

BETWEEN

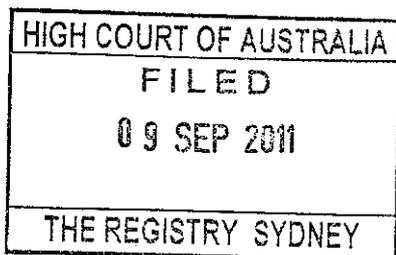
THE COMMISSIONER OF TAXATION OF THE
COMMONWEALTH OF AUSTRALIA

Appellant

and

GRAHAM BARGWANNA & MELINDA BARGWANNA AS
TRUSTEES OF THE KALOS METRON CHARITABLE TRUST

Respondents



APPELLANT'S SUBMISSIONS

PART I: Internet publication

1 These submissions are in a form suitable for publication on the Internet.

10 **PART II: Issues**

2 Whether a fund established in Australia for public charitable purposes by will or instrument of trust can satisfy the requirement in section 50-60 of the *Income Tax Assessment Act 1997* (the "1997 Act") that "*the fund is applied for the purposes for which it was established*" where part of the fund is applied for another purpose and not for public charitable purposes.

3 Whether such a fund can satisfy section 50-60 of the 1997 Act where part of the fund is intentionally applied for other purposes that are not public charitable purposes, whether or not there is a consciousness on the part of those charged with the administration of the fund that the application was in breach of trust.

PART III: Section 78B of the *Judiciary Act* 1903 (Cth)

4 The appellant certifies that he has considered whether any notice should be given to the Attorneys-General in compliance with s 78B of the *Judiciary Act* 1903 (Cth) and has concluded that no such notice need be given.

PART IV: Citations

5 The reasons for judgment of the Full Federal Court in this case are reported at (2010) 191 FCR 184. The reasons for judgment of Edmonds J are reported at (2009) 72 ATR
10 963. The reasons for decision of the Administrative Appeal Tribunal are not reported. The internet citation is [2008] AATA 275.

PART V: Facts

6 The respondents executed a deed to constitute the Kalos Metron Charitable Trust (“Fund”) on 14 October 1997. The respondents were at all relevant times the trustees of the Fund, which the Deed declared was held “in trust for such public charitable purposes as the trustees shall from time to time determine”.¹

7 The respondent trustees, who are husband and wife, authorised the wife trustee’s father, a semi-retired chartered accountant, to administer the assets of the Fund and to maintain its accounting records.

20 8 The assets of the Fund originated in gifts from the wife trustee of \$10,150 in 1997 and the accountant of \$160,000 in 2002 totalling \$170,150.² Subsequently, the Fund derived income claimed to be exempt from tax in the amount of \$547,198. No tax has been assessed or paid on this income. That income included an amount of \$509,000, which was generated by the provision of the accounting services of the accountant

¹ Clause 3 of the Trust Deed

² [2008] AATA 275 at [5]

pursuant to an arrangement between 2003 and 2007 whereby his fees for service were paid to the Fund and not to him. The remaining \$38,198 was investment income.

9 Between 2002 and 2007 there were a number of applications of the Fund, which the Commissioner contends were not for public charitable purposes. Relevantly, those “misapplications” fell into two categories: irregularities in the administration of the accountant’s practice trust account and the appropriation of interest income by the accountant, and the deposit of capital of the Fund in a bank account in the name of the respondent trustees.

The first misapplication

10 10 “Typically” the monies of the Fund were paid into the accountant’s practice trust account,³ where they were intermingled with monies held on behalf of other clients, himself, his wife and his controlled companies. The operation of the trust account was such that amounts held on behalf of some clients were applied for the benefit of other clients⁴. This arose from “periodic irregularities in the administration of the trust account”⁵, including irregularities where at times the balance of the trust account was less than the amount recorded as being held for the benefit of the respondent trustees.⁶ The irregularities began in August 2002 and continued into the 2007 income year.⁷

11 The accountant became aware in about 2005 that debit balances were occurring within his client trust ledger records⁸. He made an attempt to calculate the “net interest” on parts of the Fund applied to other clients, and did in fact pay that amount to the Fund in October 2007, but the calculation was calculated on a flawed assumption⁹, and he conceded that the interest would have been more if that assumption were corrected.¹⁰

³ [2008] AATA 275 at [56]

⁴ (2009) 72 ATR 963 at [20]

⁵ [2008] AATA 275 at [89]

⁶ [2008] AATA 275 at [67]

⁷ [74] to [77]

⁸ [87]

⁹ [2008] AATA 275 at [83]

¹⁰ Ibid; and see the finding of Edmonds J that the compensatory “interest” was wrongly calculated: Edmonds J at [20]

12 The interest income generated by the accountant's practice trust account was appropriated by the accountant for his own benefit or that of his accounting practice.¹¹ It was credited to a separate bank account described as his "practice account".¹² This was "a standard feature of the accountant's dealings with his clients".¹³ The total interest derived from the accountant's trust bank account for the period up to 30 June 2005 was \$142,082.¹⁴

13 The evidence did not allow the amount of interest generated by the monies in the trust account to which the Fund was entitled (and which were appropriated by the accountant) to be quantified. However the Fund was entitled to the sum of \$108,825 as
10 at 30 June 2006 and \$135,818 as at 30 June 2007.

The second misapplication

14 In March 2004, the sum of \$210,000 was transferred into an interest offset account in the name of the respondent trustees. At that time this represented almost half of the net assets of the Fund¹⁵. The offset account was a non-interest bearing bank account maintained by the respondents in their personal capacity, the effect of which was to reduce the interest due on their personal home loan. Over time the respondents paid other amounts into the interest offset account, but also withdrew amounts in excess of the amount they had paid into the account, hence effectively withdrawing trust funds for their own purposes. No interest was paid into the offset account by the respondent
20 trustees or the accountant; instead the accountant credited an interest amount to the Fund's trust ledger account at the end of each financial year.¹⁶

15 In June 2007, the interest offset arrangement was reviewed and an amount representing a "shortfall" in the trust's funds, some \$40,954, was credited to the Fund's trust ledger account by the accountant.¹⁷ In September 2007, the accountant paid \$6,706 into the

¹¹ Edmonds at [19]

¹² [2008] AATA 275 at [56]

¹³ [2008] AATA 275 at [58]

¹⁴ [2008] AATA 275 at [60]

¹⁵ [2008] AATA 275 (attached table)

¹⁶ [2008] AATA 275 at [99]

¹⁷ [2008] AATA 275 at [99]

trust bank account to compensate the respondent trustees for the delay in payment of interest.¹⁸

16 All of the misapplications set out above were intentional misapplications in the sense that they arose from transactions that were not incidental or inadvertent.¹⁹ Furthermore:

(a) in relation to the debit balances in the practice account, the accountant “always believed that the debit balances did not represent an actual deficiency in client funds and a misuse of the funds held on behalf of other clients”²⁰;

10 (b) in relation to the interest diverted to the practice account, the misapplication was intentional, “even if [the accountant] did not intend to benefit himself”²¹;

(c) in relation to the interest offset account, “the shortfall was unintended”²²; and

(d) generally, the respondent trustees entered into particular transactions, or allowed arrangements to be made by the accountant, in the belief that such transactions or arrangements were in the best interests of the Fund, or were relatively insignificant.²³

17 On 14 July 2003, Melinda Bargwanna made an application on behalf of the Fund for endorsement as an income tax exempt charity under section 50-105 of the 1997 Act.²⁴

20 In January 2005, the appellant refused the Fund’s application for endorsement for exemption from income tax.²⁵ An objection lodged by the trustees on behalf of the Fund on 16 May 2005²⁶ was disallowed on 9 September 2005.²⁷ An application to the Administrative Appeals Tribunal was upheld and in substitution for the appellant’s decision, the Tribunal determined that the Fund was entitled to be endorsed as exempt from income tax and was to be endorsed as so exempt.

