

HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ

COMMISSIONER OF TAXATION OF THE
COMMONWEALTH OF AUSTRALIA

APPELLANT

AND

WORD INVESTMENTS LIMITED

RESPONDENT

*Commissioner of Taxation of the Commonwealth of Australia v Word
Investments Limited*

[2008] HCA 55

3 December 2008

M41/2008

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

R Merkel QC with R A Brett QC and D M Harding for the appellant (instructed by Australian Government Solicitor)

J J Batrouney SC with M T Flynn for the respondent (instructed by Moores Legal)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd

Taxation – Income tax – Charities – Entity engaged in investment business and funeral business – Profits distributed to religious organisations – Whether entity exempt from income tax as "charitable institution" – *Income Tax Assessment Act 1997* (Cth), ss 50-1, 50-5, 50-50, 50-52.

Taxation – Income tax – "Charitable institution" – Whether sufficient for entity to have solely charitable purposes – Whether necessary for entity to engage in charitable activities directly – Whether necessary that distributed profits applied for charitable purposes.

Taxation – Income tax – "Charitable institution" – Whether entity's objects in fact confined to charitable purposes.

Taxation – Income Tax – Special condition for "charitable institution" income tax exemption – *Income Tax Assessment Act 1997* (Cth), s 50-50(a) – Whether entity has physical presence in Australia – Whether entity "incurs its expenditure and pursues its objectives principally in Australia".

Words and phrases – "charitable institution", "incurs its expenditure and pursues its objectives principally in Australia", "institution".

Income Tax Assessment Act 1936 (Cth), s 23(e), (j).

Income Tax Assessment Act 1997 (Cth), ss 50-1, 50-5, 50-50, 50-52, 50-55, 50-57, 50-60, 50-65, 50-105, 50-110, 50-115, 50-140, 50-145, 50-155.

- 1 GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. The Commissioner of Taxation of the Commonwealth of Australia ("the Commissioner") refused to endorse Word Investments Ltd ("Word") as an income tax exempt charity. That decision was set aside by a senior member of the Administrative Appeals Tribunal (Mr B H Pascoe) in relation to the period from 1 July 2002¹. An appeal by the Commissioner to the Federal Court of Australia (Sundberg J) was dismissed; a cross-appeal by Word was allowed, so that Word's status as an income tax exempt charity was extended back to 1 July 2000². An appeal by the Commissioner from those orders to the Full Court of the Federal Court of Australia (Stone, Allsop and Jessup JJ) was also dismissed³. The Commissioner has now appealed to this Court. That appeal, too, must be dismissed for the following reasons.

Factual background

- 2 *The role of Wycliffe.* Wycliffe Bible Translators (International) is a missionary organisation. It seeks to spread the Christian religion through missionaries. It is particularly active in developing countries, and among sections of the population who have no written language. The missionaries learn the local language, teach people to read and write that language, translate the Bible into that language, and then teach the people how to read the Bible. It has about 5,300 workers and 56 members. One of the members is Wycliffe Bible Translators Australia ("Wycliffe"). From 1 July 2000 Wycliffe has been endorsed by the Australian Taxation Office as an income tax exempt charity under subdiv 50-B of the *Income Tax Assessment Act 1997* (Cth) ("the 1997 Act"). Word was founded by members closely associated with Wycliffe who wanted to use Word to raise money within Australia and give it to Wycliffe for the carrying out of its purposes, which, at least to some degree, are fulfilled overseas.
- 3 The issues in the appeal centre on the fact that although Word has paid Wycliffe to carry out Bible translation on its behalf, Word does not itself directly carry out the training or dispatching of missionaries overseas, the publishing of the Bible or the preaching of the gospel, but gives its profits (less sums retained

1 *Re Applicant and Federal Commissioner of Taxation* (2005) 60 ATR 1265.

2 *Federal Commissioner of Taxation v Word Investments Ltd* (2006) 64 ATR 483.

3 *Federal Commissioner of Taxation v Word Investments Ltd* (2007) 164 FCR 194.

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by it⁴) to Wycliffe, and other similar Christian organisations, to enable them to perform these activities.

4 *Word's memorandum.* Word was incorporated under the *Companies Act* 1961 (Vic) on 8 August 1975, as a company limited by guarantee. The parties are agreed that at least some of the objects are charitable; Word contends that they all are. Clause 4 of the memorandum of association prohibits the payment of any of Word's income and property to members, save in return for services rendered or goods supplied. Clause 7 provides that on a winding up or dissolution any surplus is not to be given to the members, but only to some institution or institutions having objects similar to those of Word and having restrictions on distributions to members at least as great as those in Word's memorandum.

5 *Word's activities.* From about 1986 Word began to accept deposits from members of the public. The depositors received little or no interest from Word, but Word invested the money at commercial rates of interest. In the period 1996-2002, Word operated a business of conducting funerals, not all of Christians, for profit. The profits generated from the investment business and the funeral business were used to support Christian activities in the form of Bible translation and missionary work largely carried out by Wycliffe and other bodies to whom the non-retained profits were given. The parties accepted that although the Administrative Appeals Tribunal had seen the operation of the funeral business as depriving Word of its status as a charitable institution, nothing turned on the different sources of profit for the purposes of the arguments in this Court.

6 *Endorsement of tax exempt entities.* This appeal arises in relation to Divs 50 and 50-B of Pt 2-15 of the 1997 Act⁵. Word claims to be a "charitable institution", which is an "entity" covered by item 1.1 of the table set out in s 50-5 of that Act⁶. Section 50-52 provides that an entity covered by item 1.1 is not exempt from income tax unless the entity is endorsed as exempt from income tax

4 Pursuant to sub-cl 3(a) of the memorandum, quoted at [20] below.

5 After the period relevant to this appeal, the endorsement provisions of the 1997 Act (ss 50-115 to 50-160 of subdiv 50-B) were repealed by the *Tax Laws Amendment (2004 Measures No 1) Act* 2004 (Cth) (No 95 of 2004), Sched 10, item 39. In their place, Pt 5-35 of Sched 1 of the *Taxation Administration Act* 1953 (Cth) was introduced. Section 50-105 was amended to correspond with the new provisions.

6 See below at [49].

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under subdiv 50-B⁷. In subdiv 50-B there appeared at the relevant time s 50-115, which provided that an entity might apply to the Commissioner for endorsement as exempt from income tax. Section 50-105 obliges the Commissioner to endorse an entity which has applied for endorsement as exempt from income tax if it is entitled to be so endorsed. Section 50-110(1) provides that the entitlement of an entity to be endorsed depends on meeting the requirements of s 50-110. Section 50-110(2) provides that one requirement is that the entity be a "charitable institution" as described in item 1.1 of the table set out in s 50-5. Section 50-110(5)(a) provides that another requirement for an entity in the circumstances of Word is that the entity meet the conditions referred to in the column headed "Special Conditions" against item 1.1 of the table. One of those special conditions, created by s 50-50(a), is that the entity be one which "has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia".

7 *Word's application to the Commissioner.* Word applied to the Commissioner for endorsement as exempt from income tax. The Commissioner refused that application by letter of 2 May 2001. The letter said:

"Commercial enterprise entities are not considered to be charities. This is the case irrespective of whether charitable consequences flow from the entity's activities."

On 16 March 2002 Word made a further application for endorsement in relation to the period from 1 July 2000. On 13 May 2002 the Commissioner rejected that application on the ground that Word was "not an organisation instituted to advance or promote charitable purposes." On 18 July 2002 Word objected to that refusal, but by letter of 24 February 2003 the Commissioner disallowed the objection. That letter said:

"In your circumstances, your main activities are to provide financial planning advice and to carry out investment activities for the investors. You receive income from the investment of the funds of investors. You then distribute your available funds to other organisations to enable them to carry out evangel [sic] activities to benefit of [sic] a wide range of indigenous people.

7 See below at [50].

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We consider that the money generating purposes are not incidental to the religious purposes. The money generating purposes represent independent purposes which are a mean [sic] to fulfill your religious purposes."

The issues

8 Although the Commissioner conceded that Word had not set up a tax avoidance scheme, he posed four issues in the path of Word's claim to be endorsed as exempt from income tax.

9 The first issue posed by the Commissioner is whether Word is prevented from being a "charitable institution" by reason of the fact that its objects are not confined to charitable purposes.

10 On the assumption that the first issue were to be resolved in Word's favour, the second issue posed by the Commissioner is whether:

"an entity, which does not itself engage in any significant charitable activities but, rather, is established to conduct, and conducts, an investment, trading or other commercial activity for profit (albeit not for distribution to its members) is a charitable institution because it was established for the purpose of distributing, and distributes, its profits, wholly or mainly to charitable institutions."

11 Assuming that the second issue were to be decided in Word's favour, the third issue is whether Word is prevented from being a "charitable institution" by reason of the fact that the institutions to which it gave its profits "were not confined as to the use to which they may put the funds distributed to them".

12 Assuming that the third issue, too, were to be resolved in favour of Word, the fourth issue posed by the Commissioner is whether Word is prevented from being a "charitable institution" which is entitled to be endorsed as exempt from income tax on the ground that it does not comply with s 50-50(a) in that it cannot be said that it "has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia".

First issue: are Word's objects confined to charitable purposes?

