money for the objective purpose of the acquisition, construction or maintenance of a school building for the purposes of its school use. Such disbursements may be in respect of:

- acquiring or constructing a school building for the purposes of its school use;
- maintaining a school building for the purposes of its school use;
- investing or lending money in order to provide money for the acquisition construction or maintenance of a school building for the purposes of its school use; or
- administering the fund.

***Acquisition or construction***

80. Disbursements from a school building fund in respect of acquisition or construction may include:

- consideration for the purchase or construction of the building;
- consideration for the purchase of land to the extent that it reasonably relates to the area of land occupied by the building;
- incidental costs of acquisition or construction, including costs relating to planning, negotiating, financing and obtaining approval for the acquisition or construction;
- the cost of fixtures to the building;
- the cost of performing initial repair of the building;
- the cost of constructing a separately identifiable addition to, or extension of, an existing building, such as an additional floor, room or other permanent structure; and
- payments in respect of a lease of a school building (for example rent) to the extent that they reasonably relate to the building and the area of land occupied by the building.

81. A school building fund can provide money in order to satisfy a condition imposed by a local governing body or other public authority where:

- the condition must be satisfied before construction of a school building will be permitted; and

- the money provided reasonably relates to the construction of the building, as opposed to other matters affected by the condition.

### *Maintenance*

82. Disbursements from a school building fund in respect of maintenance may include:

- the cost of repairs, painting and plumbing relating solely to the building.
- the cost of cleaning a school building;
- consideration for the purchase of equipment used exclusively for maintaining the building;
- the cost of insurance relating solely to the building;

83. A school building fund cannot provide money to pay:

- the cost of maintaining facilities which are not buildings, including sports fields, sports equipment, playgrounds, landscaping and open-air carparks; and
- general operating costs of a school such as water, gas, electricity, sewerage, contents insurance, teaching staff salaries or the general upkeep of furnishings.

84. A school building fund can only provide money to pay security monitoring costs to the extent that those costs reasonably relate to the preservation or protection of a school building.

85. A school building fund cannot provide consideration in respect of maintenance which relates to the non-school use of a building unless the fund is fully and promptly reimbursed for the amount provided.

### *Investments*

86. A school building fund can only undertake an investment (including a loan) in order to enable or facilitate the provision of money to acquire, construct or maintain a school building for the purposes of its school use.

87. The purpose of an investment is determined on an objective basis. The requisite purpose will only exist where:

- at the time the investment is undertaken, there is an objective intention to acquire, construct or maintain a school building for the purposes of its school use; and
- the investment is a bona fide and temporary arrangement, designed to make efficient use of money until such time as it is required for the acquisition, construction or maintenance of the building.

88. A school building fund cannot undertake an investment on terms which are less favourable to it than the terms which may reasonably be expected to apply between parties dealing at arm's length.

### *Fund administration costs*

89. A school building fund can only disburse money on fund administration costs which enable or facilitate the provision of money to acquire, construct or maintain a school building for the purposes of its school use.

90. Disbursements in respect of administration costs may include:

- the costs of establishing or promoting the fund;
- the costs of operating the fund, including bank charges, stationery costs, and accounting and audit fees; and
- reasonable remuneration for the fund's administrator and staff.

### **Deductible gift requirements**

91. If a donation to a school fundraising appeal is partly for a school building fund and partly for other purposes, the part that is intended as a gift to the school building fund will only be tax deductible if the donor establishes how the donation is to be allocated at or before the time the donation to the appeal is made.

92. A donation will not be tax deductible if an entity other than the donor determines the amount that is to be allocated to the school building fund and the donor does not approve or direct the allocation before or at the time the gift is made.

### **Ancillary funds**

93. A school wishing to raise money for a number of income tax deductible purposes may establish an ancillary fund, gifts to which are deductible, provided they satisfy the requirements in Item 2 in the table in section 30-15. Money raised by such a fund can be subsequently provided to one or more of the funds, authorities or institutions covered by Subdivision 30-B.

## Examples

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### **Example 1: Non-school institution operating a school for the purposes of Item 2.1.10**

94. *Local Church wishes to establish a 'School of Ministries' that will be open to the public at large, where students will undertake a nationally recognised course of study for the attainment of a Diploma, Bachelor or Masters of Theology and Ministry.*

*In doing so, it will establish a separate body within the Church with a school board, constitution and accounts. A number of qualified lecturers will be engaged to provide instruction in accordance with a defined curriculum. Students will be required to undertake the course within a set timeframe and pass various forms of assessment as part of the course.*

*The 'School of Ministries' will be a school for the purposes of Item 2.1.10.*

### **Example 2: Instruction by a non-school institution not constituting a school for the purposes of Item 2.1.10**

95. *Family Church establishes an Adult Bible Education Program, advertised as open to members of the public. Courses are structured to give a broad coverage of scripture topics and are designed to enhance participants' spiritual life through a deeper understanding of the Bible. They are also suitable as introductory courses for those who wish to undertake more in-depth study. Participants are not required to enrol. Attendance, however, is typically good and regular. Instruction is given by theology graduates. Participant achievement is not assessed and the courses do not lead to any externally recognised qualification or status. The Program is one of a number of ministry initiatives conducted by Family Church.*

*The Adult Bible Education Program is not a school for the purposes of Item 2.1.10.*

*The Program does not have an organisational identity which is sufficiently distinct from that of Family Church. Further, in the absence of enrolment and assessment the instruction provided to participants is not sufficiently systematic.*

**Example 3: A Sunday School that is a school for the purposes of Item 2.1.10**

96. *Good Neighbour Church conducts a number of Sunday school groups for children of various ages. The Church establishes a Sunday school committee of three persons which includes the pastor and two other permanent members from the congregation. The Church makes provision in its constitution for the establishment of this committee and specific rules are developed in respect of the operation of the committee and the Sunday schools. Separate accounts and records are kept.*

*The Committee is responsible for selecting prospective teachers based on minimum standards that they have set. Teachers are required to be properly trained and to have appropriate qualifications (including blue card). The Committee is also responsible for the curriculum that is taught and has applied the national curriculum for that religious body. The design of the curriculum takes into account the age of the child and their level of knowledge.*

*Children are assessed on what they have learnt, for which they receive certificates which enable them to progress to new levels. Parents are also required to register their children and ensure that they are signed in and out of classes.*

*The Sunday school groups are a school for the purposes of Item 2.1.10.*

**Example 4: A Sunday School that is not a school for the purposes of Item 2.1.10**

97. *Local Church conducts a number of Sunday school groups for children of various ages during church services. The children who attend are those who have come to church that day and class sizes vary from week to week. The Sunday school classes are based on topics which are developed by the Sunday school teachers, who are members of the Church who have a calling or interest in children's ministry.*

*Children are taught principles from the Bible and participate in memory verse games which are designed to enable them to memorize passages of Scripture. Teachers take an active interest in the progress of each child, but there is no formal assessment process.*

*The Sunday school is not a school for the purposes of Item 2.1.10.*

*The Sunday school groups do not have an organisational identity which is sufficiently distinct from that of Local Church. Further, the instruction provided to children is not sufficiently regular and systematic, as it depends upon when children attend Church.*

**Example 5: Various Church activities not constituting a school for the purposes of Item 2.1.10**

98. *Local Church also conducts the following during the week:*

- *the weekly sermon;*
- *a women's group that has as its purpose teaching from the Bible;*
- *a youth group every Friday night with teachings from the Bible and youth based activities;*
- *weekly Bible study classes conducted by the senior pastor based on topics determined by the pastor for that week;*
- *spiritual support and counselling;*
- *a pre-marital course with marriage counselling; and*
- *a one week church conference held on an annual basis with guest speakers.*

*These activities are performed and/or organised by a pastor from the Church and a team of senior church staff. They do not involve any formal curriculum, process of assessment or correction.*

*None of these activities on their own or in conjunction with each other constitute a school for the purposes of Item 2.1.10. Specifically:*

- *they are not performed by an organisation with an identity which is sufficiently distinct from the Church; and*
- *the instruction provided is insufficiently systematic to be regarded as a course of education. There is no set curriculum, assessment or correction, and participants are not given any new qualification or status.*

**Example 6: A school building for the purposes of Item 2.1.10**

99. *Primary School intends to build an indoor sports complex on school grounds to support its sports curriculum. The complex will include a gym, a basketball court and an in-ground swimming pool, all enclosed by walls and a roof.*

*A school building fund can provide money to acquire, construct or maintain the sports complex.*

*The complex (including the in-ground swimming pool) will be a building for the purposes of Item 2.1.10 as it is a permanent structure forming an enclosure that provides protection from the elements. The building will be used for the purposes of providing instruction and has the character of a school building.*

**Example 7: School building with some non-school use**

100. *Little Primary School provides a supervised before and after school care service for its students. This care does not involve the provision of any instruction or training. Little Primary School uses the existing school hall and facilities. The use of the school hall for this purpose does not contribute materially to the hall's maintenance costs.*

*A school building fund can provide money to maintain the hall.*

**Example 8: School building with some non-school use – Building the Education Revolution (BER) program**

101. *ABC Primary School constructs a multipurpose hall with a grant from the Australian government under the Building the Education Revolution (BER) program. The hall contains a large open area marked out for basketball and netball courts, a food service area, storage rooms and toilets. It is equipped with stage blocks, screens, tables and chairs which are stored away when not in use. The School uses the hall for various purposes including physical education classes, school assemblies, the school canteen, a wet-weather play area, school concerts and graduation ceremonies.*

*The school regularly hires out the hall to various community and sports groups after school hours, on weekends and during school holidays. On Sundays the hall is used by a local church for worship services. The non-school use of the hall gives rise to additional maintenance costs and those costs are material. Hire is on a cost-recovery basis in accordance with the BER Guidelines. The hall has not been modified to cater for use by external bodies.*

*A school building fund can provide money to maintain the hall, provided that it is promptly reimbursed for the cost of the building's non-school use. This reimbursement could be funded from the cost recovery fees charged for the hire of the building.*

*The use of the hall by community and church groups occurs outside of school hours and does not materially limit or detract from its use by the school, nor is it otherwise incompatible with such use. Although non-school use is regular, it is not use of a kind which would prevent the hall from being considered to be used as a school as a matter of ordinary language.*