¹⁸ [2008] AATA 275 at [100]

¹⁹ (2009) 72 ATR 963 at [31]

²⁰ [2008] AATA 275 at [88]

²¹ (2009) 72 ATR 963 at [33(2)]

²² [2008] AATA 275 at [105]

²³ (2010) 191 FCR 184 at [68]

²⁴ Application for endorsement dated 14 July 2003

²⁵ Decision of the Commissioner dated 13 January 2005

²⁶ Objection dated 16 May 2005

²⁷ Notice of Decision on Objection dated 9 September 2005

- 18 The Tribunal held that the “is applied” criterion in section 50-60 of the 1997 Act required an impressionistic characterisation of the conduct of the Fund,²⁸ and that it was appropriate to apply the “is applied” criterion by enquiring whether the Fund was administered substantially in accordance with its constituent terms.²⁹
- 19 The Tribunal found that the accountant bore total responsibility for the irregularities in his trust bank account records.³⁰ The respondent trustees were not implicated in the accountant’s apparent failure to apply the funds in his trust bank account exclusively for the benefit of each of the persons entitled to them. The Tribunal concluded that the question of the application of the Fund was properly determined by the conduct of the trustees themselves.³¹ The overall administration of the Fund, and the accountant’s acknowledgment of his obligation to compensate the Fund for his irregular administration, led to the conclusion that the Fund was applied for the purposes for which it was established.³²
- 20 The Tribunal found that the diversion of interest income to the accountant or his practice did not relevantly inform an assessment of the purpose for which the Fund was applied. This was because, despite the irregularities in the accountant’s management of the Fund, the basic and dominant purpose of his administration remained those for which the Fund was established.³³
- 21 The Tribunal also found that that, having regard to all the circumstances, the irregularities involved in the operation of the interest offset account did not warrant the conclusion that the Fund was applied for extraneous purposes. This was because the shortfall in the monies available in the interest offset account was unintentional and because the shortfall was later remedied by the accountant.³⁴
- 22 The primary judge upheld the appeal from the decision of the Tribunal, on two bases. First, he found that the statute required that the fund “is” applied, not that it is

²⁸ [2008] AATA 275 at [91]

²⁹ [2008] AATA 275 at [50]-[51]

³⁰ [2008] AATA 275 at [93]

³¹ [2008] AATA 275 at [96]

³² [2008] AATA 275 at [96]

³³ [2008] AATA 275 at [64]

³⁴ [2008] AATA 275 at [105]

“substantially” or “principally” applied for public charitable purposes.³⁵ His Honour said that misapplications of the fund are not cured by a holistic consideration of the conduct of the fund by those administering it.³⁶

23 Secondly, the primary judge held, subject to two specified exceptions, that the intentions of the trustees of the Fund are not relevant in relation to the “is applied” question. His Honour accepted that the intention of the trustees or the administrator of the Fund in applying monies may be relevant where there is an incidental or inadvertent misapplication. However, as the misapplications in the present case were actions which were intentional, and which carried significant benefits for persons who were clearly not objects and whose benefit was not within the ambit of the purposes for which the Fund was established, that issue did not arise,³⁷ and the intentional misapplication of the Fund’s assets was not cured or exculpated by the fact that the accountant did not intend to benefit a person appreciating that the person and their benefit were not objects within the ambit of the charitable purpose for which the Fund was established.³⁸

10

24 The Full Court allowed the appeal from the decision of the primary judge and set aside the decision of the Tribunal. The Full Court remitted the proceedings to the Tribunal to determine, on the basis of the previous evidence, whether the Fund as a whole was being applied to the relevant purpose in accordance with the Full Court’s reasons.³⁹

20

25 The Full Court found that a misapplication of a part of a fund on one occasion may not lead to the conclusion that the fund as a whole is being, or has been, misapplied⁴⁰. Their Honours found that the relevant question is not whether the fund has been substantially applied for the relevant purpose, but whether, having regard to the whole administration of the relevant fund, it is to be concluded that the fund is applied to that purpose⁴¹. In determining that question, the actual intention of a trustee in entering into a particular transaction may be relevant⁴².

³⁵ (2009) 72 ATR 963 at [29]-[30]

³⁶ (2009) 72 ATR 963 at [32]

³⁷ (2009) 72 ATR 963 at [31]

³⁸ (2010) 191 FCR 184 at [33]

³⁹ *Bargwanna v Commissioner of Taxation (No 3)* [2011] FCAFC 18 at [13]-[14]

⁴⁰ (2010) 191 FCR 184 at [63]

⁴¹ (2010) 191 FCR 184 at [69]

⁴² (2010) 191 FCR 184 at [71]

26 The Full Court concluded that the Tribunal had not addressed the correct question. Their Honours found that rather than considering whether administration of the Fund as a whole, the Tribunal started with the proposition that there was substantial compliance with the Fund's constituent terms, and that, erroneously, created a presumption that the appellant was required to rebut⁴³.

PART VI: Argument

Brief statement of argument

10 27 The construction of section 50-60 preferred by the Full Court proceeded from a fundamental error namely that a fund may still satisfy the requirements of the section notwithstanding the application of part of the fund to an extraneous purpose. That conclusion is inconsistent with the statutory language and context of section 50-60, it fails to take into account the nature and purpose of the income tax exemption to which section 50-60 relates, it is uncertain and unclear, and it is inconsistent with the limited authority that exists in relation to section 50-60.

20 28 There was a further erroneous conclusion: that a misapplication must be an intentional breach of trust to cause a fund to fall outside section 50-60. That conclusion conflates the "is applied" criterion with the requirement in section 50-5 that the fund be "established" for public charitable purposes, and poses a false dichotomy between misapplications that are inadvertent and those that are an intentional breach of trust. An intentional misapplication is not inadvertent, whether it was knowingly intended to be a breach of trust or not.

The statutory context

29 The exemption in issue is provided for by Subdivision 50-A of the 1997 Act, section 50-1 of which provides that

"The total *ordinary income and *statutory income of the entities covered by the following tables in exempt from income tax. In some cases, the exemption is subject to special conditions."

⁴³ (2010) 191 FCR 184 at [74]

30 The exemption is available for a fund if it falls within, and meets the requirements of the provisions specified in, item 1.5B in section 50-5:

Charity, education, science and religion		
Item	Exempt entity	Special conditions
1.5B	fund established in Australia for public charitable purposes by will or instrument of trust (and not covered by item 1.5 or 1.5A)	see sections 50-52 and 50-60

31 Section 50-52 requires that an entity covered by item 1.5B be endorsed as exempt from income tax under Subdivision 50-B. Section 50-105 of Subdivision 50-B provides that:

“The Commissioner must endorse an entity as exempt from income tax if the entity:

- (a) is entitled to be endorsed as exempt from income tax; and
- (b) has applied for that endorsement in accordance with Division 426 in Schedule 1 to the Taxation Administration Act 1953.”

10

32 Section 50-110 sets out the requirements for endorsement pursuant of section 50-105. One such requirement, set out in subsection 50-110(5), is that the entity must meet the relevant special conditions in the table in section 50-5 (which as set out above, includes satisfaction of section 50-52). The apparent circularity in these requirements is cured by subsection 50-110(6), which provides that the condition in section 50-52 is not a relevant condition for the purposes of subsection (5).

33 Section 50-60, the section at issue in this case, currently provides:

“A fund covered by item 1.5A or 1.5B is not exempt from income tax unless the fund is applied for the purposes for which it was established and:

- (a) incurs, and has at all times since 1 July 1997 incurred, its expenditure principally in Australia and pursues, and has at all times since 1 July 1997 pursued, its charitable purposes solely in Australia; or
- (b) is a fund which is referred to in a table in Subdivision 30-B or in item 2 of the table in section 30-15; or
- (c) distributes solely, and has at all times since 1 July 1997 distributed solely, to either or both of the following:
 - (i) a charitable fund, foundation or institution which, to the best of the trustee’s knowledge, is located in Australia and incurs its

20

expenditure principally in Australia and pursues its charitable purposes solely in Australia;

- (ii) a charitable fund, foundation or institution that, to the best of the trustee's knowledge, meets the description and requirements in item 1 or 2 of the table in section 30-15.

34 Section 50-60 was amended by Act No 63 of 2005 to correct an anomaly that is irrelevant to the issues in this case. A copy of section 50-60 as enacted is annexed to these submissions.

Application of the fund as a whole

10 35 The appellant contends that the Full Court erred in concluding that section 50-60 could be satisfied where part of the assets of the fund are applied to purposes other than its constituent purposes (other than in the case of a *de minimis* application). There are a number of other reasons why the construction adopted by the Full Court should not be preferred.