13 *The primary argument.* The Commissioner submitted that Word's objects were not confined to religious or charitable purposes. The Commissioner accepted that where the question was whether property was held by a trustee on trust for charitable purposes, the character of the trust as a trust for charitable purposes was not affected by the power of the trustee to invest the assets, or use

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them to carry on businesses, with a view to profit. But the Commissioner submitted that where the question was not whether the property was held by a trustee on trust for charitable purposes, but rather was whether an institution not holding its property as trustee, but owning it absolutely, was to be characterised as a charitable institution, its power to use its assets in business with a view to profit, and its utilisation of that power, was crucial. The Commissioner submitted that if an entity claiming to be a charitable institution made a profit "as an incidental activity, or as concomitant and ancillary to the conduct" of the entity's charitable activities, it would not cease to be a charitable institution. But he said that if the profit-generating activity went beyond the incidental or the ancillary, the institution was not charitable. The Commissioner relied on the following statement by Gibbs J (Barwick CJ, Menzies and Walsh JJ concurring) in *Stratton v Simpson*⁸:

"It is established that 'an institution is a charitable institution if its main purpose is charitable although it may have other purposes which are merely concomitant and incidental to that purpose' or in other words if each of its objects is either charitable in itself or should be construed as ancillary to other objects which themselves are charitable^[9]. If however the non-charitable purpose is not merely incidental or ancillary to the main charitable purpose, the institution will not be charitable^[10]."

The Commissioner submitted that the main object of Word was not religious but was "to engage in investment and trading activities for the purpose of raising funds for Wycliffe and other similar organisations". The Commissioner submitted that the "basic function" of Word was to conduct businesses, and the making of profits and the distribution of them to charitable institutions like Wycliffe were merely incidental to the conducting of businesses.

14 The Commissioner relied on a statement of Starke J that where the stated objects in a memorandum of association are "of a mixed character and the memorandum does not make it clear which are its main or dominating

8 (1970) 125 CLR 138 at 159-160; [1970] HCA 45.

9 *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 375 at 442 and 450; [1952] HCA 48.

10 *Oxford Group v Inland Revenue Commissioners* [1949] 2 All ER 537; *In re Harpur's Will Trusts* [1962] Ch 78 at 87.

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characteristics", it was necessary to examine the activities of the company¹¹. The Commissioner additionally relied on the following statement of Williams J in the same case about the Royal Australasian College of Surgeons¹²:

"in order to determine what is the main or dominant purpose of the College, it is a mistake to examine the objects contained in the memorandum in [a] disjunctive fashion. They should be examined in conjunction with one another and in the light of the circumstances in which the College was formed and of the manner in which the College is fulfilling the purposes for which it was incorporated."

15 The Commissioner further relied on *Roman Catholic Archbishop of Melbourne v Lawlor*¹³. That case concerned an attempted bequest to an archbishop and three bishops "to establish a Catholic daily newspaper". The particular point which the Commissioner desired to extract from the case was put succinctly by Starke J thus¹⁴: "The objects and purposes of a Catholic newspaper are not, and can by no means be, confined to strictly charitable purposes."

16 Finally, the Commissioner relied on the following statement of Rand and Locke JJ in the Supreme Court of Canada in *R v The Assessors of the Town of Sunny Brae*¹⁵:

"We have today many huge foundations yielding revenues applied solely to charitable purposes; they may consist, as in one case, of a newspaper business; even if these foundations themselves carried on their charitable ministrations, to characterize them as charitable institutions merely because of the ultimate destination of the net revenues, would be to distort the meaning of familiar language; and to make that ultimate application the sole test of their charitable quality would introduce into the law conceptions that might have disruptive implications upon basic

11 *Royal Australasian College of Surgeons v Federal Commissioner of Taxation* (1943) 68 CLR 436 at 448; [1943] HCA 34.

12 *Royal Australasian College of Surgeons v Federal Commissioner of Taxation* (1943) 68 CLR 436 at 452.

13 (1934) 51 CLR 1; [1934] HCA 14.

14 (1934) 51 CLR 1 at 25.

15 [1952] 2 SCR 76 at 92.

principles not only of taxation but of economic and constitutional relations generally. If that is to be done, it must be by the legislature."

- 17 *The central authorities.* It must be said at the outset that the Commissioner relied on authorities coming from a range of fields and on a range of issues – whether land was being used exclusively or wholly for charitable purposes so as to enjoy immunity from rates¹⁶; whether a bequest for a particular purpose was for charitable purposes¹⁷; whether a gift for charitable and non-charitable purposes, the whole gift being capable of devotion to the latter, was charitable¹⁸; will construction cases¹⁹; and cases about whether, for example, a building was exempt from rates on the ground that it was used exclusively for the religious work of a religious organisation²⁰. The primary relevant line of authority, however, is that which is concerned with the predecessor to ss 50-5, 50-50 and 50-110 of the 1997 Act, namely s 23(e) of the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act")²¹. The Commissioner did rely on this line of authority²². The principal statements made in it were made about companies in an age in which the ultra vires doctrine existed and in which it was mandatory for companies to state their objects in a memorandum of association. In that age, a failure by a company to comply with its objects could have deleterious consequences for third parties dealing with the company. It is not now mandatory for companies to state their objects in a memorandum of association,

16 *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation* (1952) 85 CLR 159; [1952] HCA 4; *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138.

17 *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1.

18 *In re Smith, decd* [1954] SASR 151 at 159-160.

19 *Stratton v Simpson* (1970) 125 CLR 138.

20 *R v The Assessors of the Town of Sunny Brae* [1952] 2 SCR 76; see also *Oxfam v Birmingham City District Council* [1976] AC 126.

21 It provided that the "income of a religious ... charitable institution" was to be exempt from income tax.

22 *Royal Australasian College of Surgeons v Federal Commissioner of Taxation* (1943) 68 CLR 436 at 447-448, 450-451 and 452; *Incorporated Council of Law Reporting (Q) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 670-672; [1971] HCA 44.

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and the ultra vires doctrine no longer exists²³. But there is no reason to suppose that the tests laid down in the s 23(e) line of cases no longer apply in relation to the 1997 Act to companies like Word, which state objects in a memorandum. That is, it is necessary to examine the objects, and the purported effectuation of those objects in the activities, of the institution in question. In examining the objects, it is necessary to see whether its main or predominant or dominant objects, as distinct from its concomitant or incidental or ancillary objects, are charitable²⁴.

18 *The distinction between purposes and objects.* In *H A Stephenson & Son Ltd (In Liq) v Gillanders, Arbuthnot & Co*²⁵ Dixon J drew the following distinction:

"When the question is whether a particular transaction binds the company, or is *extra vires*, the well-known principle may not apply by which, in considering whether a company should be wound up because the substratum of its constitution has failed, its true, main, dominant or paramount purpose is ascertained and general clauses are understood as subsidiary, as conferring powers not independent but subserving the main end. In the one case the ultimate question is whether it is just and equitable that the company should be wound up, and, for its determination, general intention and common understanding among the members of the company may be important. In the other case the question is one of corporate capacity only, and this must be ascertained according to the true meaning of the memorandum interpreted by a fair reading of the whole instrument."

While the distinction may lack precise correspondence with the modern law since the abolition of the ultra vires doctrine, it applies precisely to companies like Word, which have a memorandum of association with an objects clause.

19 *What are the objects of Word?* However, it is not necessary in this appeal to seek to distinguish between the main, predominant or dominant object and other objects. That is because Word has only one group of objects – a group of

23 See *Companies (Victoria) Code*, ss 66C, 67 and 68. See now *Corporations Act 2001* (Cth), ss 124 and 125.

24 *Royal Australasian College of Surgeons v Federal Commissioner of Taxation* (1943) 68 CLR 436 at 447, 448, 450 and 452.

25 (1931) 45 CLR 476 at 487; [1931] HCA 47.

objects of advancing religious charitable purposes. All other "objects" which may seem to be outside that group are on their true construction either objects within that group, or powers to carry out objects within that group.

20 Clause 3 of Word's memorandum of association is too lengthy to quote, but it opens with the words: "The object [sic] for which the company is established are ..." It suffices to quote the first three objects:

- "(a)(i) To proclaim preach teach enunciate expound and to propagate evangelise continue carry forward expand and increase the Christian Religion both in Victoria and throughout the rest of the world by all means whether oral printed visual audible mechanical or otherwise.
- (ii) To provide train maintain and send forth teachers preachers and lecturers who subscribe to the basis of belief of the member of the Company contained in Clause 8 hereof.^[26]
- (iii) To co-operate with encourage and provide assistance both financial and otherwise for Evangelical Missionary Organisations and Evangelical Missionaries operating or to become operative in Victoria or elsewhere throughout the world."

The memorandum declares that the objects specified "shall be regarded as independent objects". Sub-clause 3(a) of the memorandum sets out 17 matters. Sub-clause 3(a)(xvii), which gives a power to acquire equipment for the purposes of Word stands apart from the other 16 matters and is of the same kind as those set out in sub-cl 3(b)-(ak). Among the other 16 matters set out in sub-cl 3(a) are numerous purposes, which, whether considered by themselves or in the context of cl 3, are plainly charitable (eg sub-cl 3(a)(i)). There are other purposes in sub-cl 3(a) which, considered by themselves, are not charitable, for example, sub-cl 3(a)(iv), which provides: "To hold rallies and other meetings in Victoria and when occasion arises through the rest of the world." However, when the 16 purposes enumerated in sub-cl 3(a)(i)-(xvi) are read as a whole, each of them on its true construction states a charitable purpose – a purpose of advancing religion in a charitable sense. Those which taken separately are beyond that purpose are to be read down as being within it. Sub-clauses 3(a)(xvii) and (c)-(ak) need to be read in the light of sub-cl 3(b) which provides: "To carry on any business or activity which may seem to the Company capable of being conveniently carried on in connection with the objects for which this Company is established." This

26 Clause 8 sets out seven propositions comprising a declaration of faith.

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suggests that for the most part it is sub-cl 3(a) which states the company's purposes, not sub-cll 3(b)-(ak), which perform another function. That suggestion is confirmed by the radical difference between the matters listed in sub-cl 3(a)(i)-(xvi) and the matters listed in sub-cll 3(a)(xvii) and (b)-(ak). The former can truly be described as purposes, while the latter are not to be construed as purposes at all, but rather as powers.