**Example 9: Building not used as a school**

102. *East West Church is a church that also conducts a school for the purposes of Item 2.1.10. The Church decides to build one large building with a 3,000 seat capacity which will be used to hold church services and other church related activities; and will also be used by the school.*

*The building will be used by the 500 students of the school a little over 50% of the time each week to conduct the practical component of their drama and dance courses using the bare stage area. On average, the building is also used by 10,000 people per week for various church services, youth and other church related activities.*

*A school building fund cannot provide money to acquire, construct or maintain the building.*

*The building has been designed to cater for the Church and the large numbers that will attend church activities.*

*Although the building will be used for the purposes of instruction more than 50% of the time, it is not a school building. The size of the building, its design and the number of people who use it each week for non-school activities indicate that the building cannot be described as a being 'used as a school' as a matter of ordinary language.*

*The building's significant non-school use also means that it cannot be regarded as being used as a school in conjunction with one or more other school buildings.*

#### **Example 10: Building not 'used as a school'**

103. *Private College has constructed an indoor 25-metre swimming pool which it makes available for public use from early morning until evening, charging entry fees. The pool is also used regularly by health professionals to conduct hydrotherapy sessions and by swimming instructors to give private lessons. When the pool is required for students, lanes are cordoned off for student use.*

*A school building fund cannot provide money to maintain the pool building.*

*The extent of the building's non-school use indicates that it cannot be described as being used as a school as a matter of ordinary language. The use of the building by health professionals and others detracts from or limits its ability to be used by the school.*

*The building's significant non-school use also means that it cannot be regarded as being used as a school in conjunction with other school buildings.*

#### **Example 11: Part of a building to be 'used as a school'**

104. *The governing Council of Northwest Church wants to construct a new building. The building will include a hall, a number of rooms described as 'classrooms', an office, a kitchen and a storeroom.*

*The Council intends to use the classrooms and office for a 'School of Ministries' where students will study for a Bachelor of Theology. The 'School of Ministries' is a school for the purposes of Item 2.1.10.*

*The Council intends to use the hall and kitchen for the purposes of Church services, functions and events.*

*Under an arrangement between the Council and the Board of the school:*

- *the School will have priority access to the classrooms but will allow them to be used by the Church for Bible study groups and youth meetings outside of school hours;*
- *the Church will have priority access to the hall and kitchen but will allow those facilities to be used for School events; and*
- *the School and Church will have equal access to storeroom.*

*A school building fund can provide money to acquire, construct and maintain the classrooms and office. A school building fund cannot provide money to acquire, construct or maintain the remainder of the building.*

*The classrooms and office will be buildings in their own right for the purposes of Item 2.1.10. The classrooms will be buildings used as a school. Their use will be controlled by the School and their school use will be substantial. Further, the non-school use of the classrooms will not limit or detract from their school use. The office will be used as a school in conjunction with the classrooms.*

*The hall and kitchen will not be school buildings. Their use will not be controlled by the School and their school use will not be sufficiently substantial. Neither the hall nor the kitchen will be used as a school, whether alone or in conjunction with other buildings.*

*The storeroom will not be a school building. Its character is influenced as much by its Church use as it is by its school use.*

*The amount of money which can be provided by a school building fund must be determined on a reasonable basis, having regard to the cost of the classrooms and office relative to the cost of the building as a whole.*

## **Example 12: Building specifically designed or materially adapted for non-school use**

105. *Exceptional College is a school of 1,000 students which is affiliated with Exceptional Church. Exceptional College wishes to have an auditorium that is large enough to accommodate school students, their families and invited guests for student award presentations, annual and other student cultural presentations, religious services involving students and other occasional school events. The auditorium will also be used to provide lectures to students on a regular basis.*

*Due to its location, Exceptional College has had difficulties in hiring facilities of this kind in the past. It considers the convenience in having its own facility outweighs the additional expense involved in constructing its own.*

*Based on current and projected student enrolments and records regarding the number of attendees that typically attend its functions, the College estimates that the auditorium would need to seat 2,500 people.*

*The auditorium will have movable partitions which will enable a part of the building to be converted into temporary lecture theatres.*

*Exceptional Church would also like to use the auditorium for public church services and functions on the weekends, when it is not being used by Exceptional College. It estimates the auditorium would need to seat an additional 2,500 people for this purpose.*

*It is decided that the auditorium will be built to seat 5,000 people. Considerable expenditure will also be incurred on items such as lighting and staging equipment so that the auditorium can be used for public church services that will be held every weekend. The auditorium complex will include administration offices solely for church use and a gift shop.*

*A school building fund cannot provide money to acquire, construct or maintain the auditorium.*

*The physical attributes of the building as a whole prevent it from being regarded as a building to be 'used as a school' as a matter of ordinary language. Although the building will be put to school use, its size and design indicate that it does not have the character of a school building. The building's character is influenced as much by its design for public church events as it is by its design for the purpose of providing instruction.*

*The lecture theatres will not be buildings in their own right for the purposes of Item 2.1.10 as they are not a permanent, fixed and separately identifiable part of the auditorium.*

### **Example 13: Use of buildings incidental to the provision of instruction in a school building**

106. Country College constructs a stand alone toilet block and a stand alone tuck-shop facility on school property. The toilet block is for the use of students, teachers and visitors to the school. The school tuck-shop facility operates during school hours for students and teachers. Orders are taken by the tuck-shop and delivered during school time.

*A school building fund can provide money to acquire, construct and maintain the toilet block and tuck-shop.*

*Both the toilet block and tuck-shop facility are incidental to the provision of instruction in one or more other buildings. Accordingly, they are buildings used as a school for the purposes of Item 2.1.10.*

**Example 14: Use of a building not incidental to the provision of instruction in a school building**

107. *Country College, as described above, is located in the centre of town and decides to construct a stand alone café food facility that it owns and operates. The food available and the café food facility itself will be designed to attract office workers in town, though it is equally available to members of the school community. Unlike the school tuck-shop, the café food facility will operate at times and on days when the school does not operate.*

*A school building fund cannot provide money to acquire, construct or maintain the facility.*

*Country College will not use the facility to provide instruction to students. Further, the building's significant non-school use prevents it from being regarded as being used as a school in conjunction with other buildings. Accordingly the facility will not be a building used as a school for the purposes of Item 2.1.10.*

**Example 15: Use of a building incidental to the provision of instruction in a school building**

108. *Religious College, a denominational school, plans to build a chapel on college grounds. The chapel will only be used by teachers and students for religious services and prayer as part of the conduct of the school.*

*A school building fund can provide money to acquire, construct or maintain the chapel.*

*The use of the chapel is incidental to the provision of instruction in a denominational school and as such is a building used as a school for the purposes of Item 2.1.10.*

**Example 16: Use of building incidental to the provision of instruction in a school building despite some non-school use**

109. *Following on from example 15, Religious College plans to allow the chapel to be used by former students and members of its denomination for wedding and funeral services. However, it will only allow this use of the chapel during weekends and school holidays. The design of the Chapel is not affected by Religious College's plan to allow this non-school use.*

*A school building fund can provide money to acquire or construct the chapel.*

*Although the chapel will be put to regular non-school use, that use will not impact on the conduct of the school and will not require the incurrence of any additional acquisition or construction costs.*

*After construction, the chapel is used by teachers and students for religious services and prayer as part of the conduct of the school. It is also used to host weddings and funerals when not required by the school for school use. This non-school use gives rise to additional maintenance costs and those costs are material.*

*A school building fund can provide money to maintain the chapel, but only to the extent that such maintenance relates to the use of the chapel for school purposes. A reasonable apportionment is required.*

*If a school building fund covers all maintenance costs of the chapel it must be promptly reimbursed for those costs which reasonably relate to the use of the chapel for non-school purposes.*

**Example 17: Use of a building not incidental to the provision of instruction in a school building**

110. *Junior Primary School decides to support working parents in its school and local community by building and operating a child care centre from a stand alone building on school grounds. The child care centre will be open to the public (with preference to siblings of school students) but will also offer before and after school care to the students of the school and students of other schools.*

*A school building fund cannot provide money to acquire, construct or maintain the centre.*

*The centre will not be used to provide instruction to students and its use will not be incidental to the provision of instruction in a school building. Although it will be available to school students for after school care, it will also be available for public use.*

**Example 18: Maintenance costs not related to the use of a building as a school**

111. *Secondary College is a school for the purposes of Item 2.1.10. It has a stand alone school gymnasium building that it uses as part of its physical education curriculum and also for school events. The building has a large floor area with court markings and an area for fitness equipment. The College is approached by a local businessman who wishes to operate a fitness club from the school building for the general public outside of school hours during the early morning, evenings and weekends.*

*The businessman has requested construction of a separate entrance and a small storage area for the fitness club's goods and sound equipment. Other than that, existing school equipment and facilities are to be used.*

*The operation of the fitness club results in additional maintenance costs and those costs are material.*

*A school building fund cannot provide money to pay any costs associated with the alterations for the fitness club area.*

*A school building fund can provide money to pay maintenance costs which relate to the school use of the building. If a school building fund provides money in respect of all maintenance costs, it must be promptly reimbursed for those costs which reasonably relate to the use of the building by the fitness club. A reasonable apportionment is required in order to determine what proportion of the total cost of maintenance can be borne by the fund.*

**Example 19: Acquisition for the future construction of school buildings**

112. *Secondary College is a school for the purposes of Item 2.1.10. It is located next to a national park and space for expansion is limited and heavily restricted due to environmental concerns. In order to expand, the College entered into negotiations with the owner of an adjacent property with a view to acquiring the property and demolishing the building on that property to make way for a new classroom building. It has a development plan for the new building professionally prepared, and intends using funds from a school building fund it has already established.*

*The College signed a contract with the owner to purchase the property subject to planning approval being granted by the local council. However, planning approval is provided on the condition that an environmental impact study is conducted to determine the best method to minimise the impact of construction on the neighbouring national park.*

*As opportunities to expand are limited, the College decides to make the contract unconditional and proceed with the contract of purchase with the intention of renting the property at commercial rates until planning approval is eventually granted.*

*Although the funds used to acquire the property are not actually used to acquire or construct a building to be used as a school, it is evident that they are the first step towards that end. This will be the case even if planning approval takes a number of years.*

**Example 20: Investment by a school building fund – loans**

113. *Secondary College has a school building fund which is accumulating funds for the next phase of expansion and refurbishment of the school. The fund is approached to make an interest-free loan to the school for the purpose of meeting the school's operational costs.*

*The school building fund cannot use money in this way. The interest-free nature of the loan indicates that it has a purpose other than providing money to acquire, construct or maintain a school building for school purposes. In order for the loan to constitute a permissible investment by the fund, it would need to be a strictly temporary arrangement made on ordinary commercial terms.*

## **Date of effect**

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114. This Ruling applies to years of income commencing both before and after its date of issue. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

115. Paragraph 14 of Taxation Ruling TR 96/8 (withdrawn) provided that a building is taken to be used as a school or college if it is used or proposed to be used as a school or college for more than 50% of the time. This test has not been adopted in this Ruling except to the extent outlined in paragraphs 116 to 119 below.