36 The first reason is that the Full Court's conclusion was reached by way of an erroneous analysis of obiter of the majority of the High Court about section 50-60 in *Commissioner of Taxation v Word Investments*⁴⁴. Section 50-60 was not at issue in *Word Investments*; it was the subject of comment by the High Court by way of comparison with the provision with which the Court was there concerned. The Full Court found that the words used by the High Court in *Word Investments* had an element of "continuity", and that this indicated that a discrete breach of trust would not cause a fund to fail to satisfy section 50-60. That does not follow. The use of the continuous present tense merely indicates that the requirement that the fund be applied for the purposes for which it was established is an ongoing one. That requirement fails to be satisfied if there is a single or discrete breach of trust. At the moment that breach occurs, it may not be said that the fund "is applied for the purposes for which it was established". In any event, there is a gap in the logic in moving from the proposition that a single breach of trust is acceptable to the proposition that a misapplication of only part of the assets of the Fund may be acceptable. A single breach of trust could involve a misapplication of all of the assets of the trust.

⁴⁴ (2008) 236 CLR 204

37 The second reason is that the construction adopted by the Full Court is inconsistent with both the words of the section and its statutory context. In section 50-60, the legislature chose the words “the fund is applied for the purposes for which it was established”. The language used is clear: what is required to be applied for a particular purpose is *the fund*, not part of the fund. That is the ordinary meaning of the phrase used. It would have been a simple matter to introduce an adverb such as “principally” to qualify the verb “applied”, thereby indicating that a misapplication of a part of the fund would not offend section 50-60. It is significant, in the appellant’s contention, that adverbs such as “principally” and “substantially” are used elsewhere in Subdivision 50-A (subsection 10 50-55(a), section 50-65(a), section 50-70(a)) and even within section 50-60 itself (section 50-60(a)).

38 The use of the word “solely” in section 50-60(c) does not contradict the proposition. That word is used to qualify the verb “distributes”, and is necessary because the income or capital of the fund that is capable of distribution can be distributed to persons falling within the categories specified in subparagraphs (i) and (ii) of paragraph (c), or to persons falling outside those categories, or can remain undistributed. Put another way, it is possible for the fund to satisfy the requirement that it distribute to persons in the nominated categories while it also distributes to other persons. By contrast, in the chapeau of section 50-60 it is “the fund” which must be applied (even accumulation is 20 an application of the fund⁴⁵ and so must be accumulation for the relevant purpose), and so it is sufficient to require that the fund “is applied” for the relevant purpose. It is not controversial that “the fund” means all of the fund assets, both capital and income⁴⁶.

39 Section 50-60 has its origin in section 23(j) of the *Income Tax Assessment Act 1936* (the “1936 Act”). Section 23(j) was part of the 1936 Act as enacted, and provided an income tax exemption for:

“the incomes of the following funds, provided that the particular fund is being applied for the purpose for which it was established –

- (i) a provident, benefit or superannuation fund established for the benefit of employees;

⁴⁵ *Trustees, Executors and Agency Company Ltd v Acting Federal Commissioner of Taxation* (1917) 23 CLR 576 per Isaacs J at 587

⁴⁶ (2010) 191 FCR 184 at [70]

- (ii) a fund established by will or instrument of trust for public charitable purposes; and
- (iii) a fund established for the purpose of enabling scientific research to be conducted by or in conjunction with a public university or public hospital.”

40 Like section 50-60, the scheme of section 23(j) is to determine first the purpose for
which the relevant fund was established, and then to evaluate whether the fund “is
being applied for the purpose for which it was established”. The phrase common to
both provisions is unambiguous: it is *the fund* that must be applied in the relevant way,
10 which means that all of the fund, being the income and the capital, represented by all of
the assets of the fund must be put to its constituent purpose. The Fund in this case
comprised various assets including loans, shares and cash (both at bank and in the trust
account) and, to satisfy section 50-60, all of those assets must have been applied to the
Fund’s public charitable purposes at all times during the period for which the Fund
seeks endorsement under Subdivision 50-B. A conclusion that part of the capital and
part of the income of the Fund was not applied to the purpose for which the fund was
established necessarily means that section 50-60 was not satisfied.

41 The third reason is that the construction adopted by the Full Court fails to take into
account the nature and purpose of the exemption to which section 50-60 relates.
20 Section 50-60 is one of the qualifying conditions within Subdivision 50-A, which
confers in section 50-1 the widest possible exemption from income tax, namely a
complete exemption in relation to the “total *ordinary income and *statutory income”
of the entities to which it applies. Furthermore, Subdivision 50-A confers an exemption
upon particular kinds of bodies or funds that meet the requirements specified therein. It
is not an exemption that exists for the purpose of encouraging, rewarding or protecting
some type of activity. The latter class of exemption is to be given a liberal rather than a
narrow construction and application, because such a liberal construction is said to best
serve Parliament’s purpose in encouraging or promotion that activity: *Totalizator
Agency Board v Commissioner of Taxation* (1996) 69 FCR 311 at 323A per Hill J (with
whom Tamberlin and Sundberg JJ agreed); *Commissioner of Taxation v Reynolds
Australia Alumina Ltd* (1987) 18 FCR 29 at 35 per Beaumont J and 46-47 per Burchett
30 J; *Commissioner of Taxation v ICI (Australia) Ltd* (1972) 127 CLR 529 at 563 per
Barwick CJ and 581 per Gibbs J. Parliament’s purpose in relation to the former class of

exemption is to exempt the relevant body or fund from taxation. That purpose “is promoted by construing the exemption item in accordance with its ordinary meaning”, not by construing the provision to give it a particular meaning favourable to the body or fund in question: *Totalizator Agency Board* at 323C.

42 In the appellant’s submission, both the breadth of the exemption and the fact that is an exemption of the kind that falls within the second class of exemptions identified in *Totalizator Agency Board* indicate that a construction consistent with the ordinary meaning of the words “is applied” should be preferred. So much was recognised by the primary judge⁴⁷, and his analysis on that point was subsequently referred to with approval by the Full Court in *Commissioner of Taxation v Co-operative Bulk Handling Ltd* (2010) 189 FCR 322 at [18] per Mansfield and McKerracher JJ. The Full Court did not address the issue at all.

43 The fourth reason why the construction adopted by the Full Court should not be preferred is the uncertainty attendant on that construction. The Full Court found that the primary judge, having found non-compliance with section 50-60 upon the basis of the “interest set-off question and the trust account question”, should have proceeded to consider “the administration of the Fund as a whole”, taking into account “the wider conduct of the fund”⁴⁸. In the appellant’s respectful submission, it is not clear at all what further analytical steps the primary judge should have taken. His Honour reached the position that misapplications of the Fund had occurred in relation to the interest offset account and the trust account and it was implicit in his judgment that all other applications of the Fund may have been consistent with its constituent purpose. His Honour traversed those other applications in paragraphs [15] to [22] of his judgment.

44 It is unclear how the Full Court’s test would apply in circumstances where there is a single misapplication of the assets of a fund. In paragraph [63] of the joint judgment, their Honours indicated that a misapplication of a part of a fund on one occasion would not necessarily lead to the conclusion that section 50-60 is not satisfied. Later in paragraph [72], the Full Court said that a “discrete breach” may, alone, be sufficient to justify an inference as to intention, and that “a deliberate misapplication” may justify adverse inferences as to the transaction in question. Furthermore, the Full Court

⁴⁷ (2009) 72 ATR 963 at [28]

⁴⁸ (2010) 191 FCR 184 at [72]

rejected the Tribunal's test which turned on "concepts of substantiality" (paragraph [69]) but then proceeded to say that "the disposition of a substantial part of the Fund's assets for an unauthorized purpose might also, by itself, justify an adverse inference" (paragraph [72]).

45 The fifth reason why the construction adopted by the Full Court should not be preferred is that it is inconsistent with the limited authority extant in relation to section 50-60 (and its predecessors). In the joint judgment in *Word Investments* it was observed that because a fund of the kind described in section 50-60 continues to have its status as a fund even if the trustees are acting in breach of trust and not applying the assets to the relevant fund purposes, it was necessary to make express provision for the loss of the exemption where the fund is not applied for the purposes for which it was established; its assets must be applied for those purposes from time to time thereafter⁴⁹. The statutory task is an enquiry into how the assets of the fund are being applied, and where there is a breach of trust, one concludes that the assets of the fund are not being applied to the relevant fund purposes. It is not an impressionistic review of the "wider conduct of the fund" requiring a determination of the subjective purposes of the fund administrators to further characterise breaches of trust.