21 The most specific of the arguments advanced by the Commissioner for the conclusion that the objects for which Word's profits might be applied were not limited to religious or other charitable purposes centred on three provisions of the memorandum. One was sub-cl 3(k) of the memorandum: "To subscribe and make payments to any fund for religious charitable *or* benevolent objects of any description" (emphasis added). The second was sub-cl 3(u):

"To set aside out of the profits of [Word] such sums as the Board of Directors thinks proper as reserved, for maintaining the whole or any part of [Word's] property or for meeting contingencies and for any other purposes connected with the business of [Word] or any part thereof and the Board of Directors may invest the sums so set aside in the business of [Word] or in such securities as the Board of Directors selects."

The third was the incorporation by sub-cl 3(aj) of cl 7 of the Third Schedule to the *Companies Act* 1961 (Vic) which conferred a power "to subscribe or guarantee money for charitable *or* benevolent objects, *or* for any exhibition, *or* for any public, general, *or* useful object" (emphasis added).

22 So far as sub-cl 3(u) is concerned, a power to retain profits conferred on directors of a company which has charitable purposes cannot negate its character as a charitable institution. Its exercise, while it may delay the moment when assets are applied to charitable purposes, also increases the chance that more assets will eventually be so applied. So far as sub-cl 3(k) and cl 7 of the Third Schedule are concerned, they do not create purposes. They confer powers only. Those powers do not authorise conduct which does not further the charitable purposes of Word.

23 The Commissioner's reliance on *Roman Catholic Archbishop of Melbourne v Lawlor* was misplaced. In that case Rich J, Starke J and Dixon J held that a gift by will of personal property "to establish a Catholic daily newspaper" extended beyond charitable purposes. Gavan Duffy CJ and Evatt J, and McTiernan J, held that it did not. The question whether the "purposes" stated in sub-cll 3(a)(xvii) and (b)-(ak) are in truth purposes or merely powers is quite different from the question in *Lawlor's* case. It is true that the question whether all the purposes stated in sub-cl 3(a) are charitable purposes and no more bear

some analogy with that discussed in *Lawlor's* case, but it is clear that when the purposes in sub-cl 3(a)(i)-(xvi) are read together they are all charitable purposes.

24 It is therefore necessary to reject the Commissioner's arguments so far as they submitted that Word had a "commercial object of profit from the conduct of its business" which was "an end in itself" and was not merely incidental or ancillary to Word's religious purposes. Word endeavoured to make a profit, but only in aid of its charitable purposes. To point to the goal of profit and isolate it as the relevant purpose is to create a false dichotomy between characterisation of an institution as commercial and characterisation of it as charitable.

25 *Circumstances of Word's formation.* In addition to what flows from the construction to be given to the memorandum of association, it is necessary to take into account the circumstances in which Word was formed²⁷. The Administrative Appeals Tribunal found that the founders of Word "had a clear intention that its function was to raise funds for the benefit of [Wycliffe] and/or similar religious organisations." Among the evidence supporting that finding was the assertion of Mr Ross Wilkerson, a director of both Word and Wycliffe, that the "intention in establishing [Word] was to create a fundraising auxiliary primarily to support the religious activities of [Wycliffe] and the propagation of Christian religion." He also said that Word "was established as a financial support company for Wycliffe." He further said that Word "regards itself as a supporting arm of Wycliffe and the directors of [Word] have a close interest and involvement in the work of Wycliffe"; that Wycliffe recommends people to be directors of Word; and that the two companies share offices and staff. There was also evidence of David Cummings, who had served with Wycliffe Bible Translators (International) from 1957 (ie before Word was incorporated). He said that the group who founded Word had three points in mind:

- "• That interested friends of Wycliffe might lend [Word] money, for the board of [Word] to invest, so that any profits would then go directly to the work of Bible translation and its affiliate activities such as Church Planting (establishing an initial core group of worshippers), training of pastors, literacy work, publishing the translated scriptures and recruiting nationals to be involved in translation work and preaching the gospel.

27 *Royal Australasian College of Surgeons v Federal Commissioner of Taxation* (1943) 68 CLR 436 at 452 per Williams J ("circumstances in which the College was formed").

- It was a way of highlighting the need for funding for the religious work of Wycliffe and an avenue for friends to have a vehicle to see their investment directly helping the religious work of Wycliffe Bible Translators and its workers.
- The [Word] board then gave itself to finding the most profitable ways it could use the money, lent or given from the interested Christian public, that would gain the best income on the invested monies. It was the intention that most (if not all) of the interest would be channeled into the religious work of Wycliffe or its members, with the balance of interest being returned to investors."

26 *Word's activities.* In *Royal Australasian College of Surgeons v Federal Commissioner of Taxation*²⁸ McTiernan J said that whether the appellant in that case fulfilled the description of a scientific institution depended less on the fact that it could direct its efforts to scientific objects than "what it does in pursuit of each of them." The inquiry, so far as it is directed to activities, must centre on whether it can be said that the activities are carried on in furtherance of a charitable purpose. So far as the actual activities of Word in furtherance of its purposes are relevant, it is plain that, subject to the Commissioner's contentions in relation to the second and third issues²⁹, the funds paid out by Word were paid to bodies fulfilling charitable purposes. The activities of Word in raising funds by commercial means are not intrinsically charitable, but they are charitable in character because they were carried out in furtherance of a charitable purpose.

27 *The Sunny Brae case.* The short answer to the Commissioner's reliance on *R v The Assessors of the Town of Sunny Brae*³⁰ is that Word's position does not depend on the mere fact that its revenues are applied solely to charitable purposes, but on the related fact that those are its sole purposes. Unlike the society in that case as viewed by the majority of the Supreme Court of Canada, Word is not a company with both charitable and non-charitable purposes which carried on commercial businesses and incidentally conferred benefits on charity; Word is a company having purposes which are solely charitable and which carried on commercial businesses only in order to effectuate those purposes.

28 (1943) 68 CLR 436 at 450. See also at 448-449 per Starke J, 452 per Williams J.

29 Discussed below at [35]-[45].

30 [1952] 2 SCR 76 at 92: see above at [16].

Christian Enterprises Ltd v Commissioner of Land Tax. The Commissioner relied on the opinions of Nagle J at trial³¹ and Walsh JA (Asprey JA concurring) on appeal in *Christian Enterprises Ltd v Commissioner of Land Tax*³². Christian Enterprises Ltd was a company limited by guarantee. Its primary objects were either religious or raising funds for religious purposes. Its objects were expressed to include commercial objects, but these were expressed to be for the purposes of carrying out the primary objects. The Commissioner of Land Tax assessed it as liable for land tax, and rejected its claims that it was exempt as a "charitable institution" pursuant to s 10(1)(d) of the *Land Tax Management Act 1956* (NSW) or a "religious society" pursuant to s 10(1)(e). Nagle J said that in view of the religious purposes, it could be said that the company was being carried on for charitable purposes, but held that it was not a charitable *institution*: it was not enough to constitute an institution that seven individuals with charitable intentions formed themselves into a company³³. He also held that it was not a religious society. In the Court of Appeal, Walsh JA and Asprey JA (Wallace P dissenting) agreed on the first point, but disagreed on the second. Contrary to the Commissioner's submissions in the present appeal, Walsh JA (like Nagle J) did not construe the phrase "charitable institution" as a single composite expression, but saw it as having two integers – one to do with objects which were charitable, the second to do with "institutional" characteristics. Thus he said³⁴:

"the religious objects of the company must be regarded as charitable objects.

But I do not think it was an 'institution'".

Walsh JA went on to deny that every company with charitable objects was a charitable institution. The Commissioner submitted in this appeal that the "authorities and dictionary references discussed by Nagle J and Walsh JA suggest that for an entity to be a 'charitable institution' it must possess a public character, purpose or object". The authorities and dictionary references do not in fact suggest this. Walsh JA summarised an argument of counsel which assumed that the word "institution" included "a notion of something which has a public

31 [1967] 1 NSW 653.

32 [1968] 2 NSW 99.

33 [1967] 1 NSW 653 at 657.