### **Acquisition and construction**

116. Funds and persons who make a gift or contribution to a fund are permitted to apply paragraph 14 of TR 96/8 (withdrawn) for the purposes of arrangements for the acquisition or construction of a building which the fund became committed to before the issue of this Ruling.

117. For the purposes of paragraph 116 of this Ruling, circumstances in which a fund will be committed to an arrangement before the issue of this Ruling include where, before that time, the fund:

- accepted significant donations or contributions relating to the arrangement; or
- incurred, or became legally required to incur, significant financial costs for the purposes of entering into or carrying out the arrangement.

118. The question of whether a fund is a school building fund for the purposes of Item 2.1.10 depends on a characterisation of all acquisition and construction arrangements entered into by a fund, including those entered into after the issue of this Ruling. Where a fund is permitted to apply paragraph 116 of this Ruling in respect of an existing arrangement but later becomes committed to another acquisition or construction arrangement that does not meet the requirements of this Ruling, that fund will cease to be a school building fund for all purposes, including the earlier arrangement.

### **Maintenance**

119. Funds and persons who make a gift or contribution to a fund are permitted to apply paragraph 14 of TR 96/8 (withdrawn) for the purposes of characterising the provision of money by a fund to maintain a building before 1 July 2013.

## Appendix 1 – Explanation

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**ⓘ** *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

### Legislative framework

120. A gift or contribution to a school building fund is deductible under section 30-15 if:

- the gift is money or property of the kind covered by column 2 of item 1 of the table in subsection 30-15(1);
- the value of the gift is \$2 or more;
- the fund is in Australia;
- if the property is to be valued by the Commissioner – the requirements in section 30-212 are satisfied;
- the fund, the entity that legally owns the fund, or the government body constituted by the persons who control the fund, is endorsed under Subdivision 30-BA; and
- the fund satisfies the requirements of Item 2.1.10 of the table in subsection 30-25(1).

121. In order for a fund to satisfy Item 2.1.10:

- it must be a public fund established and maintained solely for the purpose of providing money for the acquisition, construction or maintenance of a building used as a school;
- the building must be used as a school by a government, a public authority or a non-profit society or association as described in Item 2.1.10; and
- the fund must be registered under the ACNC Act 2012; or not be an ACNC type of entity which is listed in column 1 of the table in subsection 25-5(5) of the ACNC Act 2012.

122. The key requirements of Item 2.1.10 considered in this Ruling are as follows:

- there must be a school;
- there must be a building;
- the building must be used as a school;
- the building must be used as a school by a qualifying body;
- there must be acquisition, construction or maintenance; and

- the fund must be established and maintained for the requisite purpose.

### **There must be a school**

123. In order for Item 2.1.10 to apply there must be a school or an objective intention to carry on a school.

124. As the ITAA 1997 does not define the words 'school' and 'college' or the composite phrase 'school or college', they take their meaning from their ordinary usage and statutory context.

125. In the *Australian Oxford Dictionary*,<sup>4</sup> the principal definition of 'school' is 'an institution for educating or giving instruction, especially for children'. A 'college' is defined as 'an establishment for further or higher education, sometimes part of a university'.

126. Ordinary usage points to what would be a 'school' within the ordinary meaning.<sup>5</sup>

127. For the purposes of Item 2.1.10, it is considered that a 'school or college' must be both a place of assembly and an educational organisation.

### **Place of assembly**

128. In order for a school to exist for the purposes of Item 2.1.10, there must be one or more buildings where people assemble for the purpose of instruction.

129. In *Cromer Golf Club Limited v. Downs and Another* (1973) 47 ALJR 219; [1972-73] ALR 1295 ('*Cromer*') Barwick CJ interpreted the meaning of 'school' in its use in a provision of the *Public Works Act 1912* (NSW) which allowed the resumption of land for school sites. That use did not depend on a specific definition of 'school' and so its interpretation depended on its ordinary meaning, considered in light of its legislative context. The meaning of 'school' in the context of resumption of a site required a use apt to include all the different things that might properly be included in the site of a school, not just its buildings or structures. His Honour said at ALJR 221; ALR 1299:

It seems to me that a 'school' is a place where people, whether young, adolescent or adult, assemble for the purpose of being instructed in some area of knowledge or of activity. Thus there are drama schools, ballet schools, technical schools, trade schools, agricultural schools and so on.

<sup>4</sup> *The Australian Oxford Dictionary, 1999, Oxford University Press, Melbourne.*

<sup>5</sup> *Australian Airlines v. Federal Commissioner of Taxation* 96 ATC 4324 at 4329 per Jenkinson J, cited with approval by Lockhart J in *Commissioner of Taxation v. Australian Airlines* 96 ATC 5187 at 5194.

***Educational organisation***

130. In order for there to be a school for the purposes of Item 2.1.10, there must also be an educational organisation which:

- has a distinct identity; and
- provides regular, ongoing and systematic instruction in a course of non-recreational education.

***Distinct identity***

131. As an organisation, a school must have its own distinct identity. For that reason, it will ordinarily have its own name.

132. Further, a school will ordinarily be an institution in its own right. A school will usually have its own distinct institutional identity, even though it may exist within a broader institution or organisation.

133. The institutional existence of a school was discussed by Lord Denning MR in *Bradbury v. London Borough of Enfield* [1967] 3 All ER 434 at 438:

It appears to me that a 'school' is an institution which exists independently of the buildings in which it is housed for the time being. Many a school retained its identity during the war even though it was evacuated to a place two hundred miles away. A school is an institution with a character of its own.

134. In *Stratton v. Simpson* (1970) 125 CLR 138, Gibbs J considered the meaning of 'institution' and said at 157-159:

In its ordinary sense 'institution' means 'an establishment, organization, or association, instituted for the promotion of some object, especially one of public utility, religious, charitable, educational etc.' (The Shorter Oxford English Dictionary). It means, as was said in *Mayor etc. of Manchester v. McAdam* (1896) AC 500, at p 511, 'an undertaking formed to promote some defined purpose. . .' or 'the body (so to speak) called into existence to translate the purpose as conceived in the mind of the founders into a living and active principle'. Although its meaning must depend on its context, it would not ordinarily connote a mere trust (cf. *Minister of National Revenue v. Trusts and Guarantee Co. Ltd.* (1940) AC 138, at p 149). A school could appropriately be called an institution within the ordinary meaning of the word.

135. In order for an organisation to be a school in an institutional sense it must:

- be instituted for the promotion, pursuit and achievement of one or more defined purposes;<sup>6</sup>
- have a quality of permanence; and<sup>7</sup>
- have a governing body which controls its affairs.<sup>8</sup>

<sup>6</sup> *Mayor etc of Manchester v. McAdam* [1896] AC 500; *Stratton v. Simpson* (1970) 125 CLR 138, per Gibbs J at 157-159.

<sup>7</sup> *Re Douglas; Obert v. Barrow* [1886-90] 35 Ch D 472 at 484.

136. The 'National Fitness Camp' considered in *Cromer*<sup>9</sup> was an educational institution. It was operated pursuant to a Commonwealth fitness scheme which involved the establishment of Fitness Councils in each State, each of which had a Director of National Fitness and Recreation Services. The Council formed a series of fitness camps, administered in a similar manner by permanent staff, who provided instruction in courses which included physical education, physical sciences and social sciences.

*Regular, ongoing and systematic instruction in a course of non-recreational education*

137. In order for an organisation to be regarded as a school for the purposes of Item 2.1.10, it must have as its primary function or essential purpose the provision of regular, ongoing and systematic instruction in a course of education that is not, or is no more than incidentally, recreational in character.

138. In *Commissioner of Taxation v. The Leeuwin Sail Training Foundation Limited* (1996) 68 FCR 197; (1996) 96 ATC 4721; (1996) 33 ATR 241 ('*Leeuwin*') the Full Federal Court considered whether a body running a sail training ship was conducting a 'school' for the purposes of a sales tax exemption provision that contained the composite term 'school or university'.<sup>10</sup>

139. The Court concluded that the collocation of 'school' and 'university' did not prevent the word 'school' from carrying its ordinary meaning, and found that the Administrative Appeals Tribunal ('AAT') was correct in concluding that the body was conducting a school within that meaning. In coming to this conclusion, the AAT and Court relied upon the following factors:

- the fact that the taxpayer's principal object was to promote education by the provision of a training scheme;
- the provision of training manual and pre-voyage preparatory material;
- the selection and training of crew;
- the giving of instruction on a range of topics;
- participation in structured problem solving and learning activities; and
- assessment of each participant for the purposes of deciding whether they should be awarded a 'Certificate of Achievement'.

<sup>8</sup> *Commissioner of Land Tax (NSW) v. Joyce* [1974] HCA 39; (1974) 132 CLR 22.

<sup>9</sup> *Cromer Golf Club Ltd v. Downs & Anor* [1971] 1 NSWLR 963 at 966-968.

<sup>10</sup> Item 109 of Schedule 1 to the *Sales Tax (Exemptions and Classifications) Act 1992*.

140. In *Australian Airlines Ltd v. Commissioner of Taxation* (1996) 65 FCR 341; (1996) 96 ATC 4324; (1996) 32 ATR 261 Jenkinson J considered whether an in-house flight training centre conducted by an airline was a 'school' for the purposes of an exemption from sales tax. His Honour considered Barwick CJ's definition in *Cromer* and said at FCR 346, ATC 4328, ATR 265:

I accept that in its ordinary meaning in this country the word 'school' comprehends an institution in which instruction in some area or areas of knowledge or activity is imparted, whether to children or adults, by persons professing the capacity to give that instruction, the institution having as its reason for existence the imparting of that instruction.