46 *Compton v Commissioner of Taxation* (1966) 116 CLR 233 establishes that the anterior requirement for the conferral of tax exempt status – that the fund be established for the requisite purpose – requires that the fund be established exclusively for that purpose⁵⁰ (see also *Mahony v Commissioner of Taxation* (1967) 41 ALJR 232 at 235 per Taylor J, and *Driclad v Commissioner of Taxation* (1968) 121 CLR 45 at 67 per Barwick CJ and Kitto J). The purpose of conferring an exemption from tax is not promoted by a construction of section 50-60 which accepts that the application of a significant proportion of a fund's assets towards extraneous purposes is capable of satisfying the statute.

47 In *Mahony*, the fund with which the Court was concerned made a loan to a business associate of the employer company, and an unsecured loan to another company. The loans were not made in the interests of fund, but were made to serve the business interests of the employer company and one of its directors. The Court found that fund

⁴⁹ (2008) 236 CLR 204 at 237 [70]

⁵⁰ at 248 per Menzies J

was not exempt from taxation under section 23(j) of the 1936 Act on the basis that it was not established for the benefit of employees⁵¹. However, Taylor and Windeyer JJ indicated that if the fund had been established for the relevant purpose, their Honours would have concluded that the fund was not being applied for that purpose. Taylor J said⁵²:

10

“If, however, I am wrong in taking this view I am satisfied that at no relevant time was the fund being applied for the purpose for which it was established. In the context in which the word “applied” is used it seems to me that the condition expressed by the relevant proviso must mean provided that the fund is being applied in accordance with the rules under which it was constituted. It would follow, therefore, that if a fund answers the statutory description the condition is ordinarily satisfied if the use to which the fund was being put is in accordance with the rules under which it was established.”

48 Taylor J then observed that “if it were necessary to say so” he would say that it was the intention of the company that the fund should not be administered in accordance with its constituent deed⁵³. His Honour did not reach any conclusion as to whether such an inquiry was necessary or relevant to section 23(j).

49 Windeyer J said⁵⁴:

20

“If I should be mistaken on this view of the matter, I would hold that this fund was not at any time being applied for the benefit of employees. The statutory requirement that the fund “is being applied” for the purposes for which it was established was the subject of some discussion during the course of the argument. It does not cause me any great difficulty in this case. If a fund answering the statutory description was not being administered according to the trusts thereof, the statutory requirement of due application would not be met.”

50 The appellant respectfully submits that this obiter falling from two members of the High Court supports the proposition that a misapplication of a fund will disqualify that fund for endorsement as an income tax exempt fund.

⁵¹ at 234 per Kitto J, 235 per Taylor and 238 per Windeyer J

⁵² at 235

⁵³ at 237

⁵⁴ at 238

Intention to apply the Fund

51 The Full Court found that section 50-60 required a consideration of any misapplications of the fund in the light of the wider conduct of the fund, including the intention of its trustee or administrator in entering into the particular transaction (ascertained subjectively). If that subjective evidence revealed that the misapplication was “deliberate” in the sense of “intending to breach the trust”, then an “adverse inference” would be made. If the misapplication was the result of a mistake, or inept administration, then no such inference would be drawn⁵⁵.

10 52 To the extent that the actual intention of a trustee or administrator is relevant at all, the appellant contends that the Full Court erred in deciding that there must be an intention to breach the trust for the fund to fall outside section 50-60.

20 53 There is no basis in the statutory language of section 50-60 for the distinction drawn by the Full Court between applications that are intentional in the sense that they are entered into voluntarily and purposely, and applications that are deliberate in the sense that they are undertaken with an intention to breach the trust. It is a gloss on the provision that finds no support in the cases in which this Court has considered section 50-60 or its legislative predecessor. Furthermore, it is based on the premise that an application is either inadvertent or is a deliberate breach of trust⁵⁶. It fails to address the situation where the application is deliberate but the relevant trustee or administrator does not appreciate that the application is in breach of trust.

54 The words used in section 50-60 support the construction for which the appellant contends. The requirement is that the fund “is applied”, not that it “is intended to be applied”. The word “purpose” in the relevant phrase relates to the establishment of the fund, not the ongoing application of that fund. Put another way, sections 50-5 (item 1.5B) and 50-60 require one to ask two questions⁵⁷. The first is, what is the purpose for which this fund was established? The second is, has this fund been applied for that purpose? The second question permits no enquiry into whether the trustees or administrators intended to breach the trust.

⁵⁵ (2010) 191 FCR 184 at [71], [72]

⁵⁶ (2010) 191 FCR 184 at [72], first three sentences

⁵⁷ *Compton* at 249-250

55 Whether a fund is applied to its constituent purpose is to be determined from what the fund actually did, not by reference to the understanding of the trustees or administrators of the fund. The enquiry is that sense similar to that to be undertaken for the purpose of determining whether a fund “*is established*” for public charitable purposes (section 50-5, item 1.5B). The latter enquiry necessitates an examination of two objective matters: the constituent deed⁵⁸, and the subsequent activities of the fund⁵⁹. There is no basis in either case for permitting subjectively ascertained understanding of the trustees or administrators to be taken into account.

10 56 The misapplications in the present case were intentional and not inadvertent. None of them were incidental consequences of carrying out the charitable purpose for which the Fund was established⁶⁰. The accountant knew that the interest on his trust account balance, including interest to which the Fund was entitled, was diverted to his own practice account. That was a standard feature of his arrangements with his clients. The interest offset account arrangement was implemented by the accountant with the full knowledge and complicity of the trustees. The failure by the accountant or the trustees to appreciate that these transactions were an application of the income or capital of the Fund to private purposes and were a breach of trust is irrelevant to section 50-60.

PART VII: Legislation

20 *Income Tax Assessment Act 1997*, Subdivisions 50-A and 50-B (as at 1 July 2003) Still in force
Income Tax Assessment Act 1936, section 23(j) (as passed) Not in force – See Annexure A.

PART VIII: Orders sought

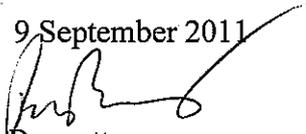
1. Appeal allowed.
2. Set aside the orders 2 and 3 of the Full Court of the Federal Court made on 17 February 2011 and in their place order that the appeal to that Court be dismissed.
3. Appellant to pay the respondents’ costs in this appeal.

⁵⁸ *Compton* at 250

⁵⁹ *Cronulla Sutherland Leagues Club v FCT* (1990) 23 FCR 82 at 88-89; *Brookton Co-operative* at 445, 450-1, 461

⁶⁰ *Re Crown Forestry Rental Trust; Latimer v Commissioner of Inland Revenue* [2004] 4 All ER 558 at 569

Dated 9 September 2011


David Bennett

Tel: (02) 8815 9108

Fax: (02) 9101 9499

Email: david.bennett@5wentworth.com

Elizabeth Collins

Tel: (02) 9223 8541

Fax: (02) 9221 5604

Email: ecollins@sixthfloor.com.au

Kristen Deards

Tel: (02) 9376 0672

10 Fax: (02) 9101 9493

Email: kristen.deards@banco.net.au

(6.) Any officer shall, if and when required by the Commissioner, Second Commissioner or a Deputy Commissioner to do so, make an oath or declaration, in the manner and form prescribed, to maintain secrecy in conformity with the provisions of this section.

Penalty: Two hundred and fifty pounds or imprisonment for twelve months.

PART III.—LIABILITY TO TAXATION.

Division 1.—General.

17. Subject to this Act, income tax at the rates declared by the Parliament, shall be levied and paid for the financial year commencing on the first day of July, One thousand nine hundred and thirty-six and for each financial year thereafter, upon the taxable income derived during the year of income by any person, whether a resident or a non-resident.

Income Tax.
Cf. I.T.A., s. 18
(1), (1A).

18.—(1.) Any person may, with the leave of the Commissioner, adopt an accounting period being the twelve months ending on some date other than the thirtieth day of June. His accounting period in each succeeding year shall end on the corresponding date of that year, unless with the leave of the Commissioner some other date is adopted.

Accounting period.
Cf. I.T.A., ss. 13 (1), 32 (3), (4).

(2.) Where the Commissioner has accepted returns from any person based on an accounting period as defined in the previous Act for the purposes of assessment for the last financial year to which that Act applied, that person shall be deemed to have adopted a corresponding accounting period under this section.