34 [1968] 2 NSW 99 at 104.

character or serves a public purpose", but he rejected the argument which made that assumption³⁵. If Walsh JA, despite that rejection, was intending to adopt counsel's assumption, the Commissioner did not explain why Word's purpose of advancing religion – a charitable purpose having, ex hypothesi, benefit to the public, and carried out on a substantial basis financially speaking – caused it to lack a public character or not to serve a public purpose. Although Nagle J and Walsh JA discussed examples of what was and what was not an institution, as did the Privy Council in the main case they relied on, *Minister of National Revenue v Trusts and Guarantee Co Ltd*³⁶, neither they nor the Privy Council explicitly offered any test for the meaning of "institution". In that case the Canadian settlor had settled a fund to be used "for the benefit of the aged and deserving poor" of the town of Colne in Lancashire, but there was no "charitable institution" as required for exemption from Canadian income tax; the trust was "an ordinary trust for charity"³⁷ and there was no "institution" "in the sense in which boards of trade and chambers of commerce are institutions"³⁸. Accordingly, this case can readily be distinguished, since it concerned a gift to a trustee on trust for charitable purposes as distinct from an "institution" not holding property on trust, but owning it outright and having charitable objects. *Christian Enterprises Ltd v Commissioner of Land Tax*, too, can be distinguished: unlike Word, the company had not begun to carry out its purposes, but it only engaged in the preparatory acts of investing funds for a short time before buying land on which it planned to build, but had not yet built, houses for resale³⁹. In contrast, Word's activities in pursuance of its purposes have been carried on for years.

29 For these reasons, *Christian Enterprises Ltd v Commissioner of Land Tax* does not support the Commissioner's position in this appeal.

30 *Glebe Administration Board v Commissioner of Pay-roll Tax*. The Commissioner also relied on *Glebe Administration Board v Commissioner of Pay-roll Tax*⁴⁰. It was there held that the wages paid by the Board, a body

35 [1968] 2 NSW 99 at 104.

36 [1940] AC 138.

37 [1940] AC 138 at 148 and 150.

38 [1940] AC 138 at 149.

39 [1967] 1 NSW 653 at 654.

40 (1987) 10 NSWLR 352.

corporate constituted under the *Church of England (Bodies Corporate) Act 1938* (NSW), were not exempt from pay-roll tax on the ground that the exemption given by the *Pay-roll Tax Act 1971* (NSW), s 10(b), for wages paid by "a religious ... institution" was not applicable. A majority of the Court of Appeal of the Supreme Court of New South Wales (Priestley JA, McHugh JA concurring) viewed the Board as "a statutory corporation doing commercial work within limitations fixed by reference to religious principles"⁴¹ and construed s 10(b) as not being aimed at "exempting from liability to pay-roll tax wages paid to persons substantially engaged in commercial activity."⁴²

31 That case, then, is a decision about a particular statute different from the one under consideration in this appeal, and a decision about a different entity. In contrast to the view which the Court of Appeal took of the Board in that case, the correct view in this case is that Word was using its powers to employ commercial methods to raise money for its purposes: it was not doing commercial work within limitations fixed by reference to religious principles.

32 *A final argument.* The Commissioner sought leave to rely on an argument not put before the Full Court that the conduct by Word of its investment arm alone prevented it from being a charitable institution. That leave should be granted, but the argument should be rejected for the reasons stated above.

33 *Conclusion.* Nothing in the authorities or arguments relied on by the Commissioner suggests that Word is not an "institution" in the senses approved in *Stratton v Simpson*⁴³:

"an establishment, organization, or association, instituted for the promotion of some object, especially one of public utility, religious, charitable, educational etc."⁴⁴ ... 'an undertaking formed to promote some defined purpose ...' or 'the body (so to speak) called into existence to

41 (1987) 10 NSWLR 352 at 365.

42 (1987) 10 NSWLR 352 at 373.

43 (1970) 125 CLR 138 at 158 per Gibbs J (Barwick CJ, Menzies and Walsh JJ concurring).

44 Quoting *The Shorter Oxford English Dictionary*.

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translate the purpose as conceived in the mind of the founders into a living and active principle'.^[45]"

Accordingly, subject to the Commissioner's other arguments, it is to be concluded that Word is a charitable institution.

34 *A caveat.* To avoid doubt in future, it should be noted that it would not be enough that the purpose or main purpose of an institution were charitable if in fact it ceased to carry out that purpose. Just like the former s 23(g)(iii) of the 1936 Act, so the former s 23(e) of that Act⁴⁶, and item 1.1 in the table in the present s 50-5 of the 1997 Act⁴⁷, being provisions in the legislation exempting tax on annual income, have "a periodic operation"; the statute "directs the inquiry to a particular time, namely, the year of income so that consideration must be given not only to the purpose for which the [institution] was established but also the purpose for which it is currently conducted."⁴⁸ It was not submitted that Word had acted outside its purposes; rather it was submitted that it had acted inside them, but that they were non-charitable for the reasons advanced in relation either to the first issue or the second. That contention has been rejected so far as it applies to the first issue and is rejected below in relation to the second issue.

Second issue: can an institution be charitable where it does not engage in charitable activities beyond making profits which are directed to charitable institutions which do engage in charitable activities?

35 *The Commissioner's arguments.* The Commissioner submitted that:

"this is the first occasion on which a court in Australia has determined that an entity that does not itself engage in any significant charitable activities but, rather, conducts an investment, trading or other commercial activity for profit (albeit not for the benefit of its members) is a charitable

45 Quoting *Mayor etc of Manchester v McAdam* [1896] AC 500 at 511 per Lord Macnaghten.

46 See below at [62].

47 See below at [49].

48 *Cronulla Sutherland Leagues Club Ltd v Commissioner of Taxation* (1990) 23 FCR 82 at 96 per Lockhart J. See also *Commissioner of Taxation v Triton Foundation* (2005) 147 FCR 362 at 370-371 [20], and the discussion at [70] below.

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institution, or is otherwise charitable in nature, because under its constitution it was required to, and does, distribute its profits to one or more charitable institutions."

36 The Commissioner submitted that the courts below had been wrong to make that determination. It was for the purposes of this submission that the Commissioner relied on the activities of Word. The Commissioner's point was that while, for example, it was an object of Word to "proclaim ... the Christian Religion", it did not in fact do so. All it did was raise money from commercial activities and hand it to other bodies so that they could proclaim the Christian religion. It submitted that there was no nexus between the profit and the effectuation of a charitable purpose. There were too many intermediate steps – "[Word] determining to distribute, rather than retain for its own purposes, the profit, determining to whom a distribution is to be made and making the distribution".

37 *Resolution.* It is implicit in the Commissioner's argument that there is a distinction between two cases. One case would arise where a company limited by guarantee which had religious charitable objects organised itself into two divisions, one of which employed the company's assets to make profits, the other of which spent the profits on those objects. A second case would exist where a company limited by guarantee had the same objects and made the same profits, but gave them to other organisations which spent them on those objects. On the Commissioner's argument, the first company is a charitable institution, but the second is not. It would not reflect credit on the law if the distinction implicit in the Commissioner's argument were sound. The English Court of Appeal, dismissing an appeal from Slade J, rejected a similar argument in *Inland Revenue Commissioners v Helen Slater Charitable Trust Ltd*⁴⁹ (admittedly in a different statutory context) in holding that the income of one company having charitable objects was "applied for charitable purposes" when it was paid to another company with almost identical objects. Oliver LJ said, in giving the judgment of Waller LJ, himself and Fox LJ, that:

"where the trusts on which the funds are held envisage the accomplishment of the charitable purpose by a payment to some other organisation, I cannot for my part see why such a payment is not an application of the funds.

49 [1982] Ch 49.

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... I entertain no doubt whatever that, as a general proposition, funds which are donated by charity 'A', pursuant to its trust deed or constitution, to charity 'B' are funds which are 'applied' by charity 'A' for charitable purposes."⁵⁰

Strictly speaking, that case (like this) was not one in which funds were held on trust, but was one in which one company owned assets and had certain purposes. But in this case, like that, the objects included advancing charitable purposes by assisting other organisations⁵¹, and the Commissioner does not dispute that the payments which Word makes are within its purposes. And the present case is stronger than that case, for in that case the funds advanced were retained by the recipient company and not expended on charitable purposes, whereas in the present case the income paid to Wycliffe and like bodies is expended on charitable purposes. One submission advanced by Mr Andrew Park QC for the successful taxpayer in that case may be noted⁵²:

"The Crown's wide submission that money subject to charitable trusts is not 'applied for charitable purposes' unless actually expended in the field, is revolutionary, unworkable and unacceptable in practice. There are innumerable charities, both large and small, in this country which operate on the basis of raising funds and choosing other suitable charitable bodies to donate those funds to. ... If the Crown's wide argument is correct, many charitable bodies would be losing a recognised entitlement to tax relief and may, moreover, cease to be regarded as charitable."

It is likely that the position in Australia is similar.

38 In *Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue*⁵³ MacDermott J said:

⁵⁰ *Inland Revenue Commissioners v Helen Slater Charitable Trust Ltd* [1982] Ch 49 at 56.

⁵¹ See sub-cl 3(a)(iii), quoted above at [20].

⁵² [1982] Ch 49 at 52.

⁵³ (1945) 26 TC 335 at 348.

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"the charitable purpose of a trust is often, and perhaps more often than not, to be found in the natural and probable consequences of the trust rather than in its immediate and expressed objects."

Similarly, the charitable purposes of a company can be found in a purpose of bringing about the natural and probable consequence of its immediate and expressed purposes, and its charitable activities can be found in the natural and probable consequence of its immediate activities.

39 For those reasons the second issue must be resolved against the Commissioner.

Third issue: were the institutions which received Word's payments confined in the use to which they could put them?

40 The resolution of the first two issues against the Commissioner means that the purposes and activities of Word were charitable, that it is a charitable institution and that that character is not lost by reason of the fact that it did not itself advance charitable purposes directly, but gave its profits to other institutions which did. Despite that, the Commissioner submitted that if Word were to be a charitable institution, it had to ensure that the distributions it made were utilised by the donees for the advancement of religion.