141. On appeal to the Full Federal Court, Jenkinson J's conclusion that a school was being conducted was affirmed: *Commissioner of Taxation v. Australian Airlines Ltd* (1996) 71 FCR 446; 96 ATC 5187; (1996) 34 ATR 310. In their joint judgment, Sundberg and Merkel JJ said that on the evidence before the primary judge, the centre was plainly a school in the sense described in the dictionary, in *Cromer* and in *Leeuwin*. Their Honours noted, in particular, that:

- the centre had defined syllabuses for each course of instruction provided;
- the centre had defined programs of instruction and qualified instructors;
- there was external certification of the syllabuses, the training exercises, the instructors and the equipment;
- the centre had a physically identifiable location, its own administration and was established for the sole purpose of instruction; and
- qualifications obtained at the conclusion of training were portable.

142. For the purposes of Item 2.1.10, a school is to be contrasted with a recreational course of instruction.

143. This conclusion is consistent with *Cromer*. Technical, trade and agricultural schools provide vocational training. Drama and ballet schools might provide vocational training or, alternatively, training in a recognised artistic discipline that can lead to the pursuit of a vocation. None of these examples suggests that the term 'school' was used in *Cromer* to include training in a mere hobby or recreational pursuit.

144. Even so, a 'school' may exist to teach a skill that could be used for recreation, such as training in maritime navigation and safety for recreational boating. In *Madigan v. FC of T* 2003 ATC 2150 the Tribunal held that, for sales tax purposes, a boat used for such training activity was not used mainly for 'pleasure, sport or recreation'. The question whether such a training activity could ordinarily be called a 'school' would depend on a range of considerations, such as the permanence of the operation, its physical characteristics, the nature of the courses conducted, the use of qualified instructors and qualifications conferred on successful participants.

145. Set out below are some examples of commonly encountered arrangements and their characterisation:

- An **adult religious education or Bible study centre** or a **theological college** may be a 'school or college' for the purposes of Item 2.1.10, provided it is established with the purpose of providing regular, ongoing and systematic instruction in a course of training. Such a purpose could be represented by, for example, a formal curriculum towards a qualification recognised by the related church or more widely.
- A **yoga school** is not usually a school for the purposes of Item 2.1.10. Yoga is a recreational activity and does not necessarily involve systematic instruction or study having the purpose of imparting knowledge as such.
- A **child care centre** is not a school for the purposes of Item 2.1.10 as it lacks the element of regular, ongoing and systematic instruction and lacks the purpose of systematically imparting a course of education as such. However, a **pre-school kindergarten** may qualify as a school where it involves regular and systematic instruction and these are its primary function or essential purpose.
- A **riding school** is not usually a school for the purposes of Item 2.1.10 as it usually trains persons to take part in a recreational sport. Similarly, places where instruction is provided in **dressmaking, woodwork, ceramics and cookery** as domestic or recreational pursuits would not qualify as schools, although they could if they were offered as vocational courses involving education rather than just recreational or domestic instruction. The distinction is based on the nature of the instruction provided.
- A **film and television school** where systematic training and instruction is provided in film and television operations would qualify as a school provided any recreational aspect is merely incidental.

- **Schools for opera, ballet and drama** may qualify as a school where they provide vocational courses involving education – that is, where there is a curriculum and examinations, their primary function or essential purpose is systematically imparting a course of knowledge as such by regular and systematic instruction, and any recreational aspect is no more than incidental. For example, the instruction provided by a drama school to qualify professional actors may be distinguished from the training offered by a recreational or amateur opera, ballet or theatrical body.

### **There must be a building**

146. In order for Item 2.1.10 to apply there must be a building or an objective intention to acquire or construct a building.

147. The word 'building' is not defined for the purpose of the ITAA 1997 and takes its meaning from ordinary usage and its statutory context.

### **Ordinary meaning**

148. The *Australian Oxford Dictionary*<sup>11</sup> defines building to mean:

1. a permanent fixed structure forming an enclosure and providing protection from the elements etc (e.g. a house, school, factory or stable).

149. In *Cobb & Co Ltd v. Commissioner of Taxation* (1959) 101 CLR 333; (1959) 12 ATD 111; 7 AITR 534 ('*Cobb & Co*'), Windeyer J considered the meaning of 'building' in a former school building fund deduction provision.<sup>12</sup> His Honour said:<sup>13</sup>

Numerous cases were cited to show that sometimes a wall or an embankment or similar structure falls within the term 'building'; and sometimes it does not. I need not go through the cases. In each of them the meaning of 'building' depended upon its context and the circumstances and purpose of the particular instrument in which it appeared. No doubt a stone wall is built; and in that sense it is a building. No doubt too the school oval could be said to have been built... But, for the purposes in hand, this involves a strained and inappropriate use of the word 'building'. And moreover, what I have to consider is the meaning of the composite expression 'building used or to be used as a school'.

<sup>11</sup> *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.

<sup>12</sup> Former subparagraph 78(1)(a)(xv) of the ITAA 1936.

<sup>13</sup> *Cobb & Co Ltd v. Commissioner of Taxation* (1959) 101 CLR 333 at 337.

150. The same analysis applies to the word 'building' in Item 2.1.10. A building does not include everything that may be described as 'built' in some sense of that word. For the purposes of the item, a building is a permanent structure of a kind that provides protection from the elements for students, teachers, and relevant equipment and services the school provides and uses in its operation. It is roofed<sup>14</sup> and usually has walls and flooring.

151. Accordingly, a structure such as an outdoor swimming pool, a sports oval or a tennis court does not come within Item 2.1.10 as it is not a structure forming an enclosure and providing protection from the elements. However, an indoor swimming pool (surrounded by walls and a roof) that is a building or a part of a building and used as a school would qualify.

152. Although a building would usually be expected to have walls, flooring and a roof, there are circumstances where a structure can be accepted as a building for the purposes of Item 2.1.10 even if it does not have walls. For example, a covered outdoor learning area ('COLA') might be used for outdoor classes of a school and school assemblies. A covered outdoor learning area may not have any walls but be made of galvanised steel with colour bond roofing, with guttering and downpipes, and be fixed to the land by posts embedded in a concrete floor. Such a structure is considered to be a building for the purposes of Item 2.1.10 because it is in the nature of a building: it is a structure with the function of a building (albeit with an atypical design influenced by environmental and particular operational factors), it is fixed to the ground, it has a roof and its size and method of construction indicate that it is not intended to be in place on an interim or short term basis or for a temporary purpose.

### ***Part of a building***

153. A part of a building is itself considered to be a building for the purposes of Item 2.1.10 where:

- it is a permanent, fixed and structurally delineated part of the building; and
- it is capable of being the subject of a separately identifiable legal or equitable interest (see further, paragraph 51 of this Ruling)

154. For instance, if a qualifying body leases or purchases a single floor of a multistorey building for the purposes of a school, that floor is itself a building acquired by the body.

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<sup>14</sup> e.g. *Hilderbrandt v. Stephen* [1964] NSW 740 at 742-743.

155. This interpretation of the term 'building' has regard to the context in which it appears. Item 2.1.10 is concerned with the use of a building which has been acquired or constructed. Where only part of a building has been acquired or constructed by an entity, it is only that part of the building which the entity is capable of using for any purpose. The concept of acquisition is discussed further in paragraph 54 and paragraphs 208 to 212 of this Ruling.

### **Fixtures**

156. For the purposes of Item 2.1.10, a 'building' is considered to include fixtures to a building.

157. In *Australian Provincial Assurance Co. Ltd. v. Coroneo* (1938) 38 S.R. (N.S.W.) 700,<sup>15</sup> Sir Frederick Jordan said at 712:

The question whether a chattel has become a fixture depends upon whether it has been fixed to land, and if so for what purpose. If a chattel is actually fixed to land to any extent, by any means other than its own weight, then prima facie it is a fixture;... the test of whether a chattel which has been to some extent fixed to land as a fixture is whether it has been fixed with the intention that it shall remain in position permanently or for an indefinite or substantial period... or whether it has been fixed with the intent that it shall remain in position only for some temporary purpose...

158. Fixtures that become part of a building for the purposes of Item 2.1.10 are items attached to a building so as to form part of it permanently or for an indefinite or substantial period of time rather than for a temporary purpose.

159. Whether a chattel has become a fixture depends on the intention of the party bringing the item on to the land, having regard to the degree of annexation and the object of annexation.<sup>16</sup>

160. Fixtures ordinarily include ducted heating systems, fixed air conditioning systems and carpets permanently fixed to the floor. The fact that an item cannot be detached from the building without substantial damage to the item or to the building is a strong indication of the item being attached to the land as a fixture.

161. Non-fixture assets which are used to fit out a school ordinarily include computers, furniture, training equipment and laboratory equipment. Although these items may be expensive and substantial, they do not come within the scope of Item 2.1.10 if they are not fixtures.

<sup>15</sup> Quoted with approval by Lockhart J in *Feltex Commercial Interiors Pty Ltd v. Federal Commissioner of Taxation* (1990) 90 ATC 4925; (1990) 21 ATR 920.

<sup>16</sup> *Holland v. Hodgson* (1872) LR 7 CP 328.

**The building must be used as a school**

162. In order for Item 2.1.10 to apply there must be a building used as a school or an objective intention for a building to be used as a school.

163. This Ruling uses the term '**school building**' to denote a building which is used as a school for the purposes of Item 2.1.10.

164. In order for a building to be 'used as a school' for the purposes of Item 2.1.10 it must have the character of a school building. This will be the case where:

- it is used to provide instruction of the kind described in paragraphs 13 to 19 of this Ruling; and
- the extent and character of that use is such that the building can be described as 'used as a school' as a matter of ordinary language.

165. A building is also considered to be a school building where its use is incidental to the provision of instruction in a building which satisfies paragraph 26 of this Ruling; see paragraphs 42 to 45 and paragraphs 190 to 196 of this Ruling.

166. For the purposes of this Ruling:

- the **school use** of a building refers to the use of the building to provide instruction of the kind described in paragraphs 13 to 19 of this Ruling or for purposes which are incidental to that use; and
- the **non-school use** of a building refers to use of a building which is not school use

**General principles**

167. A thing is 'used' where it is employed to or for a purpose.<sup>17</sup> Accordingly, a building cannot be used as a school unless it is employed for the purpose of providing instruction in the course of the operation of a school.