19. Income shall be deemed to have been derived by a person although it is not actually paid over to him but is reinvested, accumulated, capitalized, carried to any reserve, sinking fund or insurance fund however designated, or otherwise dealt with on his behalf or as he directs.

Money credited reinvested, &c., to be income.
Cf. I.T.A., ss. 19, 25 (d).

20. For all the purposes of this Act, income wherever derived and any expenses wherever incurred shall be expressed in terms of Australian currency.

Income to be expressed in Australian currency.

21. Where, upon any transaction, any consideration is paid or given otherwise than in cash, the money value of that consideration shall, for the purposes of this Act, be deemed to have been paid or given.

Where consideration not in cash.

22. Where any income is received in the year of income as a result of a transaction entered into prior to the commencement of this Act, and that income would have been assessable income under the previous Act if that Act had continued in force and had applied to the assessment of the income derived in the year of income, that income shall be assessable under this Act notwithstanding that the transaction was entered into prior to that commencement.

Income arising from past transactions.

23. The following income shall be exempt from income tax:—

Exemptions.
Cf. I.T.A., s. 14
(1) (g), (h), (p)

(a) the official salary of, and the income derived from sources out of Australia by, any person being—

(i) the Governor-General or the Governor of a State;

- (ii) the representative in Australia of the government of another country ;
- (iii) a foreign consul ;
- (iv) a trade commissioner of any part of the British Empire other than Australia ;
- (v) a member of the staff of any such representative, foreign consul or trade commissioner if the member is domiciled in the country represented by the representative, foreign consul or commissioner, and is temporarily resident in Australia by direction of the government of the country so represented for the purpose of performing his official duties, and if the official salary of officials (if any) of the government of the Commonwealth temporarily resident for similar purposes in the country so represented is exempted from income tax by that country ; or
- (vi) an officer of the government of any country outside Australia which is part of the British Empire, who is temporarily in Australia to render service on behalf of that country or the Commonwealth or a State in accordance with any arrangement between the governments of that country and of the Commonwealth or of a State, if the salaries of officers of the government of the Commonwealth temporarily in that country for similar purposes in accordance with a similar arrangement are exempted from income tax by that country ;

Cf. I.T.A., s. 14
(1), (f).

- (b) the remuneration paid by the government of the Commonwealth or of a State to a non-resident for expert advice to that government or as a member of a Royal Commission ;

Cf. I.T.A., s. 14
(1) (g).

- (c) income derived—

- (i) in the capacity of representative of an association or club established in any country for the control of any out-door athletic sport or game in that country by any person visiting Australia in that capacity for the purpose of engaging in contests in Australia in that sport or game ;
- (ii) by any club or association in any other part of the British Empire as its share of the proceeds of cricket, football or similar matches played in Australia by a team controlled by that club or association visiting Australia from that part of the British Empire, and recognized by the authority controlling that class of match in Australia as being representative of that part of the British Empire ;

- (iii) by the representative of any government, visiting Australia on behalf of that government, or by any member of the entourage of that representative, in his official capacity as such representative or member ;
- (iv) in the capacity of representative of any society or association established for educational, scientific, religious or philanthropic purposes, by any person visiting Australia in that capacity for the purpose of attending international or Empire conferences or for the purpose of carrying on investigation or research for such society or association ;
- (v) in the capacity of representative of the press outside Australia, by any person visiting Australia in that capacity for the purpose of reporting the proceedings relating to any matters referred to in the preceding sub-paragraphs of this paragraph ;
- (vi) by any person visiting Australia, from an occupation carried on by him while in Australia, if, in the opinion of the Treasurer, that visit and occupation are primarily and principally directed to assisting the Commonwealth government or a State government in the settlement or development of Australia ; and
- (vii) as director's fees or salary by a non-resident during a visit to Australia during which he acts as a director, manager or other administrative officer of a manufacturing, mercantile or mining business or of a business of primary production, if the visit of the non-resident to Australia does not exceed six months ;
- (d) the revenue of a municipal corporation or other local governing body or of a public authority constituted under any Act or State Act, or under any law in force in a Territory being part of the Commonwealth ; Cf. I.T.A., s. 14 (1) (a).
- (e) the income of a religious, scientific, charitable or public educational institution ; Cf. I.T.A., s. 14 (1) (d).
- (f) the income of a trade union and the income of an association of employers or employees registered under any Act or State Act, or under any law in force in a Territory being part of the Commonwealth relating to the settlement of industrial disputes ; Cf. I.T.A., s. 14 (1) (c).
- (g) the income of a society or association not carried on for the purposes of profit or gain to the individual members thereof, and being a friendly society, or a society or association established for musical purposes, or for the encouragement of music, art, science or literature ; Cf. I.T.A., s. 14 (1) (b), (e).

Cf. I.T.A., s. 14
(1) (j).

(h) the income of a society or association not carried on for the purposes of profit or gain to the individual members thereof, established for the purpose of promoting the development of aviation or of the agricultural, pastoral, horticultural, viticultural, manufacturing or industrial resources of Australia;

Cf. I.T.A., s. 14
(1) (u).

(i) the income of a savings bank conducted exclusively for the benefit of depositors;

Cf. I.T.A., s. 14
(1) (f), (g).

(j) the incomes of the following funds, provided that the particular fund is being applied for the purpose for which it was established—

(i) a provident, benefit or superannuation fund established for the benefit of employees;

(ii) a fund established by will or instrument of trust for public charitable purposes; and

(iii) a fund established for the purpose of enabling scientific research to be conducted by or in conjunction with a public university or public hospital;

Cf. I.T.A., s. 14
(1) (i).

(k) pensions paid under the *Australian Soldiers' Repatriation Act* 1920-1934, and wounds and disability pensions of the kinds specified in sub-section (2.) of section sixteen of the *Finance Act* 1919 of the United Kingdom;

Cf. I.T.A., s. 14
(5).

(l) the income received by way of periodical payments in the nature of alimony or maintenance, by a woman from her husband or former husband: Provided that for the purpose of making such payments the husband, or former husband, has not divested himself of any income producing assets, or diverted from himself income upon which he would otherwise have been liable to tax;

Cf. I.T.A., s. 5A.

(m) income derived prior to the first day of July, One thousand nine hundred and thirty-seven, directly and in the first place from primary production, mining or fisheries in the Northern Territory of Australia by a resident of that Territory;

Cf. I.T.A., s. 14
(1) (n).

(n) the income derived by a resident of any Territory or Island in the Pacific Ocean, other than New Zealand, which is governed, controlled, or held under mandate by the Government of any part of the British Empire, or by a condominium in which any part of the British Empire is concerned, from the sale in Australia, by or on behalf of that person, of produce of the Territory or Island of which he is a resident;

Cf. I.T.A., s. 14
(1) (o).

(o) the income derived by a person from the working of a mining property in Australia or in the Territory of New Guinea principally for the purpose of obtaining gold, or gold and copper, provided that in this case the value of the output of gold is not less than forty per centum of the total value of the output of the mine;

- (p) income derived by a *bona fide* prospector from the sale, transfer or assignment by him of his rights to mine for gold in a particular area in Australia or in the Territory of New Guinea. For the purpose of this paragraph, "*bona fide* prospector" means a person, other than a company, who has personally carried out the whole or major part of the field work of prospecting for gold in the particular area, or who has contributed to the expenditure incurred in the work of prospecting and development in that area, and includes a company which has itself carried out the whole or major part of such work; Cf. I.T.A., s. 14
(1) (c).
- (q) income derived by a resident from sources out of Australia, where that income is not exempt from income tax in the country where it is derived, or where the taxpayer is liable to pay royalty or export duty in any country outside Australia in respect of goods from the sale of which the income is derived. For the purposes of this paragraph, a taxpayer shall be deemed to be liable to pay royalty or export duty in any country outside Australia if he satisfies the Commissioner that he sold the goods in that country to another person for export from that country, and that the price for which the goods were sold was less, by the amount of the royalty or the export duty, as the case may be, than the price which the taxpayer could have obtained from the sale of the goods outside that country; Cf. I.T.A., s. 14
(1) (g).
- (r) income derived by a non-resident from sources wholly out of Australia;
- (s) the income of—
- (i) any fund or association maintained by a religious institution; or
 - (ii) any company the whole of the shares of which are held by or on behalf of a religious institution, where the fund or association is maintained, or the company was formed and is carried on, for the sole purpose of insuring property belonging to the religious institution, and where the profits arising from the fund, or derived by the association or company, are devoted to that sole purpose or to the purposes of the religious institution.