41 *The Commissioner's submissions.* The Commissioner submitted that the potential donees of Word's funds were not confined to religious or charitable institutions, and the distributions were not confined to religious purposes. He submitted, by reference to evidence, that the "amounts distributed were able to be utilised by Wycliffe and the other organisations as they deemed fit". In another version of his argument, he accepted that all the donees were religious institutions, but submitted that while the money may have been used by the donees for religious purposes (which he conceded could have been charitable), it may also have been used for purposes conducive to religion (which he submitted were not charitable). He further submitted that sub-cll 3(a)(iii), (k), (u) and (aj) (incorporating cl 7 of the Third Schedule to the *Companies Act* 1961 (Vic)) and cl 4 "did not require that a distribution be confined to charitable purposes or to charitable institutions."

42 *Word's memorandum.* The last point was to some degree also made in connection with the first issue⁵⁴. It is convenient to deal with it at the outset.

54 See above at [21].

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Sub-clause 3(u) and cl 4 have nothing to do with the present issue, namely how far the recipients of Word's bounty were free to deal with it as they pleased: that is because sub-cl 3(u) deals with the power to retain, not only power to distribute or purpose of distribution, and because cl 4 deals only with the use of Word's property to promote its objects and not to benefit members. As to sub-cl 3(a)(iii), even if, read in isolation, that might permit a distribution for a non-charitable purpose, when read with the other relevant parts of sub-cl 3(a) (namely sub-cl 3(a)(i)-(ii) and (iv)-(xvi)), it is clear that Word is not authorised to make distributions for non-charitable purposes. It is true that sub-cl 3(k) and cl 7 of the Third Schedule⁵⁵ on their face confer a power to make payments to non-charitable objects or institutions. But sub-cl 3(k) and cl 7 of the Third Schedule, read in context, would not be construed to permit payments to non-charitable institutions or for purposes outside those charitable purposes described in sub-cl 3(a)(i)-(xvi). One arm of the Commissioner's submission thus fails: no part of the memorandum of association authorises payments to institutions which are entirely free as to the use they make of the payments.

43 *Did Word leave the recipients at liberty to spend the amounts as they wished?* The other arm of the Commissioner's submission turns on whether in fact any conditions were imposed by Word on the recipients of its gifts, or whether they were left free to spend the gifts as they wished. This was not a matter the Commissioner explicitly raised in his Statement of Facts Issues and Contentions before the Administrative Appeals Tribunal. However, in this appeal he relied on the evidence of Mr Wilkerson who said:

"In 2002, the directors of [Word] determined that [Word] should ensure the translation of certain Christian Scriptures. To ensure this, [Word] requested Wycliffe to carry out translation on behalf of [Word]. [Word] paid to Wycliffe a sum of \$92,597 for that purpose rather than make an equivalent distribution leaving the choice of applying those funds to the discretion of Wycliffe. In this way [Word] was able to participate more closely in the advancement of the Christian Religion through directing the translation of Christian Scriptures."

In cross-examination, Mr Wilkerson answered the following question affirmatively:

55 Set out above at [21].

"The money that is donated to Wycliffe and other organisations, it is up to Wycliffe and those other organisations to determine how best to use that money?"

Contrary to the Commissioner's submission, the meaning of these two pieces of rather vague evidence is not that Wycliffe was entirely at liberty to spend the money as it liked – either on translating Christian Scriptures or on some other purpose – but simply that it was at liberty to select any method it chose for the purpose of effectuating translations of Christian Scriptures, but was under an obligation not to spend the money on purposes other than that purpose. Accepting that Word bears the burden of proof on the point, it tendered evidence, and that evidence, although vague, was not contradicted or undercut in cross-examination. The evidence effectively negates the Commissioner's contention that the recipients of Word's bounty were at liberty to spend it on non-charitable objects. If that factual contention were to have been established, it would have been necessary to conduct a much more detailed evidentiary inquiry before the Tribunal on the issue than in fact took place.

44 To some degree the Commissioner appeared to argue that there was no obligation on Wycliffe and the other entities to use the income transferred by Word in any particular way. That proposition cannot be accepted. They had an obligation to fulfil their purposes. In *Inland Revenue Commissioners v Helen Slater Charitable Trust Ltd*, the Court of Appeal approved the following observation of Slade J⁵⁶:

"Any charitable corporation which, acting intra vires, makes an outright transfer of money applicable for charitable purposes to any other corporation established exclusively for charitable purposes, in such manner as to pass to the transferee full title to the money, must be said, by the transfer itself, to have 'applied' such money for 'charitable purposes,' within the meaning of the two subsections, unless the transferor knows or ought to know that the money will be misapplied by the transferee."

Slade J was speaking in a particular statutory context, but the proposition is equally true of the present case. There is no evidence, nor even any suggestion, that Word knew or ought to have known that the entities to which it transferred its income would misapply it, or that they did misapply it.

45 Accordingly, the third issue must be resolved against the Commissioner.

56 [1982] Ch 49 at 60.

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Fourth issue: s 50-50(a)

46 *The courts below.* As explained above⁵⁷, the entitlement of Word to endorsement as exempt from income tax depends on compliance with s 50-50(a), namely that it be an entity which "has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia". There was no contest that Word had a physical presence in Australia, made the decisions about which entity should receive its income in Australia, and made the payments so determined in Australia. The primary judge in the Federal Court considered that s 50-50(a) did not raise any question about the charitable nature of Word. It merely "asks a physical question, a nexus question. Viewed in this light there can be no doubt that Word's nexus is exclusively with Australia. What it does, namely handing money to Wycliffe, it does in Australia."⁵⁸ In the Full Federal Court, Allsop J (Stone J concurring) found no assistance in s 23(e) of the 1936 Act or the Explanatory Memorandum in relation to amendments made to s 23(e) which now find their counterpart in s 50-50. He said⁵⁹:

"The statutory question is: How and where does Word 'pursue its objectives'? It does so by donating funds in Australia to organisations which will use those funds probably outside Australia for a charitable purpose. There is no warrant in the legislation to combine the corporate forms of Word and the donee companies ... Word's objectives are pursued in Australia by the donation of funds in accordance with its objects for evangelising religious purposes, which are charitable."

Jessup J agreed. He added that he did not see that approach as creating tax avoidance problems or as being antagonistic to the objects underlying the legislation⁶⁰.

57 At [6].

58 *Federal Commissioner of Taxation v Word Investments Ltd* (2006) 64 ATR 483 at 496 [52].

59 *Federal Commissioner of Taxation v Word Investments Ltd* (2007) 164 FCR 194 at 208-209 [56].

60 *Federal Commissioner of Taxation v Word Investments Ltd* (2007) 164 FCR 194 at 222 [100]-[101].

47 *The Commissioner's arguments.* The Commissioner contended that the religious objects which might cause Word to be characterised as a charitable institution were not effectuated by Word inside Australia, but by Wycliffe outside Australia. The Commissioner submitted that it was inconsistent for the Full Court to rely on the religious objects (only in fact pursued outside Australia) to characterise Word as a charitable institution, but to ignore the place where they were pursued in relation to s 50-50(a). Thus the Commissioner's argument on the fourth issue was essentially a back-up for the argument on the second issue. In relation to the second issue, the Commissioner argued that Word was not a charitable institution because it was wrong to attribute to it the charitable purposes of its donees like Wycliffe⁶¹. But in relation to the fourth issue the Commissioner contended that if the second issue was decided adversely because the charitable purposes of donees like Wycliffe were attributed to Word, there should be success on the fourth issue in view of the requirement that those purposes had to be pursued principally in Australia.

"In summary, Word donated its profits primarily to Wycliffe for the purpose of Wycliffe applying those profits for Wycliffe's religious evangelical objectives pursued principally outside Australia. If that purpose of Word is the purpose by reference to which Word is to be characterised as a charitable institution, Word did not meet the requirements of s 50-50(a) because that objective was pursued principally outside Australia. Section 50-50(a) should be construed in that manner to give effect to, rather than thwart, its purpose."

48 *The legislative context of s 50-50.* These submissions cast little clear light on the true construction of s 50-50(a). In deference to them, however, the following provisions must be taken into account as establishing the context in which s 50-50(a) appears.

49 The starting point is a table appearing in s 50-5 containing nine items to which later provisions refer. The relevant items in the table are⁶²:

61 See [36] above.

62 It is not necessary to examine the origins of items 1.6 and 1.7 in the table in s 50-5.

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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

50 Section 50-50 provides:

"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 30-15⁶³; 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."

63 Item 1 of the table in s 30-15 comprises: "A fund, authority or institution covered by an item in any of the tables in Subdivision 30-B", and those tables include copious lists of potential recipients, some defined generically, some identified by name.

25.

Section 50-50(a) has counterparts in ss 50-55(a), 50-60(a), 50-65(a) and 50-70(a). At the material time s 50-52(1) provided:

"(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."

51 Section 50-55 provides:

"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."

52 Section 50-57 provides:

"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."

53 At the material time s 50-60 provided:

"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

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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."

54 Section 50-75 contains provisions to aid in determining whether an institution, fund or other body incurs its expenditure or pursues its objectives principally in Australia, but they do not assist in resolving the present appeal.

55 A different set of provisions related to the powers of the Commissioner against an entity endorsed as exempt from income tax, and the duties of that entity.

56 Section 50-140(1) provided:

"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."