168. However, a building is not 'used as a school' merely because some form of systematic instruction occurs there. Rather, the reference in Item 2.1.10 to a 'building used as a school' is considered to be a reference to a building of a particular kind or character. Such a building must not merely be used by a school for the purposes of providing instruction; it must be a building whose use for school purposes is so significant that the building can itself be described as 'a school' as a matter of ordinary language.

169. This view is not based on the sole purpose test referred to in paragraph 57 of this Ruling. Rather, it is based on an interpretation of the meaning of the phrase 'building used as a school'.

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<sup>17</sup> For example *Shell-Mex & B P Ltd v. Clayton* [1955] 3 All ER 102 at 106; *R v. Rintel* (1991) 52 Crim R 209 at 210-211.

170. A building may be used for the purpose of a school and also for other purposes. In such cases it is necessary to determine whether the building can nonetheless be characterised as 'used as a school' for the purposes of Item 2.1.10.

171. In this regard, the absence of the word 'solely' before the phrase 'used as a school' does not necessarily indicate that a building 'used as a school' can also be used for an unlimited range of other purposes. In the absence of that word, it remains necessary to determine what it means for a building to be 'used as a school' as a matter of ordinary language.

172. In *Randwick Corporation v. Rutledge* [1959] HCA 63; (1959) 102 CLR 54 ('*Randwick*') the High Court considered whether a racecourse was 'used as a public reserve' for the purposes of *The Local Government Act 1919 (NSW)*. Windeyer J said:<sup>18</sup>

The presence of 'exclusively', 'solely', or 'only' always adds emphasis; and is not to be disregarded (*Reg. v. Cockburn*(3).) When such words are present, it is a question of fact whether the land is being used for any purpose outside the stipulated purpose (cf. *Trustees of Victorian Rifle Association v. Mayor of Williams-town*(4); *Down v. Attorney-General of Queensland*(5). As Kitto J. said in *Lloyd v. Federal Commissioner of Taxation* (6), such words confine the use of the property to the purpose stipulated and prevent any use of it for any purpose, however minor in importance, which is collateral or independent, as distinguished from incidental to the stipulated use. Even without such words, an exemption from rating based upon use or occupation for a particular purpose or in a particular manner can only apply when the property is so used that it can properly be described as used for that purpose or in that manner, any other user being merely incidental, or at least not inconsistent with such main user.

173. In order for a building to be described as 'used as a school' as a matter of ordinary language, its use for school purposes must be substantial.

174. In *Australian Red Cross Society v. Albury City Council* [1973] 28 LGRA 211 the Court considered whether land was exempted from rating on the grounds that it was used or occupied for charitable purposes. It was held that land did not need to be used or occupied solely for charitable purposes and it was sufficient to show a substantial use or occupation for such purpose. Else-Mitchell J held:

There is clear authority for the proposition that exemptions which are conditioned upon use or occupation for some public purpose are satisfied by a substantial, as distinct from an entire or exclusive, use or occupation: see *Young Men's Christian Association v. Sydney City Council* (1); *Randwick Municipal Council v. Rutledge*; *Trustees of Royal Botanic Gardens and Government Domain v. Sydney City Council*. The conception of substantial use or occupation is difficult to define. Sugerman J, in the YMCA case attempted closer definition by stating as the test of substantial use whether outside uses are

<sup>18</sup> *Randwick Corporation v. Rutledge* [1959] HCA 63; (1959) 102 CLR 54 at paragraph 37.

‘such in kind, frequency or relative magnitude as to preclude the conclusion’ of substantial use for the charitable purpose.

175. Similarly, a building will not be regarded as being ‘used as a school’ as a matter of ordinary language where its non-school use is of such kind, frequency or relative magnitude as to preclude the conclusion that the building has the character of a school.

176. This view is consistent with Windeyer J’s obiter dicta in *Cobb & Co*. There his Honour said at CLR 337:

A school building that on occasions is used for the purposes other than teaching – for example, for educational conferences, parents’ meetings, etc – may still be properly said to be used as a school. And the occasional gratuitous use of a school building for the meetings of an outside body is not necessarily incompatible with its being a building used as a school.

177. The examples provided by Windeyer J support the conclusion that the school use of a building must be sufficient for the building to be regarded as having the character of a school. If this was not a requirement of the legislation, it would not matter whether the other uses referred to by his Honour were related to education or whether they were occasional or frequent. The examples imply that the non-school use of a building may alter the building’s character where such use exceeds a certain threshold; but this will not occur where such use is compatible with a school or is occasional only.

178. A weighing of various factors is required to determine whether a building has the character of a school building.

179. In considering whether non-school use precludes the conclusion that a building is a school building, regard is had to the extent to which such use materially limits, detracts from or is otherwise incompatible with the provision of instruction as described in paragraphs 13 to 19 of this Ruling.

180. Other factors which are relevant to determining whether a building is used as a school include:

- the amount of time the building is put to school use relative to the amount of time it is put to non-school use;
- the number of people involved in the school use of the building relative to the number involved in its non-school use;
- the physical area of the building put to school use relative to the physical area put to non-school use; and
- the extent to which the building has been adapted or modified in order to accommodate its school or non-school use.

181. A qualifying body may carry on a range of activities, only some of which relate to the carrying on of a school. For instance, a single qualifying body might carry on a church, a charity and a school. Where a qualifying body carries on a school organisation and one or more other organisations or institutions, it is necessary to have regard to the extent to which the school organisation is able to control the use of the building. While regard must also be had to the actual use of the building, the inability of the school organisation to control the use of the building may be an indication that the building is not used as a school.

### ***To be used as a school***

182. Where a building is being acquired or constructed, it is necessary to determine whether it is 'to be used' as a school. A building is considered to meet this requirement where it is intended to be a school building for the purposes of paragraphs 26 to 28 of this Ruling.

183. The building's character is determined on an objective basis, having regard to all of the surrounding circumstances.

184. In some statutory contexts the phrase 'to be used' refers to the physical characteristics or attributes of a building or its suitability for a given purpose, without regard to the intentions of a particular person.<sup>19</sup> In contrast, Item 2.1.10 is concerned with the use of a building by a qualifying body.

185. Despite this, the physical attributes of a building are an important and potentially decisive indication of whether the building is objectively intended to be used as a school.

186. For instance, an assertion that a building will be used for school purposes will not establish that it is 'to be used as a school' where the building's physical characteristics indicate that it is designed to be a church.

187. In characterising the physical attributes of a building it is necessary to have regard to the extent to which the building has been specifically designed or materially adapted to enable, support or facilitate its use for non-school purposes. A building will not be a school building where its design or adaptation is of such significance that the building cannot be regarded as a school as a matter of ordinary language.

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<sup>19</sup> For example *Sunchen Pty Ltd v. Federal Commissioner of Taxation & Anor* 2010 ATC 20-229; (2010) 78 ATR 197.

188. As discussed in paragraph 180 of this Ruling, the activities of a qualifying body may extend beyond the operation of a school. Where a qualifying body carries on a school organisation and one or more other organisations or institutions, it is necessary to have regard to the extent to which the school organisation will be able to control the use of the building. The ability of a non-school organisation to control the use of the building is a strong objective indication that the building will not have the character of a school building. In the absence of evidence relating to the actual use of the building, that indication may be decisive.

189. For instance, a hall owned by the qualifying body may be available for school use and non-school use. If the school is required to book the hall for school use and must find another facility at times when the hall is reserved for other activities, the hall is not a school building. The fact that the school cannot control the use of the hall is an indication that the hall is not a building used as a school.

### ***Incidental buildings***

190. A building which is not used to provide instruction as described in paragraphs 13 to 19 of this Ruling is also considered to be used as a school where :

- its actual or intended use is incidental to the provision of instruction in one or more school buildings; and
- it can be regarded as being 'used as a school' as a matter of ordinary language when considered in conjunction with those buildings.

191. A building's use is incidental to the provision of instruction in a school building where it is used together with the school building, but in a manner which is ancillary or subordinate to it.<sup>20</sup> In the present context, such a building is not used to provide instruction, but it is used to support or facilitate the provision of instruction in one or more other buildings.

192. A building of this kind cannot be regarded as a school as a matter of ordinary language. However, it may be regarded as being 'used as a school' in conjunction with other buildings. This will typically be the case where a school is being carried on in a complex consisting of a number of buildings.

193. In determining whether a building's use is incidental to the provision of instruction in a school building, regard is had to the nature and scale of the uses to which the building is or will be put, as well as its physical characteristics.<sup>21</sup>

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<sup>20</sup> *Emin v. Secretary of State for the Environment and Mid-Sussex County Council* (1989) 58 P & CR 416 at 422.

<sup>21</sup> *Emin v. Secretary of State for the Environment and Mid-Sussex County Council* (1989) 58 P & CR 416 at 422.

194. In determining whether a building of this kind can be characterised as a school building, when considered in conjunction with one or more other buildings, it is necessary to have regard to the extent of its non-school use. Such a building is not a school building where its non-school use prevents it from being regarded as being used as a school as a matter of ordinary language.

195. The use of a building for school prize giving or school fundraising activities are examples of use for activities which are incidental to the provision of instruction in a school building.

196. Further examples of buildings which may be used for purposes which are incidental to the provision of instruction in a school building include:

- facilities for students or staff of the school;
- a school administration office;
- a school assembly hall;
- residential accommodation of a boarding school; and
- residential accommodation for teachers.<sup>22</sup>

### **The building must be used as a school by a qualifying body**

197. For the purposes of Item 2.1.10, the use of a building as a school must be by a qualifying body.

#### ***Qualifying body***

198. A qualifying body is a government, a public authority, or a society or association which is carried on otherwise than for the purposes of profit or gain to its members.

199. One or more trustees do not, as such, constitute an association.<sup>23</sup> A society or association connotes a relationship among persons 'associated' for a common purpose or to share a common interest. Ordinarily, the members of an association are bound by a contract, the contractual obligations setting out the duties and conferring the rights which bind the members.<sup>24</sup> In contrast, trustees are bound by an equitable obligation to act in accordance with the terms of the trust. Their duties under the trust do not depend on their agreement and should the trustees be unable to agree on the exercise of any discretion their duties will prevail.<sup>25</sup>

<sup>22</sup> *Mayor, Etc, of Christchurch v. Boland* (1910) 30 NZLR 57.