24.—(1.) Where any income is exempt from income tax, the exemption shall be limited to the specified or original recipient of the income, and shall not extend to persons receiving payments from that recipient, although the payments may be made wholly or in part out of that income. Limitation of
exemption.
Cf. I.T.A., s. 15

(2.) The exemption of any income from income tax shall not exempt any person from furnishing any return or information which is required by the Commissioner, or from including in his return such information as is prescribed, or as is required by the Commissioner.



Tax Law Improvement Act 1997 (121 of 1997)

Schedule 3 Exempt income

Part 3 Consequential amendment of the Income Tax Assessment Act 1936

46 Section 102M (subparagraph (b)(ii) of the definition of exempt entity)

Omit "paragraph 23(j)", substitute "item 1.5 or 1.6 of the table in section 50-5 of the *Income Tax Assessment Act 1997*".

This work is copyright. [Click here for notice of copyright.](#)

© Commonwealth of Australia

This work is copyright. You may download, display, print and reproduce this material in unaltered form only (retaining this notice) for your personal, non-commercial use or use within your organisation. Apart from any use as permitted under the Copyright Act 1968, all other rights are reserved.

Requests and inquiries concerning reproduction and rights should be addressed to Commonwealth Copyright Administration, Attorney General's Department, Robert Garran Offices, National Circuit, Barton ACT 2600 or posted at <http://www.ag.gov.au/cca>

Part 2-15—Exempt income

Division 50—Exempt entities

Table of Subdivisions

50-A	Various exempt entities
50-B	Endorsing charitable entities as exempt from income tax

Subdivision 50-A—Various exempt entities

Table of sections

50-1	Entities whose ordinary income and statutory income is exempt
50-5	Charity, education, science and religion
50-10	Community service
50-15	Employees and employers
50-20	Finance
50-25	Government
50-30	Health
50-35	Mining
50-40	Primary and secondary resources, and tourism
50-45	Sports, culture, film and recreation
50-50	Special conditions for items 1.1 and 1.2
50-52	Special condition for items 1.1, 1.5, 1.5A and 1.5B
50-55	Special conditions for items 1.3, 1.4, 6.1 and 6.2
50-57	Special condition for item 1.5
50-60	Special conditions for items 1.5A and 1.5B
50-65	Special conditions for item 1.6
50-70	Special conditions for items 1.7, 2.1, 4.1, 9.1 and 9.2
50-72	Special condition for item 4.1
50-75	Certain distributions may be made overseas
50-80	Testamentary trusts may be treated as 2 trusts

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 50-1

50-1 Entities whose ordinary income and statutory income is exempt

The total *ordinary income and *statutory income of the entities covered by the following tables is exempt from income tax. In some cases, the exemption is subject to special conditions.

Note 1: Ordinary and statutory income that is exempt from income tax is called exempt income: see section 6-20. The note to subsection 6-15(2) describes some of the other consequences of it being exempt income.

Note 2: Even if you are an exempt entity, the Commissioner can still require you to lodge an income tax return or information under section 161 of the *Income Tax Assessment Act 1936*.

50-5 Charity, education, science and religion

Charity, education, science and religion		
Item	Exempt entity	Special conditions
1.1	charitable institution	see sections 50-50 and 50-52
1.2	religious institution	see section 50-50
1.3	scientific institution	see section 50-55
1.4	public educational institution	see section 50-55
1.5	fund established for public charitable purposes by will before 1 July 1997	see sections 50-52 and 50-57
1.5A	trust covered by paragraph 50-80(1)(c)	see sections 50-52 and 50-60
1.5B	fund established in Australia for public charitable purposes by will or instrument of trust (and not covered by item 1.5 or 1.5A)	see sections 50-52 and 50-60
1.6	fund established to enable scientific research to be conducted by or in conjunction with a public university or public hospital	see section 50-65

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 50-10

Charity, education, science and religion

Item	Exempt entity	Special conditions
1.7	society, association or club established for the encouragement of science	see section 50-70

Note 1: Section 50-52 has the effect that certain charitable institutions, funds and trusts are exempt from income tax only if they are endorsed under Subdivision 50-B.

Note 2: Section 50-80 may affect which item a trust is covered by.

50-10 Community service

Community service

Item	Exempt entity	Special conditions
2.1	society, association or club established for community service purposes (except political or lobbying purposes)	see section 50-70

50-15 Employees and employers

Employees and employers

Item	Exempt entity	Special conditions
3.1	(a) employee association; or (b) employer association	the association: (a) is registered under an *Australian law relating to the settlement of industrial disputes; and (b) is located in Australia, and incurs its expenditure and pursues its objectives principally in Australia

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Chapter 2 Liability rules of general application

Part 2-15 Exempt income

Division 50 Exempt entities

Section 50-25

Employees and employers

Item	Exempt entity	Special conditions
3.2	trade union	located in Australia and incurring its expenditure and pursuing its objectives principally in Australia

Note: Despite items 3.1 and 3.2, certain ordinary and statutory income of some associations of employees and some registered trade unions may be subject to income tax under Division 8A of Part III of the *Income Tax Assessment Act 1936*.

50-25 Government

Government

Item	Exempt entity	Special conditions
5.1	(a) a municipal corporation; or (b) a local governing body	none
5.2	a public authority constituted under an *Australian law	none

Note: The ordinary and statutory income of a State or Territory body is exempt: see Division 1AB of Part III of the *Income Tax Assessment Act 1936*.

50-30 Health

Health

Item	Exempt entity	Special conditions
6.1	public hospital	see section 50-55
6.2	hospital carried on by a society or association	not carried on for the profit or gain of its individual members, see also section 50-55

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 50-35

Health		
Item	Exempt entity	Special conditions
6.3	the following organisations registered for the purposes of the <i>National Health Act 1953</i> : (a) a medical benefits organisation; (b) a health benefits organisation; (c) a hospital benefits organisation	not carried on for the profit or gain of its individual members

50-35 Mining

Mining		
Item	Exempt entity	Special conditions
7.1	the Phosphate Mining Company of Christmas Island Limited (incorporated in the Australian Capital Territory)	none
7.2	the British Phosphate Commissioners Banaba Contingency Fund (established on 1 June 1981)	none

50-40 Primary and secondary resources, and tourism

Primary and secondary resources, and tourism		
Item	Exempt entity	Special conditions
8.1	a society or association established for the purpose of promoting the development of: (a) aviation; or (b) tourism	not carried on for the profit or gain of its individual members

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Chapter 2 Liability rules of general application

Part 2-15 Exempt income

Division 50 Exempt entities

Section 50-45

Primary and secondary resources, and tourism

Item	Exempt entity	Special conditions
8.2	a society or association established for the purpose of promoting the development of any of the following Australian resources: (a) agricultural resources; (b) horticultural resources; (c) industrial resources; (d) manufacturing resources; (e) pastoral resources; (f) viticultural resources; (g) aquacultural resources; (h) fishing resources	not carried on for the profit or gain of its individual members
8.3	a society or association established for the purpose of promoting the development of Australian information and communications technology resources	not carried on for the profit or gain of its individual members

50-45 Sports, culture, film and recreation

Sports, culture, film and recreation

Item	Exempt entity	Special conditions
9.1	a society, association or club established for the encouragement of: (a) animal racing; or (b) art; or (c) a game or sport; or (d) literature; or (e) music	see section 50-70

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 50-50

Sports, culture, film and recreation

Item	Exempt entity	Special conditions
9.2	a society, association or club established for musical purposes	not carried on for the profit or gain of its individual members
9.3	the Australian Film Finance Corporation Pty Limited (incorporated under the <i>Companies Act 1981</i> on 12 July 1988)	none

50-50 Special conditions for items 1.1 and 1.2

An entity covered by item 1.1 or 1.2 is not exempt from income tax unless the entity:

- (a) has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia; or
- (b) is an institution that meets the description and requirements in item 1 of the table in section 30-15; or
- (c) is a prescribed institution which is located outside Australia and is exempt from income tax in the country in which it is resident; or
- (d) is a prescribed institution that has a physical presence in Australia but which incurs its expenditure and pursues its objectives principally outside Australia.