57 Section 50-145(1) provided:

"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."

Since the 1997 Act is a taxation law for the purposes of the *Taxation Administration Act* 1953 (Cth), failure to comply with ss 50-140(1) and 50-145(1) was an offence against s 8C of the 1953 Act. Finally, s 50-155(1) provided:

"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."

58 *The background to s 50-50.* Does the background to s 50-50 cast any light on its construction? The detailed submissions of the Commissioner have revealed the background to be as follows.

59 *Origin of items 1.1-1.4.* Section 11(d) of the *Income Tax Assessment Act* 1915 (Cth) ("the 1915 Act") provided:

"The following incomes, revenues, and funds shall be exempt from income tax: –

...

(d) the income of a religious, scientific, charitable, or public educational institution".

That is the origin of items 1.1, 1.2, 1.3 and 1.4 of the table in s 50-5. Section 11(d) was re-enacted in the *Income Tax Assessment Act* 1922 (Cth) ("the 1922 Act"), s 14(1)(d) and in the 1936 Act, s 23(e).

60 *Origin of items 1.5-1.5B.* Before 1916 there was no exemption for the income of a trust for public charitable purposes. Section 26(1) of the 1915 Act obliged the trustee to pay tax on the income of the trust, unless it was distributed to beneficiaries (s 27(2)). This state of affairs was altered by the *Income Tax Assessment Act* (No 2) 1916 (Cth). It made an amendment to s 11(f) of the 1915 Act ("the 1916 amendment"). The effect of the amendment was to exempt from income tax "the income of a fund established by any will or instrument of trust for public charitable purposes if the Commissioner is satisfied that the fund is *being applied by the trustees to public charitable purposes*" (emphasis added). That is the origin of items 1.5, 1.5A and 1.5B of the table in s 50-5. Section 11(f) as amended was substantially re-enacted in the 1922 Act, s 14(1)(f).

61 In s 23(j)(ii) of the 1936 Act, the legislature continued the exemption, but in a different form. Section 23 created an exemption from income tax for:

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

...

(ii) a fund established by will or instrument of trust for public charitable purposes". (emphasis added)

The test thus turned not on the Commissioner's satisfaction that a fund established for public charitable purposes was being applied for those purposes, but on the application in fact of the fund for the purpose for which it was established.

62 *The 1997 amendment to s 23(e).* The *Taxation Laws Amendment Act (No 4)* 1997 (Cth) amended s 23(e) of the 1936 Act by adding at the end:

"which:

- (i) has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia; or
- (ii) is an institution to which a gift by a taxpayer is an allowable deduction because the institution is referred to in a table in subsection 78(4)^[64]; or
- (iii) is a prescribed institution which is located outside Australia and is exempt from income tax in the country in which it is resident; or
- (iv) is a prescribed charitable or religious institution that has a physical presence in Australia but which incurs its expenditure and pursues it [sic] objects principally outside Australia."

63 *The Explanatory Memorandum.* The general explanation given in the Explanatory Memorandum for the amendment to s 23(e) and related amendments was⁶⁵:

"The measures will address avoidance arrangements which take advantage of the tax exempt status of charitable trusts and close off the possibility of certain organisations which also currently enjoy an income tax exemption from being used for tax avoidance purposes. Additionally, they will prevent, in particular circumstances, the transfer of revenue from Australia to a foreign country where Australia foregoes its taxing right by providing an income tax exemption for the Australian source income of an

64 Section 78(4) of the 1936 Act at that time provided that a gift by a taxpayer to a fund, authority or institution in Australia listed in 12 tables was an allowable deduction if certain conditions were met.

65 Explanatory Memorandum, *Taxation Laws Amendment Bill (No 4)* 1997 (Cth) at [5.2].

offshore organisation but the organisation is not exempt from tax on this income in its home country."

Later the Explanatory Memorandum gave a more particular explanation⁶⁶:

"Section 23 provides an exemption from income tax for income derived from sources in Australia by a range of entities irrespective of whether these entities are located in Australia or offshore or whether their activities are undertaken in Australia or offshore ...

The Government has decided to remove these exemptions for these organisations if they are located or pursue their objects offshore in order to prevent:

- certain tax avoidance arrangements which could use these organisations to shift untaxed funds overseas; and
- a transfer of revenue from Australia to a foreign country where income is exempted in Australia but not in the organisation's country of residence."

The Commissioner accepted that the second of the two points made in each of these passages was unrelated to the tax avoidance aspect of the legislation and irrelevant to the present appeal. The Commissioner did not suggest in the present appeal that Word and Wycliffe were engaged in "tax avoidance". The Explanatory Memorandum did not make it clear whether s 23(e)(i) (and hence its successor, s 50-50(a)) rested on the purpose of preventing tax avoidance or the other purpose or both.

64 The Explanatory Memorandum said of the words "in Australia"⁶⁷:

"5.28 The Bill provides that for an organisation to remain exempt it must generally have a 'physical presence' in Australia or in some cases be 'located' in Australia. These terms are not defined in the legislation and therefore take their ordinary or everyday meaning.

66 Explanatory Memorandum, Taxation Laws Amendment Bill (No 4) 1997 (Cth) at [5.24] and [5.25].

67 Explanatory Memorandum, Taxation Laws Amendment Bill (No 4) 1997 (Cth) at [5.28] and [5.29].

5.29 In the case of 'physical presence' a broad interpretation is to be adopted – all that is required is for an organisation to operate through a division, sub-division or the like in Australia. The structure of the organisation is immaterial as is whether it has its central management and control or principal place of residence in Australia. On the other hand, the term would not apply where an organisation merely operates through an agent based in Australia."

The Explanatory Memorandum also said⁶⁸:

"5.36 An organisation which falls within paragraphs 23(e), 23(ea) or 23(g) which has a physical presence in Australia but which does not incur its expenditure and pursue its objectives principally in Australia will only remain eligible for the exemption from income tax if the organisation falls within section 78 (see paragraph 5.8).

5.37 An organisation which falls within the above paragraphs but which is located offshore can only be exempt from Australian tax on its Australian source income if it is exempt from income tax in the country in which it is located and is specifically prescribed by the Income Tax Regulations to be exempt.

5.38 In the case of a charitable or religious institution which falls within paragraph 23(e), and which has a physical presence in Australia it will also be possible to gain an exemption by being specifically prescribed in the Regulations.

5.39 These conditions recognise that there may be some organisations that fall within section 78 although they undertake activities offshore. It will also allow the Government to grant income tax exemptions, on a case by case basis, to paragraph 23(e), 23(ea) or 23(g) organisations located offshore or paragraph 23(e) charitable or religious institutions with a physical presence in Australia but which pursue their objectives offshore.

5.40 This regulation making process will allow Parliament the opportunity to fully scrutinise the organisation to determine whether it should receive the benefit of the exemption."

⁶⁸ Explanatory Memorandum, Taxation Laws Amendment Bill (No 4) 1997 (Cth) at [5.36]-[5.40].

65 *The 1997 position.* The 1997 Act was enacted as Act No 38 of 1997. When originally enacted, it did not contain Pt 2-15, Div 50, which contains sections of importance for the present appeal⁶⁹. The 1997 Act in that form came into force on 1 July 1997. On the same day Sched 1 to the *Tax Law Improvement Act* 1997 (Cth), which was Act No 121 of 1997, came into force: see s 2(2) of that Act. It contained in Pt 2-15, Div 50, the precursor to the present s 50-5, but did not contain s 50-50.

66 *The 1998 changes.* Then the *Taxation Laws Amendment Act (No 3)* 1998 (Cth) was enacted. The changes it made to Pt 2-15, Div 50, apart from amending the sections introduced by the *Tax Law Improvement Act* 1997, included introducing s 50-50 in substantially its present form. (The only difference is that in 1998 s 50-50(b) referred to "Subdivision 30-B", not s 30-15.) Another change was to introduce s 50-60 in substantially its present form.

67 When the amendments to the 1997 Act effected by the *Taxation Laws Amendment Act (No 3)* 1998 came into force the four additional sub-paragraphs at the end of par 23(e) of the 1936 Act introduced in 1997 appeared in s 50-50 as follows. Paragraph 23(e)(i) became s 50-50(a). Paragraph 23(e)(iii) became s 50-50(c). Paragraph 23(e)(iv) became s 50-50(d), save that the words "charitable or religious" were deleted. The provision corresponding to par 23(e)(ii), namely s 50-50(b), was: "is an institution which is referred to in a table in Subdivision 30-B". Paragraph 23(e)(ii) and s 50-50(b) had a similar effect, in that each required the relevant entity to have what the Commissioner called "tax deductible gift recipient status".

68 *The Explanatory Memorandum relating to s 50-50.* The Explanatory Memorandum relating to s 50-50 was originally directed to the Taxation Laws Amendment Bill (No 7) 1997. It stated that it was now necessary to amend the 1997 Act "to 'catch up' the amendments made" by the *Taxation Laws Amendment Act (No 4)* 1997 to the 1936 Act⁷⁰. It said, speaking of what became s 50-50(a)⁷¹:

69 Such as ss 50-5, 50-50, 50-60, 50-105, 50-110, 50-115, 50-140, 50-145 and 50-155.

70 Explanatory Memorandum, Taxation Laws Amendment Bill (No 7) 1997 (Cth) at [3.6].

71 Explanatory Memorandum, Taxation Laws Amendment Bill (No 7) 1997 (Cth) at [3.11] and [3.12].

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"The basic rule now provides that for an organisation to be exempt from income tax it must generally have a 'physical presence' in Australia or in some cases be 'located' in Australia. These terms are not defined in the legislation and therefore take their ordinary or everyday meaning.