<sup>23</sup> *Kibby v. Registrar of Titles; sub nom Kibby v. Santiniketan Park Association Inc* [1999] 1 VR 861; [1998] VSC 148.

<sup>24</sup> *Re Thackrah* [1939] 2 All E.R. 4, 6.

<sup>25</sup> *Re Hilton, Gibbs v. Hale-Hilton* [1909] 2 Ch 548.

200. However, where trustees carrying on a school act for and according to the purposes of a society or association, that society or association may be regarded as carrying on the school through the trustees. In these circumstances, the society or association can be regarded as using as a school a building the trustees use as the school.

201. This could occur, for example, due to fluctuating membership of the society or association. In these circumstances, the society or association may be regarded as carrying on the school through the trustees, and so the society or association may be regarded as using as a school any buildings the trustees use as the school. The terms of the trust will include or indicate the basis on which the relevant society or association is established.

### ***Use by a qualifying body***

202. In order for a qualifying body to use a building as a school the body must:

- carry on the school;
- control the use of the building; and
- use the building in the provision of instruction of the kind described in paragraphs 13 to 19 of this Ruling.

203. Whether a qualifying body carries on a school is to be determined by reference to the constituent and governing documentation of the organisation and its actual activities and operations.

204. In order for a qualifying body to use a building as a school it needs to control the use of the building in its capacity as the operator of a school.

205. In order for a qualifying body to use a building as a school, it must have sufficient control over the building's use to enable it to direct the application of the building to school purposes. This control will arise from a legal or equitable interest in the building held by the qualifying body, its members or an entity which the qualifying body controls; see paragraphs 54 and 210 of this Ruling.

206. Accordingly, a qualifying body does not use a building as a school merely because a third party provides access to the building for purposes which are beneficial to the operation of a school carried on by the body. For example, a local scout hall that is hired by a nearby school for a few hours every weekday for art classes is not a building whose use is controlled by the requirements of operating the school. Such a building is used by a school, but not as a school.

**There must be acquisition, construction or maintenance**

207. In order for Item 2.1.10 to apply an entity must acquire, construct or maintain a building or have an objective intention to do so.

**Acquisition**

208. The word 'acquisition' is not defined and therefore takes its meaning from its ordinary usage and statutory context.

209. The *Macquarie Dictionary*<sup>26</sup> defines 'acquire' as:

1. to come into possession of; get as one's own...
2. to gain for oneself through one's actions or efforts

210. It is considered that a building is acquired for the purposes of Item 2.1.10 where:

- it is provided in order to enable an entity to obtain ownership of a legal or equitable interest<sup>27</sup> in a building (including a leasehold interest); and
- that interest is sufficient to enable the entity to control the use of the building.

211. This interpretation has regard to the context in which the word 'acquisition' appears. The requirement for a building which is 'used as a school' calls for a high degree of control over the uses to which the building is put.

212. A building can be acquired through the acquisition of a leasehold interest. The building is acquired when the lease is entered into. However, the terms of the lease must confer sufficient control over the building to enable it to be used to provide instruction of the kind referred to in paragraphs 13 to 19 of this Ruling. This means the lease must allow the qualifying body to use the building to provide regular, ongoing and systematic instruction in a course of education. This may not be possible where, for instance, the lease has a short duration.

**Construction**

213. The word 'construction' is not defined and takes its meaning from its ordinary usage and statutory context.

214. A building is constructed for the purposes of Item 2.1.10 where it is formed or put together.

215. The *Macquarie Dictionary* defines 'construct' as:<sup>28</sup>

1. to form by putting together parts; build; frame; devise.

<sup>26</sup> *The Macquarie Dictionary*, 2009, rev 5<sup>th</sup> Edn, The Macquarie Library Pty Ltd, NSW.

<sup>27</sup> For example *Trade Practices Commission v. Australian Iron & Steel Pty Ltd* (1990) 92 ALR 395 at 404-405.

<sup>28</sup> *The Macquarie Dictionary*, 2009, rev 5<sup>th</sup> Edn, The Macquarie Library Pty Ltd, NSW.

216. In order to satisfy Item 2.1.10, the entity for which the building is being constructed must have a legal interest in the building being constructed which is sufficient to enable it to control the building's use. Without such an interest, it cannot be said that what is being constructed is 'a building used as a school'.

### **Maintenance**

217. The word 'maintenance' is not defined and takes its meaning from its ordinary usage and statutory context.

218. It is considered that a building is maintained for the purposes of Item 2.1.10 where action is taken to keep the building in proper or good condition.

219. The definition of 'maintenance' in the *Australian Oxford Dictionary*<sup>29</sup> refers to 'maintaining' which in turn means to:

...cause to continue; keep up, preserve...

220. The *Macquarie Dictionary*<sup>30</sup> defines 'maintain' as:

to keep in existence or continuance; preserve; retain... 2. to keep in due condition, operation, or force; keep unimpaired...

### **The fund must be established and maintained for the requisite purpose**

221. Item 2.1.10 requires a school building fund to satisfy the sole purpose test referred to in paragraph 57 of this Ruling.

### **Requisite purpose**

222. The sole purpose test requires a school building fund to be established and maintained solely to provide money for the acquisition, construction or maintenance of a building used as a school by a qualifying body.

223. The word 'solely' refers to the purposes or objects for which the fund is established and maintained.

224. In *Cobb & Co*, Windeyer J considered the meaning and effect of the word 'exclusively' in the phrase 'a public fund established and maintained exclusively for providing money for the acquisition, construction or maintenance of a building used or to be used as a school' by a qualifying body.

225. His Honour said:<sup>31</sup>

<sup>29</sup> *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.

<sup>30</sup> *The Macquarie Dictionary*, 2009, rev. 5th edn, The Macquarie Library Pty Ltd, NSW.

<sup>31</sup> *Cobb & Co Ltd v. Commissioner of Taxation* (1959) 101 CLR 333 at 336.

The word 'exclusively' in the Act properly refers to the purposes or objects for which the fund is established or maintained. It does not refer to the use of the building. For example, a fund to acquire a building and also to provide books, etc, would be outside the provision, and so would a fund for the acquisition of a building and the endowment of a scholarship. But to be within the provision a building has only to be used as a school.

226. The same analysis is considered to apply to the use of the word 'solely' in Item 2.1.10.

227. A fund will not satisfy the sole purpose test if it is established or maintained for the purpose of providing money to acquire, construct, or maintain a building:

- that is not used or objectively intended to be used as a school to any extent; or
- that is not used or objectively intended to be used by a qualifying body.

228. A fund may outlay money to acquire, construct or maintain a building which is used as a school and is also used for other purposes. In such cases, it is necessary to determine what the money is provided for.

229. It is considered that a fund will only satisfy the sole purpose test where it is established and maintained to provide money for the purpose of both:

- acquiring, constructing or maintaining a building which is a school building for the purposes of paragraphs 26 to 28 of this Ruling; and
- putting that building to school use

230. Accordingly, a fund will not satisfy the sole purpose test where it is established or maintained to provide money for the purpose, or for purposes which include, the non-school use of a building. This is the case, even though the building may be a school building.

231. This does not mean that a building must be used solely as a school. However, it means that a fund must not have a purpose of providing money for the non-school use of a building.

232. The phrase 'building used, or to be used as a school' in Item 2.1.10 is considered to be a compound expression which refers to a building having a particular purpose or character. The purposes of the fund relate to the expression 'building used as a school' as a whole rather than merely to the word 'building' severed from its context.<sup>32</sup> Accordingly, it is considered that a connection is required between the purposes for which a fund is established and maintained and use of the building.

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<sup>32</sup> *Lorimer v. Smail* (1911) 12 CLR 504; *Mersey Docks and Harbour Board v. Henderson Bros* (1888) 13 App Cas 595 at 599-600.

233. If Item 2.1.10 did not require any such connection, a school building fund could be established and maintained solely in order to provide money for the non-school purposes of a building with school and non-school uses. Such an outcome would be difficult to reconcile with the existence of a sole purpose test and the requirement that a building be 'used as a school'. The need for strict exclusivity of purpose in relation to the fund is not apparent if no connection is then required between the purposes of the fund and the manner in which the building is used.

234. Such an interpretation would also be inconsistent with the apparent purpose or object of the legislation. An interpretation which promotes the raising of funds only for the purposes of building and maintaining educational establishments<sup>33</sup> is to be favoured over an interpretation which also assists in raising funds for a potentially wide range of purposes unrelated to education.<sup>34</sup>

### ***Determining purpose***

235. It is a question of fact whether a fund is established and maintained solely to raise money for the requisite purpose.

236. The purposes of the fund are determined on an objective basis, having regard to all of the surrounding circumstances, including the constituent documents of the fund, and the manner in which money is actually provided by the fund.

### ***Constituent documents***

237. A fund will not satisfy the sole purpose test where its constituent documents indicate that it has a purpose other than the provision of money for the acquisition, construction or maintenance of a school building for the purposes of its school use.

238. A body's constituent documents will formally set out the reasons for which it is to exist and operate. Those documents provide an objective indication of the purposes for which the fund was established, as well as the purposes for which it is maintained.

239. The constituent documents of a fund are the starting point for determining whether it is established and maintained for the requisite purpose. It is necessary to examine the fund's stated objects and then consider the extent to which those objects are reflected in the fund's actual activities.<sup>35</sup>

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<sup>33</sup> Second Reading Speech from Income Tax and Social Services Contribution Assessment Bill 1954.

<sup>34</sup> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation: section 15AA of the *Acts Interpretation Act 1901*.

<sup>35</sup> *Federal Commissioner of Taxation v. Word Investments Ltd* (2008) 236 CLR 204 at paragraph 17.

*What money is provided for*

240. The purpose for which money is actually provided is an indication of the objective purposes for which the fund is established or maintained.

241. The objective purpose of an outlay is determined by reference to what it is apt to achieve.<sup>36</sup> Objective purpose is an attribute of the transaction whereby money is laid out, rather than the state of mind of the person making the outlay.<sup>37</sup> The objective purpose of an outlay is attributed to a transaction by reference to all the known circumstances at the relevant time.

242. The objective purpose of providing money is judged at the time the fund provides the money or incurs an obligation to provide it, if earlier. It is at this time that it is possible to assess what the outlay is apt to achieve from an objective point of view.