Note 1: Certain distributions may be disregarded: see section 50-75.

Note 2: The entity must also meet other conditions to be exempt from income tax: see section 50-52.

50-52 Special condition for items 1.1, 1.5, 1.5A and 1.5B

- (1) An entity covered by item 1.1, 1.5, 1.5A or 1.5B is not exempt from income tax unless the entity is endorsed as exempt from income tax under Subdivision 50-B.

* To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Chapter 2 Liability rules of general application

Part 2-15 Exempt income

Division 50 Exempt entities

Section 50-55

Note: The entity will not be exempt from income tax unless it also meets other conditions: see section 50-50 (for an entity covered by item 1.1), 50-57 (for an entity covered by item 1.5) or section 50-60 (for an entity covered by item 1.5A or 1.5B).

(2) However, an entity that is a charitable institution prescribed for the purposes of paragraph 50-50(c) or (d) may be exempt from income tax even if the entity is not endorsed as exempt from income tax under Subdivision 50-B (as long as the entity meets the other requirements of this Division).

(3) This section has effect despite all the other sections of this Subdivision.

Note: This means that an entity covered both by an item other than 1.1, 1.5, 1.5A or 1.5B and by one of those items is not exempt from income tax unless the entity is endorsed under Subdivision 50-B as exempt from income tax (or is prescribed for the purposes of paragraph 50-50(c) or (d)) and the entity meets the requirements of whichever of sections 50-50, 50-57 and 50-60 is relevant.

50-55 Special conditions for items 1.3, 1.4, 6.1 and 6.2

An entity covered by item 1.3, 1.4, 6.1 or 6.2 is not exempt from income tax unless the entity:

- (a) has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia; or
- (b) is an institution that meets the description and requirements in item 1 of the table in section 30-15; or
- (c) is a prescribed institution which is located outside Australia and is exempt from income tax in the country in which it is resident.

Note: Certain distributions may be disregarded: see section 50-75.

50-57 Special condition for item 1.5

A fund covered by item 1.5 is not exempt from income tax unless the fund is applied for the purpose for which it was established.

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Note: The fund must also meet another condition to be exempt from income tax: see section 50-52.

50-60 Special conditions for items 1.5A and 1.5B

A fund covered by item 1.5A or 1.5B is not exempt from income tax unless the fund is applied for the purposes for which it was established and:

- (a) incurs, and has at all times since 1 July 1997 incurred, its expenditure principally in Australia and pursues, and has at all times since 1 July 1997 pursued, its charitable purposes solely in Australia; or
- (b) is a fund which is referred to in a table in Subdivision 30-B or in item 2 of the table in section 30-15; or
- (c) distributes solely, and has at all times since 1 July 1997 distributed solely, to a charitable fund, foundation or institution which, to the best of the trustee's knowledge, is located in Australia and incurs its expenditure principally in Australia and pursues its charitable purposes solely in Australia; or
- (d) distributes solely, and has at all times since 1 July 1997 distributed solely, to a charitable fund, foundation or institution that, to the best of the trustee's knowledge, meets the description and requirements in item 1 or 2 of the table in section 30-15.

Note 1: Certain distributions may be disregarded: see section 50-75.

Note 2: The fund must also meet other conditions to be exempt from income tax: see section 50-52.

50-65 Special conditions for item 1.6

A fund covered by item 1.6 is not exempt from tax unless the fund is applied for the purposes for which it was established and is:

- (a) a fund that is located in, and which incurs its expenditure principally in, Australia and that is established for the purpose of enabling scientific research to be conducted

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Chapter 2 Liability rules of general application

Part 2-15 Exempt income

Division 50 Exempt entities

Section 50-70

principally in Australia by or in conjunction with a public university or public hospital; or

- (b) a scientific research fund that meets the description and requirements in item 1 or 2 of the table in section 30-15.

Note: Certain distributions may be disregarded: see section 50-75.

50-70 Special conditions for items 1.7, 2.1, 4.1, 9.1 and 9.2

An entity covered by item 1.7, 2.1, 9.1 or 9.2 is not exempt from tax unless the entity is a society, association or club that is not carried on for the purpose of profit or gain of its individual members and that:

- (a) has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia; or
- (b) is a society, association or club that meets the description and requirements in item 1 of the table in section 30-15; or
- (c) is a prescribed society, association or club which is located outside Australia and is exempt from income tax in the country in which it is resident.

Note: Certain distributions may be disregarded: see section 50-75.

50-75 Certain distributions may be made overseas

- (1) In determining for the purposes of this Subdivision whether an institution, fund or other body incurs its expenditure or pursues its objectives principally in Australia, distributions of any amount received by the institution, fund or other body as a gift (whether of money or other property) or by way of government grant are to be disregarded.
- (2) In determining for the purposes of this Subdivision whether an institution, fund or other body incurs its expenditure or pursues its objectives principally in Australia, distributions of any amount from a fund that is referred to in a table in Subdivision 30-B and operated by the institution, fund or other body are to be disregarded.

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (3) In determining for the purposes of section 50-60 whether a fund:
- (a) incurs, and has at all times since 1 July 1997 incurred, its expenditure principally in Australia and pursues, and has at all times since 1 July 1997, pursued its charitable purposes solely in Australia; or
 - (b) distributes solely, and has at all times since 1 July 1997 distributed solely, to a charitable fund, foundation or institution described in paragraph 50-60(c) or (d);
- distributions of any amount received by the fund as a gift (whether of money or property) or by way of government grant are to be disregarded.

50-80 Testamentary trusts may be treated as 2 trusts

- (1) If:
- (a) a trust (the *existing trust*) covered by item 1.5 was in existence immediately before 1 July 1997; and
 - (b) on or after 1 July 1997 one or more assets are given to the existing trust (other than in return for valuable consideration) or become part of the trust property under a will;
- then, for the purposes of this Subdivision and Subdivision 50-B, the existing trust is taken to be 2 separate trusts (the *new trust* and the *old trust*) as follows:
- (c) the new trust is taken to be a trust created after the start of 1 July 1997 that consists of so much of the trust property as consists of those assets together with any income derived from those assets; and
 - (d) the old trust is taken to be a trust created before 1 July 1997 that consists of the remainder of the trust property.

* To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Chapter 2 Liability rules of general application

Part 2-15 Exempt income

Division 50 Exempt entities

Section 50-100

- (2) Where an asset is received in substitution for another asset, subsection (1) applies as if the substituted asset were the other asset.

Subdivision 50-B—Endorsing charitable entities as exempt from income tax

Guide to Subdivision 50-B

50-100 What this Subdivision is about

This Subdivision sets out rules about endorsement of charitable institutions and trust funds for charitable purposes as exempt from income tax. Such entities are only exempt from income tax if they are endorsed.

Table of sections

Endorsing charitable entities as exempt from income tax

50-105	Endorsement by Commissioner
50-110	Entitlement to endorsement
50-115	Applying for endorsement
50-120	Dealing with an application for endorsement
50-125	Notifying outcome of application for endorsement
50-130	Date of effect of endorsement
50-135	Review of refusal of endorsement
50-140	Checking entitlement to endorsement
50-145	Telling Commissioner of loss of entitlement to endorsement
50-150	Partnerships and unincorporated bodies
50-155	Revoking endorsement
50-160	Review of revocation of endorsement

[This is the end of the Guide.]

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Endorsing charitable entities as exempt from income tax

50-105 Endorsement by Commissioner

The Commissioner must endorse an entity as exempt from income tax if the entity:

- (a) is entitled to be endorsed as exempt from income tax; and
- (b) has applied for endorsement.

50-110 Entitlement to endorsement

General rule

- (1) An entity is entitled to be endorsed as exempt from income tax if the entity meets all the relevant requirements of this section.

Which entities are entitled to be endorsed?

- (2) To be entitled, the entity must be an entity covered by item 1.1, 1.5, 1.5A or 1.5B of the table in section 50-5.

Requirement for ABN

- (3) To be entitled, the entity must have an *ABN.
- (4) However, for a trust:
 - (a) covered by item 1.5 of the table in section 50-5 because the trust is covered by paragraph 50-80(1)(d); or
 - (b) covered by item 1.5A of the table in section 50-5 (because the trust is covered by paragraph 50-80(1)(c));to be entitled, the existing trust mentioned in paragraph 50-80(1)(a) must have an *ABN.