In the case of 'physical presence' a broad interpretation has been adopted – all that is required is for an organisation to operate through a division, sub-division or the like in Australia. The structure of the organisation is immaterial as it is whether it has its central management and control or principal place of residence in Australia. On the other hand, the term does not apply where an organisation merely operates through an agent based in Australia."

It also said⁷²:

"An institution ... generally only has to pursue its objects '*principally*' in Australia. This term is also not defined in the legislation. The dictionary meaning of the word 'principally' is mainly or chiefly. Accordingly, it is not possible to specify a particular percentage but less than 50% would not be considered to meet the 'principally' requirement. Where there is some doubt whether this requirement is satisfied it will be necessary to examine each institution's individual circumstances."

69 *The 1999 changes.* Then an Act called A New Tax System (Tax Administration) Act 1999 (Cth) was enacted. Schedule 8, which came into force on 22 December 1999, introduced ss 50-105, 50-110, 50-120, 50-140, 50-145 and 50-155.

70 *Section 50-50 contrasted with ss 50-57, 50-60 and 50-65.* The Explanatory Memorandum did not explain why, in s 50-60 (and ss 50-57 and 50-65), there was a requirement that the fund claimed to be exempt was "applied for the purposes for which it was established", while there was no equivalent requirement in s 50-50⁷³. The distinction has long existed in the precursors to the

72 Explanatory Memorandum, Taxation Laws Amendment Bill (No 7) 1997 (Cth) at [3.14].

73 This has occasioned surprise: O'Connell, "The tax position of charities in Australia – why does it have to be so complicated?" (2008) 37 *Australian Tax Review* 17 at 23-24.

modern legislation⁷⁴. As the Commissioner submitted in this appeal, the reason appears to lie in the difference between a "charitable institution", to which s 50-50 applies, and a "fund", or "trust", to which ss 50-57, 50-60 and 50-65 applies. Whether an entity is a "charitable institution" depends in part on its purposes and in part on its activities so far as they carry out those purposes; if its activities involve ceasing to apply its assets to the purposes for which it was established, it ceases to be a charitable institution. In s 50-50 it was thus not necessary to provide in terms that the assets of a charitable institution be "applied for the purposes for which it was established". On the other hand, s 50-60 applies to item 1.5A in the table in s 50-5 (a "trust covered by paragraph 50-80(1)(c)") and to item 1.5B (a "fund established in Australia for public charitable purposes by will or instrument of trust (and not covered by item 1.5 or 1.5A)"). And s 50-57 applies to item 1.5 (a "fund established for public charitable purposes by will before 1 July 1997"). Further, s 50-65 applies to item 1.6 (a "fund established to enable scientific research to be conducted by or in conjunction with a public university or public hospital"). In context the expression "fund" means a fund held by a trustee for charitable purposes. The trust covered by s 50-60, and the funds covered by ss 50-57, 50-60 and 50-65, continue to have their status as a trust or a fund even if the trustees are acting in breach of trust and not applying the assets to the relevant trust or fund purposes. Hence it was necessary to do in relation to ss 50-57, 50-60 and 50-65 what it was not necessary to do in relation to s 50-50, namely make express provision for loss of tax exemption where the trust or fund was not applied for the purposes for which it was established⁷⁵. As Word submitted, the difference in drafting flows from the fact that ss 50-57, 50-60 and 50-65 (unlike s 50-50) speak of funds or trusts which were "established" for certain purposes, and the legislation requires not merely that they be established at the outset for those purposes, but also that their assets be applied for those purposes from time to time thereafter. The difference between the two categories of provision casts no other light on the meaning of "charitable institution".

74 The requirement appeared in s 11(f) of the 1915 Act after the 1916 amendment, in s 14(1)(f) of the 1922 Act and in s 23(j) of the 1936 Act, but not in s 11(d) of the 1915 Act, s 14(1)(d) of the 1922 Act or s 23(e) of the 1936 Act.

75 Cf Windeyer J (dissenting) in *Stratton v Simpson* (1970) 125 CLR 138 at 144. He said that a trust for charitable purposes "is commonly called a charitable institution". At 145 he said: "I can see no reason why, unrestrained by context, a fund raised by public contributions and administered by trustees could not be properly called an institution." The contrast between s 50-50, on the one hand, and ss 50-57, 50-60 and 50-65, on the other, creates a restraining contrary context.

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71 *Difficulty of monitoring funds?* It is convenient at this point to turn to a central submission by the Commissioner. The Commissioner argued:

"The revenue would face great difficulty in monitoring the use of funds generated by a body in Australia if s 50-50(a) was satisfied by the payment over of funds in Australia to organisations which pursued their objectives outside of Australia. The identification of the objectives referred to in s 50-50(a) which must be pursued in Australia with the charitable objectives which result in the entity being characterised as a charitable institution provides a means by which the clear purpose of s 50-50(a) may be achieved."

The Commissioner also said that the legislation was based on a:

"concern ... that an organisation in Australia that distributed its income to another organisation which appeared to be a charity but conducted its operations overseas, when that money went overseas, could be used for any purpose without the Commissioner being able to ascertain whether it was being used for charitable purposes."

The Commissioner submitted that the legislation had set up:

"a system by which, if the charitable objectives were being pursued overseas, the body had to be a prescribed body by the Act and the Commissioner could then vet all the steps by which the overseas objectives were being achieved. But if it was not a prescribed body, the charitable objectives that would give it its charitable status had to be pursued principally within Australia."

72 The Commissioner's contention that the revenue authorities would have great difficulty in monitoring the use of funds generated by a body in Australia and given to another body active overseas is exaggerated. It is exaggerated because, if s 50-50(a) has an anti-avoidance purpose, this may be because the requirement it imposes makes it easier for the Commissioner to monitor organisations entitled to the exemption by using the information gathering powers backed by a criminal sanction which s 50-140(1)⁷⁶ conferred and by using the power to revoke endorsement given by s 50-155(1)(b)⁷⁷. The

76 See now *Taxation Administration Act* 1953, Sch 1, s 426-40(1).

77 See now *Taxation Administration Act* 1953, Sch 1, s 426-55(1)(b).

Commissioner's contention is also exaggerated in the light of s 50-145⁷⁸. If the Commissioner had reason to suspect that funds given by Word to Wycliffe were not being expended on charitable objects, this may attract the exercise of the power to request from Word the information and documents it had relevant to the subject. They could be relevant to Word's entitlement to be endorsed as income tax exempt, because if Word were giving funds to Wycliffe knowing that they would not be expended on charitable objects, it could not be described as a charitable institution. The same would be true if there were doubts whether Wycliffe was expending the funds on charitable objects. Word would be obliged to comply with the Commissioner's request, on pain of criminal sanctions and loss of endorsement. If Word's response to the request revealed, whether positively or by silence, that it knew that the funds were not being applied for charitable purposes, it would have ceased to be entitled to be endorsed and obliged by s 50-145(1) to give the Commissioner notice of that cessation. The same would be true if Word's response revealed that it was indifferent or careless about whether the funds were being applied for charitable purposes.

73

The intractable language. The difficulty with the balance of the Commissioner's submissions is that, once it is concluded, as it was above⁷⁹, that Word's sole purposes are charitable, and that they can be fulfilled by making payments to other institutions which have charitable purposes (as sub-cl 3(a)(iii) of the memorandum provides), s 50-50(a) does not contain language apt to deny Word exemption from income tax. That conclusion is not affected either by the context in which s 50-50(a) appears or by the history of the legislation since 1916. Section 50-50(a) requires Word to have a physical presence in Australia. This it has. Indeed it has no physical presence anywhere else. Section 50-50(a) also requires that, to that extent, Word incur its expenditure and pursue its objectives principally in Australia. That it did. The decisions to pay were made in Australia, the payments were made in Australia, the payments were made to Australian organisations, and the objects of Word included giving financial assistance to those organisations. The incurring of the expenditure and the pursuit of Word's objectives in this way took place nowhere but in Australia. Section 50-50(a) does not impose a prohibition on distributing to other charitable institutions. Nor does it require the money, when ultimately expended by Wycliffe and the other institutions, to be expended in Australia. Section 50-50(a) could have imposed a requirement of that latter kind, but it did not. It only imposed a requirement that Word incur its expenditure and pursue its objectives

⁷⁸ See now *Taxation Administration Act* 1953, Sch 1, s 426-45.

⁷⁹ See above at [19].

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principally in Australia – not that Wycliffe and the other institutions do so. No doubt the ultimate benefit to charity which Word causes is effected by Wycliffe indirectly and to some extent outside Australia, not directly and in Australia: but s 50-50(a) draws no distinction between direct and indirect effects.

74 There are admittedly, difficulties with s 50-50(a). Do the words "to that extent" govern "physical presence"? Or do they govern the incurring of expenditure and the pursuit of "objectives principally in Australia"? These difficulties do not arise in the present appeal. While in some instances the words "to that extent" may cause difficulty, the incurring by Word of expenditures and the pursuit of its objectives are acts not only done to the extent of its physical presence in Australia, but to any extent at all. The requirement of s 50-50(a) that Word have a physical presence in Australia, as it did, and incur its expenditure and pursue its objectives principally in Australia, as it did, carries the consequence that Word was completely open to scrutiny by the Australian authorities under s 50-140(1), was subject to the duty created by s 50-145(1), and was subject to the risk of revocation described in s 50-155.