243. Where a fund provides money to acquire or construct a building, the fund's objective purpose is characterised by reference to how the outlay relates to the building's intended use. Viewed objectively, an obligation incurred before a building has been acquired or constructed is apt to affect how the building will be used in the future.

244. Where a fund provides money to maintain a building, the fund's objective purpose is characterised by reference to the use of the building giving rise to the outlay. Objectively, an obligation incurred on maintenance costs will usually be apt to affect the building's current use. However, in some cases, it may be relevant to the building's future use. For instance, a building may undergo additional maintenance in anticipation of an expected increase in its future level of use.

245. A provision of money in respect of acquisition, construction or maintenance costs will not cause a fund to breach the sole purpose test where it can be reasonably explained solely by reference to the current or intended use of the building as a school.

246. A provision of money will give rise to an inference that a fund was not established or is not being maintained for the requisite purpose where it can only be explained by the non-school use of a building and its amount is material.

247. Such an inference would arise where money provided to acquire or construct a design feature or adaptation to a building which is explicable only by the building's intended non-school use. For instance, where money is spent on a fixture to a building which would not be required if the building was only put to school use.

<sup>36</sup> *FC of T v. Creer* 86 ATC 4318 at 4325.

<sup>37</sup> *Magna Alloys & Research Pty Ltd v. Federal Commissioner of Taxation* (1980) 11 ATR 276 at 279; *Robert G Nall Ltd v. Federal Commissioner of Taxation* (1937) 57 CLR 695 at 711; 1 AITR 169 at 176.

248. Such an inference would also arise where money provided to maintain a building is explicable only by the building's non-school use. For instance, where money is paid to obtain additional cleaning services following the use of a school building for community events. Such an inference would not arise, however, where the fund is fully and promptly reimbursed for the money provided. The existence of an arrangement to reimburse a fund for disbursements relating to non-school use of a building is an objective indication that such costs are not intended to be borne by the fund.

249. A provision of money may give rise to an inference that a fund was not established or is not being maintained for the requisite purpose where its amount is disproportionate to the present and future needs of the relevant school. In such cases, the size of the outlay, relative to the benefit obtained by the school, may indicate that all or part of it does not relate to the use of a school building for school purposes.

250. It will be inferred that a fund was not established or is not being maintained for the requisite purpose where it engages in a transaction which has the objective purpose of conferring a financial benefit on an entity other than a qualifying body.

251. Accordingly, a fund will fail the sole purpose test where it provides money in respect of acquisition, construction or maintenance which exceeds an amount which could reasonably be expected to be provided between parties dealing at arm's length.

252. Equally, a fund will fail the sole purpose test where it provides money in order to obtain consideration from a qualifying body or to enable another entity to obtain such consideration. For instance, a school building fund cannot pay for the construction of a school building so that the building can then be sold or leased to a qualifying body. The objective purpose of such a transaction is or includes something other than the provision of money to acquire, construct or maintain a building used as a school.

#### *Other matters*

253. Other matters which are relevant to a determination of the purposes of a fund are set out in paragraphs 75 to 90 and paragraphs 271 to 321 of this Ruling.

#### **Multipurpose buildings and complexes**

254. The principles in this Ruling apply to multipurpose buildings and buildings in multipurpose complexes in the same way as they apply to other buildings.

***Terminology***

255. For the purposes of this Ruling, a **multipurpose building** is a building which is designed to be put to a number of different uses. Typically, such a building is designed to be put to a variety of school uses. For instance, it may be a hall designed to be used for specific curricular activities such as physical education, drama and dance, for school assemblies, and for school functions such as sports days, fetes, concerts and plays. Such a building may also be put to non-school use. For instance, community groups may be permitted to use the building for meetings or sporting activities.

256. For the purposes of this Ruling, a **multipurpose complex** is a collection of buildings used for discrete but related purposes. For example, a multipurpose complex may comprise six stand-alone buildings, five of which are used by a school and one building which is used by a church. Multipurpose complexes may include common areas which are put to both school and non-school use.

***Characterisation process***

257. For the purposes of item 2.1.10, a multipurpose building or a building in a multipurpose complex can be characterised using the steps outlined below.

258. It is assumed, for the purposes of illustration, that money provided by the fund is not disproportionate to the needs of the school and is not provided in order to confer a benefit of an entity other than the qualifying body.

***Step 1 – Identify the relevant building or buildings***

259. It is first necessary to identify each relevant building for the purposes of Item 2.1.10, which may include a part of a building; see paragraphs 20 to 23 of this Ruling.

***Step 2 – Identify the school building or buildings***

260. Each building is then separately characterised in order to determine whether it is a school building for the purposes of paragraphs 26 to 28 of this Ruling.

261. A school building fund can provide money to cover some or all of the cost of acquiring, constructing or maintaining a building which is a school building.

262. A school building fund cannot provide money to cover any of the cost of acquiring, constructing or maintaining a building which is not a school building.

263. Where a common area in a multipurpose complex is a building in its own right, it is necessary to determine whether it has the character of a school building.

*Step 3 – Determine how money can be provided and apportion where required*

264. It is then necessary to apply the principles in paragraphs 58 to 73 of this Ruling in order to determine how money can be provided.

265. A school building fund can provide money to cover the entire cost of constructing or acquiring a school building where the building has not been materially adapted or specifically designed to accommodate non-school use.

266. A school building fund may only be able to cover part of the cost of constructing or acquiring a school building which has been materially adapted or specifically designed to accommodate non-school use.

267. A school building fund cannot provide money to pay the cost of the adaptation or design feature if that cost is material. Where the cost of such a design feature has not already been separately determined on a fair and reasonable basis, an apportionment is required. Such an apportionment must be based on a fair and reasonable estimation of the extent to which the adaptation or design feature contributes to the total cost of acquiring or constructing the building.

268. Such an apportionment would be required, for instance, where a common area which is part of a school building has significant design features which are intended to accommodate its non-school use.

269. A school building fund can provide money to cover all or part of the cost of maintaining a school building. A school building fund cannot provide money to pay the cost of maintenance which is only explicable by the building's non-school use if that cost is material. Where that cost has not already been separately determined on a fair and reasonable basis, an apportionment is required. Such an apportionment must be based on a fair and reasonable estimation of the extent to which the building's non-school use contributes to the total cost of maintaining the building. Such an apportionment would be required, for instance, where a material portion of the maintenance costs of a common area can only be explained by reference to the area's non-school use.

### **Fund administration**

270. Where the relevant endorsed entity is not the gift deductible school building fund itself, it must maintain a separate gift fund for donations and contributions to the school building fund:

section 30-130.<sup>38</sup> Such an endorsed entity might have purposes other than those of providing for a school building, so a separate gift fund is required in order to ensure that the sole purpose test is satisfied.

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<sup>38</sup> Although an entity that operates more than one gift fund can pool those funds and maintain a single gift fund: subsection 30-130(3).

***Payments into a school building fund***

271. A school building fund can only include amounts which are objectively intended to enable or facilitate the provision of money for the acquisition, construction or maintenance of a school building for school purposes.

272. Other money received in relation to a school – for example, government grants and school fees – must be kept separate from the school building fund.<sup>39</sup>

273. The receipt of other amounts may give rise to the inference that the fund was not established or is not being maintained for the requisite purpose.

274. Payments into a school building fund may include:

- donations or contributions of money or other property;
- amounts paid to reimburse the fund for costs associated with the non-school use of a school building – see paragraphs 85, 248, 312 and 314 of this Ruling; and
- capital and income relating to investments which are permitted by the sole purpose test – see paragraphs 86 to 88 and paragraphs 315 to 319 of this Ruling.

275. All donations to a school building fund must go into the fund, whether directly or via a holding account, on trust, on a strictly temporary basis. A transfer of property to an entity other than a school building fund is not a donation or contribution to that fund; see paragraph 322 of this Ruling.

***Disbursements from a school building fund***

276. A school building fund can only disburse money for the objective purpose of the acquisition, construction or maintenance of a school building for the purposes of its school use. Such disbursements may be in respect of:

- acquiring or constructing a school building for school purposes;
- maintaining a school building for school purposes;
- investing or lending money in order to provide money for the acquisition construction or maintenance of a school building for school purposes; or
- administering the fund.

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<sup>39</sup> Paragraphs 30-130(1)(d) and 30-130(3)(b).

### *Acquisition or construction*

277. The following explanation relates to disbursements which constitute the provision of money to acquire or construct a school building for the purposes of Item 2.1.10.

### Consideration for buildings and land

278. Money provided to acquire or construct a school building includes consideration paid to purchase or construct the building.

279. Money provided to acquire or construct a school building also includes consideration for the purchase of land, to the extent that it reasonably relates to the area of land occupied by the building.

280. Money provided to acquire a school building does not include consideration to purchase land to the extent that it reasonably relates to land not occupied by a school building. Such land relates to something other than a school building. Accordingly, a school building fund will rarely be able to cover the entire cost of purchasing land for school purposes. An apportionment will be required to reflect the extent to which the cost of the land reasonably relates to the area of the land occupied by the building.

### Incidental costs

281. Money provided to acquire or construct a school building includes incidental costs of acquisition or construction, including costs relating to planning, negotiating, financing and obtaining approval for the acquisition or construction.

282. Such costs are necessary for or incidental to the acquisition and construction of the building.

### Fixtures

283. Money provided to acquire or construct a school building includes the costs of any fixtures to the building. Fixtures to a building are regarded as part of the building itself; see paragraph 24 and paragraphs 156 to 161 of this Ruling.

284. Fixtures to a school building include security-related features such as security alarms and lighting, and window and door security such as grilles.

### Initial repair

285. Money provided to acquire or construct a school building includes expenditure of a capital nature on initial repairs to the building.

286. Such repairs are incidental to the acquisition of the building and, as such, constitute acquisition or construction rather than maintenance.

## Subsequent construction

287. Money provided to acquire or construct a school building includes the cost of constructing a separately identifiable addition to, or extension, of an existing building such as an additional floor, room or other permanent structure within the building. It also includes the cost of structural renovations to existing buildings, such as the replacement, removal or addition of walls, doors or windows.

288. Such construction may be incidental to the acquisition of the building. For instance, a school building fund may pay the cost of adding classrooms to a newly purchased building.

289. Alternatively, a school building fund may pay for construction which was not contemplated at the time a building was acquired. For instance, a school building fund may cover the cost of constructing a new laboratory within a school building which has been owned by the qualifying body for 10 years.