Requirement to meet special conditions

- (5) To be entitled, either:
 - (a) the entity must meet the relevant conditions referred to in the column headed "Special conditions" of whichever of

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 50-115

- items 1.1, 1.5, 1.5A and 1.5B of the table in section 50-5 covers the entity; or
- (b) both of the following conditions must be met:
- (i) the entity must not have carried on any activities as a charitable institution (if the entity is covered by item 1.1 of the table in section 50-5) or for public charitable purposes (if the entity is covered by item 1.5, 1.5A or 1.5B of that table);
 - (ii) there must be reasonable grounds for believing that the entity will meet the relevant conditions referred to in the column headed "Special conditions" of whichever of items 1.1, 1.5, 1.5A or 1.5B of the table in section 50-5 covers the entity.
- (6) To avoid doubt, the condition set out in section 50-52 (requiring the entity to be endorsed under this Subdivision) is not a relevant condition for the purposes of subsection (5).

50-115 Applying for endorsement

- (1) An entity may apply to the Commissioner for endorsement.
- (2) The application:
- (a) must be in a form approved by the Commissioner; and
 - (b) must be signed for the entity, or include the entity's *electronic signature if the application is *lodged electronically; and
 - (c) must be lodged at, or posted to, an office or facility designated by the Commissioner as a receiving centre for applications of that kind; and
 - (d) may be lodged electronically.

Note: The Commissioner could approve a form that is part of an application form for an ABN.

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

50-120 Dealing with an application for endorsement

Requesting further information or documents

- (1) The Commissioner may request an applicant to give the Commissioner specified information, or a specified document, the Commissioner needs to decide whether the applicant is entitled to endorsement unless the information or document is given.

Treating application as being refused

- (2) After the time worked out under subsection (3), the applicant may give the Commissioner written notice that the applicant wishes to treat the application as having been refused, if the Commissioner has *not* given the applicant before that time written notice that the Commissioner endorses or refuses to endorse the applicant.

Note: Section 50-125 requires the Commissioner to give the applicant written notice if the Commissioner endorses or refuses to endorse the applicant.

- (3) The time is the end of the 60th day after the application was made. However, if before that time the Commissioner requests the applicant under subsection (1) to give information or a document, the time is the later of the following (or either of them if they are the same):
 - (a) the end of the 28th day after the last day on which the applicant gives the Commissioner information or a document he or she has requested;
 - (b) the end of the 60th day after the application was made.
- (4) If the applicant gives notice under subsection (2), section 50-135 operates as if the Commissioner had refused the application on the day on which the notice is given.

Note: Section 50-135 lets the applicant object against refusal of an application in the manner set out in Part IVC of the *Taxation Administration Act 1953*. That Part provides for review of the refusal objected against.
- (5) The notice given by the applicant:

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Chapter 2 Liability rules of general application

Part 2-15 Exempt income

Division 50 Exempt entities

Section 50-125

- (a) may be *lodged electronically; and
- (b) must be signed for the applicant, or include the applicant's *electronic signature if the application is *lodged electronically.

50-125 Notifying outcome of application for endorsement

- (1) The Commissioner must give the applicant written notice if:
 - (a) the Commissioner endorses the applicant; or
 - (b) the Commissioner refuses to endorse the applicant.
- (2) The Commissioner may give the notice by way of electronic transmission. This does not limit the ways in which the Commissioner may give the notice.

50-130 Date of effect of endorsement

- (1) The endorsement has effect from a date specified by the Commissioner.
- (2) The date specified may be any date (including a date before the application for endorsement was made and a date before the applicant had an *ABN).

Note: An entity may fail to apply for endorsement by 30 June 2000. The Commissioner may endorse an application by such an entity from 1 July 2000.

50-135 Review of refusal of endorsement

If the applicant is dissatisfied with the Commissioner's refusal to endorse the applicant in accordance with the application, the applicant may object against the refusal in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

Note: That Part provides for review of the refusal objected against.

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

50-140 Checking entitlement to endorsement

- (1) The Commissioner may request an entity that is endorsed as exempt from income tax to give the Commissioner information or a document that is relevant to the entity's entitlement to endorsement. The entity must comply with the request.

Note 1: Section 50-110 sets out the conditions for an entity to be entitled to be endorsed.

Note 2: This Act is a taxation law for the purposes of the *Taxation Administration Act 1953*. Failure to comply with this subsection is an offence against section 8C of that Act. Also, the Commissioner may revoke the endorsement of the entity under section 50-155 if it fails to comply with this subsection.

Note 3: Section 50-150 modifies the way this subsection operates in relation to partnerships and unincorporated bodies.

- (2) The request:
- (a) is to be made by notice in writing to the entity; and
 - (b) may ask the entity to give the information in writing; and
 - (c) must specify:
 - (i) the information or document the entity is to give; and
 - (ii) the period within which the entity is to give the information or document.

The period specified under subparagraph (c)(ii) must end at least 28 days after the notice is given.

- (3) The Commissioner may give the notice by way of electronic transmission. This does not limit the ways in which the Commissioner may give the notice.
- (4) If the request is for the entity to give information in writing, the document setting out the information:
- (a) must be given to the Commissioner; and
 - (b) may be *lodged electronically; and
 - (c) must be signed for the entity, or include the entity's *electronic signature if the document is lodged electronically.

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 50-145

50-145 Telling Commissioner of loss of entitlement to endorsement

- (1) Before, or as soon as practicable after, an entity that is endorsed as exempt from income tax ceases to be entitled to be endorsed, the entity must give the Commissioner written notice of the cessation.

Note 1: An entity ceases to be entitled to endorsement if it ceases to be covered by item 1.1, 1.5, 1.5A or 1.5B of the table in section 50-5 or ceases to meet the special conditions identified in the item that covers it: see section 50-110.

Note 2: This Act is a taxation law for the purposes of the *Taxation Administration Act 1953*. Failure to comply with this subsection is an offence against section 8C of that Act.

Note 3: Section 50-150 modifies the way this subsection operates in relation to partnerships and unincorporated bodies.

- (2) The notice:
- (a) may be *lodged electronically; and
 - (b) must be signed for the entity, or include the entity's *electronic signature if the document is lodged electronically.
- (3) Subsection (1) does not apply to an entitlement to endorsement ceasing because the entity ceases to have an *ABN.

50-150 Partnerships and unincorporated bodies

Application to partnerships

- (1) If, apart from this subsection, section 50-140 or 50-145 would impose an obligation on a partnership, the obligation is imposed on each partner, but may be discharged by any of the partners.

Application to unincorporated bodies

- (2) If, apart from this subsection, section 50-140 or 50-145 would impose an obligation on an unincorporated association or body, the obligation is imposed on each member of the committee of management of the association or body, but may be discharged by any of the members of the committee.

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Defences for partners and members of committee of management

- (3) In a prosecution of a person for an offence against section 8C of the *Taxation Administration Act 1953* because of subsection (1) or (2), it is a defence if the person proves that the person:
- (a) did not aid, abet, counsel or procure the act or omission because of which the offence is taken to have been committed; and
 - (b) was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission because of which the offence is taken to have been committed.

50-155 Revoking endorsement

- (1) The Commissioner may revoke the endorsement of an entity as exempt from income tax if:
- (a) the entity is not entitled to be endorsed as exempt from income tax; or
 - (b) the Commissioner has requested the entity under section 50-140 to provide information or a document that is relevant to its entitlement to endorsement and the entity has not provided the requested information or document within the time specified in the request.

Note: Section 50-110 sets out the conditions for an entity to be entitled to be endorsed.

- (2) The revocation has effect from a day specified by the Commissioner (which may be a day before the Commissioner decided to revoke the endorsement).
- (3) However, if the Commissioner revokes the endorsement because the entity is not entitled to it, the Commissioner must not specify a day before the day on which the entity first ceased to be entitled.
- (4) The Commissioner must give the entity written notice if the Commissioner revokes its endorsement.

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Chapter 2 Liability rules of general application

Part 2-15 Exempt income

Division 50 Exempt entities

Section 50-160

- (5) The Commissioner may give the notice by way of electronic transmission. This does not limit the ways in which the Commissioner may give the notice.

50-160 Review of revocation of endorsement

If the entity is dissatisfied with the revocation of its endorsement as exempt from income tax, the entity may object against the revocation in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

Note: That Part provides for review of the revocation objected against.

[The next Division is Division 51.]

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.