## Leases

290. An entity acquires a building for the purposes of Item 2.1.10 where it obtains a legal or equitable interest in the building which is sufficient to enable the entity to control its use; see paragraph 54 of this Ruling. Such an interest may be a leasehold interest. The building is acquired when the leasehold interest in it is obtained.

291. Money provided to acquire a school building also includes consideration in respect of a lease, to the extent that it reasonably relates to the building and the area of land occupied by the building. Such amounts include rent and lease premiums.

292. Rent or lease payments facilitate the use of a building as a school in the same way as payments to finance the outright purchase of a building.

293. Money provided to acquire a school building does not include consideration in respect of a lease to the extent that it reasonably relates to land not occupied by a school building. Such land relates to something other than a school building. Accordingly, a school building fund will rarely be able to cover the entire cost of leasing land for school purposes. An apportionment will be required to reflect the extent to which lease payments reasonably relate to the area of the land occupied by the building.

### Conditions on construction

294. A school building fund can provide money in order to satisfy a condition imposed by a local governing body or other public authority where:

- the condition must be satisfied before construction of a school building will be permitted; and
- the money provided reasonably relates to the construction of the building, as opposed to other matters affected by the condition.

295. For instance, local government planning approval for a building project may be conditional on money being provided to upgrade related infrastructure such as roads or footpaths.

296. Provision of money for such purposes is permissible, even though the money does not directly relate to the construction of a school building. In such circumstances, the money is, in effect, provided to construct a school building, since the building cannot legally be constructed without it.

297. However, the money provided by the fund must reasonably relate to the construction of the school building. Where the satisfaction of the condition enables a qualifying body to construct a school building and also do other things, a school building fund can only provide money to satisfy the condition to the extent that it reasonably relates to the ability to construct the school building.

### Non-school use

298. A school building fund cannot provide consideration in respect of acquisition or construction which relates to the non-school use of a building.

299. For instance, a school building fund cannot provide money to construct a wing of a building which is designed to be used as a church. Such a disbursement would indicate that the fund was not established or is not being maintained for the requisite purpose.

### *Maintenance*

300. The following explanation relates to disbursements which constitute the provision of money to maintain a school building for the purposes of Item 2.1.10.

### Repairs

301. Money provided to maintain a school building includes amounts paid for repairs, painting and plumbing in respect of the building. This includes the cost of purchasing equipment, to the extent that it is or is to be used to repair the building.

## Cleaning

302. Money provided to maintain a school building includes amounts paid to clean the building. Expenditure on cleaning a building includes amounts paid to clean the building's floor coverings, fixtures and windows.

## Insurance

303. Money provided to maintain a school building includes amounts such as premiums paid in respect of insurance, to the extent that the insurance relates to the building.

304. The objective purpose of such expenditure is to ensure that a building remains in proper or good condition. It is not necessary for a building to be in actual need of maintenance, whether at the time such costs are incurred or at a later time.

305. Money provided to maintain a school building does not include amounts paid in respect of insurance to the extent that the insurance relates to something other than the building; for example the building's contents or the liabilities of the qualifying body.

## Security costs

306. A school building fund can only provide money to pay security monitoring costs to the extent that those costs reasonably relate to preservation or protection of a school building; for example the prevention of vandalism to the building, including its fixtures.

307. A school building fund cannot pay security monitoring costs to the extent that they relate to things other than a school building. For instance, the protection of a school building's contents, its students or staff.

308. Where security costs relate to both the preservation or protection of a school building and other matters, a reasonable apportionment is required.

## Non-building maintenance

309. A school building fund cannot provide money to pay the cost of maintaining facilities which are not buildings, including sports fields, sports equipment, playgrounds, landscaping and open-air car parks.

310. A school building fund cannot provide money to pay general operating costs of a school such as water, gas, electricity, sewerage, contents insurance, teaching staff salaries or the general upkeep of furnishings. Such costs do not relate to the maintenance of a building.

### Non-school maintenance

311. A school building fund cannot provide material consideration in respect of maintenance which relates to the non-school use of a building unless the fund is fully and promptly reimbursed for the amount provided.

312. For instance, a school building fund cannot bear the cost of hiring a cleaner to clean school buildings following weddings or church functions.

313. Non-school maintenance costs can be charged against a school building fund if the fund is fully and promptly reimbursed for the amounts provided.

### *Investments*

314. A school building fund can only undertake an investment (including a loan) in order to enable or facilitate the provision of money to acquire, construct or maintain a school building for school purposes.

315. The purpose of an investment is determined on an objective basis. The requisite purpose will only exist where:

- at the time the investment is undertaken, there is an objective, presently-existing intention to acquire, construct or maintain a school building for school purposes; and
- the investment is a bona fide and temporary arrangement, designed to make efficient use of the money until such time as it is required for the acquisition, construction or maintenance of the building.

316. The immediate object of an investment is usually to obtain future cash flows. Accordingly, an investment will not have the requisite purpose unless it is possible to point to circumstances which explain why money has been invested rather than applied more directly to the acquisition, construction or maintenance of a school building.

317. Such circumstances may exist where a fund has obtained money at a time before it is able to acquire or construct a school building. However, the fund's controllers must be able to demonstrate that the investment will assist the fund to achieve its objects within a reasonable period. The requisite purpose will not exist if the acquisition, construction or maintenance of a school building is no more than a possibility or long-term aspiration.

318. A school building fund cannot undertake an investment on terms which are less favourable to it than the terms which may reasonably be expected to apply between parties dealing at arm's length. For instance, a loan will give rise to an inference that a fund was not established or is not being maintained for the requisite purpose where it is interest-free or bears a rate of interest which is materially below market rates.

#### *Fund administration costs*

319. A school building fund can only disburse money on administration costs which enable or facilitate the provision of money to acquire, construct or maintain a school building for school purposes.

320. Disbursements in respect of administration costs may include:

- the costs of establishing or promoting the fund;
- the costs of operating the fund, including bank charges, stationery costs, and accounting and audit fees; and
- reasonable remuneration for the fund's administrator and staff.

#### **Deductible gift requirements**

321. An entity cannot make a gift or contribution to a school building fund by transferring property to an entity that is not a school building fund. This is the case, even if the transfer occurs on the basis that the entity has an obligation, or otherwise gives an assurance, that the property will be subsequently transferred to a school building fund. In such a case, the property is held in a separate fund which is not itself a school building fund.<sup>40</sup>

322. If a donation to a school fundraising appeal is partly for a school building fund and partly for other purposes, the part that is intended as a gift to the school building fund will only be tax deductible if the donor establishes how the donation is to be allocated at or before the time the donation to the appeal is made. This allocation may be established expressly or by implication.

323. If the part that is a gift to the school building fund is not established at or before the time the donor makes that gift, there is no gift to the school building fund and there is no gift deduction. If after a wider donation is received the fundraisers decide how much to allocate to the school building fund, their subsequent advice of the amount allocated to the school building fund cannot make any part of the wider donation a deductible gift to the school building fund.

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<sup>40</sup> See Taxation Determination TD 2004/23.

324. There are various ways in which a donor can establish that part of their wider donation is a deductible gift to a school building fund. For example:

- where an organisation raises funds by using a form by which a donor allocates his or her gift – for example a pledge form by which amounts are given to different purposes including the school building fund – the donor can indicate on that form the proportion or amount of his or her gift which is given to the school building fund. It is that part of the gift which is given to the school building fund; or
- the terms of the appeal, usually recorded beforehand in a printed brochure, may state the proportion (or perhaps an amount) of each contribution to the appeal which will be given to the school building fund. When a contribution is made on the basis of those terms, the amount or proportion specified in the terms of the appeal as being for the school building fund will be accepted as the amount given by the donor to that fund for the purposes of Item 2.1.10.

325. Gifts to or for the general fund or funds of a school are not deductible, even if the sum given is subsequently applied towards the cost of construction, acquisition or maintenance of a school building. Similarly, gifts to the funds of a Parents and Citizens Association (or a similar organisation) are not deductible as a gift to a gift deductible school building fund, whether or not they are subsequently applied towards the cost of construction or maintenance of a school building.

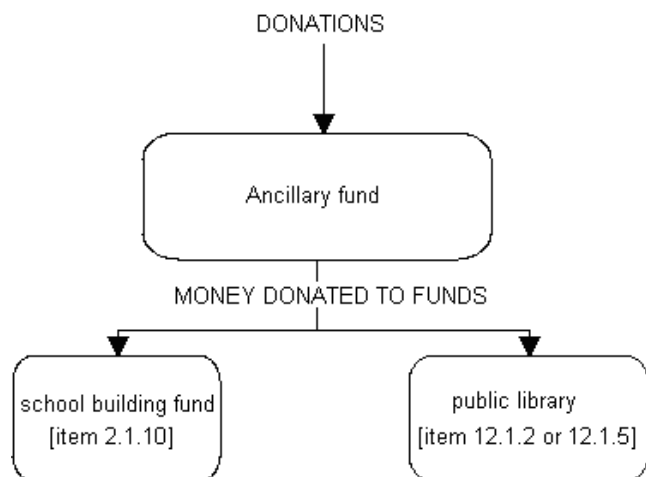
326. Unless the gift is made to an ancillary fund of the type described in paragraph 93 and discussed at paragraphs 328 to 330 of this Ruling, a tax deduction is also denied where a general pledge is made and allocations to a school building fund are subsequently determined by the fund manager from the pool of contributions received.

### **Ancillary funds**

327. A school wishing to raise money for a number of income tax deductible purposes may establish an ancillary fund, gifts to which are deductible, provided they satisfy the requirements in Item 2 in the table in section 30-15. Money raised by such a fund can be subsequently provided to one or more of the funds, authorities or institutions covered by Subdivision 30-B.

328. For example, money raised by such a fund can be subsequently provided to a school building fund (Item 2.1.10) or a public library (Item 12.1.2 or Item 12.1.5 in the table in section 30-100), without the need for the original gift to have been allocated in this way.

329. The following diagram illustrates the operation of an ancillary fund:



330. For further explanation and discussion of the criteria applicable to ancillary funds under the general gift provisions, see Taxation Ruling TR 95/27 *Income tax: public funds*.

## **Appendix 3 – Detailed contents list**

331. The following is a detailed contents list for this Ruling:

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TR 2011/D5

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- deductible gift recipients
- gifts & donations
- school building funds

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