Orders

75 The appeal must be dismissed with costs.

- 76 KIRBY J. The law on charitable institutions is "difficult", "very artificial", noted for its "illogicalities"⁸⁰ and "full ... of anomalies"⁸¹. In it, "many fine distinctions have been made"⁸². Knowledgeable judges have admitted that⁸³:

"All those who practise in this branch of the law know how infinite is the variety of the decided cases, how extreme sometimes are the refinements, and how apparent on occasions the contradictions which those cases demonstrate".

- 77 Where Australian legislatures have enacted relevant provisions, decision-makers must give effect to the will of the legislature as expressed in the language adopted, understood in light of the text, context, purpose and history. This Court, with substantial unanimity, has insisted on this approach⁸⁴. Decision-makers must not cling inconsistently to judicial observations in decisional law that do not reflect the enacted law. To some extent, the notion of what is a "charitable institution" or what are "charitable purposes" has been treated as standing apart from the requirement mentioned above⁸⁵. My own attempt to drag this body of law into the twenty-first century, in conformity with modernity and the applicable general principles, came to nothing⁸⁶.

80 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 at 307 per Lord Simonds.

81 *In re Strakosch, decd* [1949] Ch 529 at 536 per Lord Greene MR, delivering the reasons for decision of the Court.

82 *Internal Revenue Commissioners v Baddeley* [1955] AC 572 at 583 per Viscount Simonds.

83 *In re Endacott, decd* [1960] Ch 232 at 242 per Lord Evershed MR. These laments are collected by Professor G E Dal Pont in an unpublished paper, "Determining the 'Purpose'", delivered to the Queensland University of Technology on 11 July 2005.

84 Recent cases are collected in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue (Vic)* (2006) 228 CLR 168 at 198 [84] fn 86; [2006] HCA 43.

85 *Central Bayside* (2006) 228 CLR 168 at 195-201 [76]-[92].

86 *Central Bayside* (2006) 228 CLR 168 at 186 [45]. See also *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362; [1923] HCA 24; reversed in (1925) 37 CLR 317 (PC). That case is noted in *Central Bayside* (2006) 228 CLR 168 at 204-205 [104]-[109].

78 No fresh judicial heroism was called for in this case. Both parties agreed that, generally, the taxation legislation in issue here was written against the background of the Statute of Elizabeth⁸⁷, the decision of the Privy Council in *Commissioners for Special Purposes of the Income Tax v Pemsel*⁸⁸ and judicial decisions in the United Kingdom, Australia and other countries that have followed that line of authority.

79 The parties agreed that where specific legislation had been enacted, effect had to be given to it. Nevertheless, to resolve the present appeal, the general notion of what is a "charitable institution" and what are "charitable purposes" (so expressed for tax exemption purposes by the applicable taxation statute, the *Income Tax Assessment Act 1997* (Cth) ("the 1997 Act")) are to be determined by reference to the "technical meaning" of those expressions.

80 The issues in this appeal arise out of a judgment of the Full Court of the Federal Court of Australia⁸⁹. That Court, in turn, affirmed the decision of the primary judge⁹⁰. These decision-makers uniformly upheld the challenge by Word Investments Ltd ("Word") to the decision of the Commissioner of Taxation ("the Commissioner") rejecting Word's claim to be endorsed as an exempt "charitable institution" for income tax purposes.

81 In my opinion, the decisions below erred in so concluding. The Commissioner is entitled to succeed. This Court should allow the appeal and restore the Commissioner's decision to refuse to endorse Word as an exempt charity.

The facts

82 *An investment and funeral business:* Many of the facts necessary for the resolution of the appeal are contained in the reasons of Gummow, Hayne, Heydon and Crennan JJ ("the joint reasons")⁹¹. I shall use the same abbreviations as are adopted there.

87 43 Eliz I c 4 (*Charitable Uses Act* 1601).

88 [1891] AC 531 at 581-582.

89 *Federal Commissioner of Taxation v Word Investments Ltd* (2007) 164 FCR 194 per Stone, Allsop and Jessup JJ.

90 *Federal Commissioner of Taxation v Word Investments Ltd* (2006) 64 ATR 483 per Sundberg J, affirming in part and reversing in part the decision of the Administrative Appeals Tribunal: *Re Applicant and Federal Commissioner of Taxation* (2005) 60 ATR 1265.

91 Joint reasons at [2]-[7].

83 Word engaged in investment and commercial business activities, albeit for the purpose of raising funds to be distributed to charitable bodies, including the missionary organisation Wycliffe Bible Translators Australia ("Wycliffe"), associated with Wycliffe Bible Translators (International) ("Wycliffe International")⁹². Word's activities included, relevantly, the receipt of deposits from members of the public, a high minimum proportion of which were to be available for distribution by Word to recipients such as Wycliffe and Wycliffe International.

84 Word's memorandum and articles of association stated that Word existed for the purpose of providing financial planning advice and a sound investment vehicle by which interest earned could be used to further the work of Bible translation and other Christian works throughout the world. The memorandum also stated that Word was the financial support company for Wycliffe.

85 After 1996, Word began operating a funeral business, Bethel Funerals. That business operated according to ordinary commercial principles. It extended its facilities to non-Christians. It adopted a principle that "business practices will be conducted with the highest moral and ethical codes and will have decidedly Christian Principles applied in all its activities". Pricing was to include a "margin of profit which will establish Bethel Funerals as an organisation capable of financing projects for the Lord's work". In dealing with financial matters, the Bethel Funerals philosophy statements declared:

"[T]he business will be run as a professional funeral business and may expand into any allied aspects of the funeral business, such as coffin manufacturing, cemetery management or ownership, chapel ownership etc. The business may expand to other Australian States or overseas."

86 *The business' purposes:* The evidence established that the purpose of Word was to raise moneys to permit payments by it to various Christian organisations, principally Wycliffe, for international missionary purposes. The ultimate purpose of such payments was to "ensure the translation of certain Christian Scriptures". As Word knew, Wycliffe had adopted a number of special projects that were principally undertaken in overseas countries, including the Philippines and Papua New Guinea. According to a statement by Mr Ross Wilkerson, a director of Word and Wycliffe, Word's object was to support Wycliffe's missionaries:

92 See *Federal Commissioner of Taxation v Word Investments Ltd* (2007) 164 FCR 194 at 210-211 [68] per Jessup J.

"in third world countries around the world (generally countries that have previously had no written languages). Some missionaries are doing Bible translation and some are doing literacy work, such as teaching literacy skills. Missionaries move to the countries and learn the language, and then translate the Bible into that language and undertake literacy work. They may be in a country for 15 years or so.

Once a translation of the Bible is complete, publication is normally funded by other organisations such as the Bible Society. ...

Wycliffe also has special projects – for example, a current project is to support indigenous people in Papua New Guinea ('PNG') to learn the skills to do Bible translation and literacy work in PNG. Other projects could be buying equipment (such as computers) to support Bible translation and literacy work in another country, and sometimes Wycliffe may fund the publication of a translation of the Bible.

Wycliffe has a branch working in Darwin and Alice Springs working with Australian aborigines. I understand that this branch is now less active than it was previously."

87 Whilst the object of Word included making payments to enumerated religious causes, principally Wycliffe, Word itself was not engaged in Bible translation, Bible production, Bible instruction or other similar activities. In effect, Word raised the money by collecting interest on its investments and through its commercial funeral business. That money would then be disbursed through Wycliffe to Wycliffe International and through other missionary or religious bodies to perform the charitable and religious activities.

88 This characterisation of the activities of Word is made clear by the evidence of Mr Wilkerson, which was accepted by the Administrative Appeals Tribunal ("AAT"):

"[The report to investors for 30 June 1997] refers to a situation in the Philippines and some work carried out in the Philippines. Do you see that? --- About the – yes, I do, yes.

This is Wycliffe's work? --- That is correct, yes. And it was giving that example as ---

Yes, and if you turn to the report to investors for 30 June '98, the box on the second page headed: Humble service multiplies in God's hands. Again, this is referring to work undertaken by Wycliffe? --- Correct.

And also to the report to investors for the year ended 30 June 1999, and the box on the second page headed: Trembling on the altar, an extract

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from an interview with Grace Flavian, again that was work carried out by Wycliffe? --- Correct.

Word itself does not send missionaries overseas? --- No.

Also it does not train pastors? --- No.

Also Word itself does not publish scriptures? --- No.

Word itself also does not preach the Gospel? --- No. Only through its directors if they have opportunity, I guess, yes.

Thank you. The money that is donated to Wycliffe and other organisations, it is up to Wycliffe and those other organisations to determine how best to use that money? --- Yes."

89 *Factual decisions below:* The AAT summarised its conclusion on the evidence concerning the activities of Word up to 2002⁹³:

"Between 1986 or 1987 and 1996, the sole activity of [Word] was the generation of income from interest earned on deposits from individuals seeking to support ... fundraising activities. ...

However, the commencement of the funeral business in 1996 was a significant change in its operations and objectives. While it may be said that an underlying purpose of that business was the generation of profits for the ultimate benefit of a religious institution, it is difficult to consider a commercial funeral business as having an objective of the advancement of religion. ... It is likely that the advisers to [Word] came to a similar view after seeking endorsement thus leading to the transfer of the business to a trust from 1 July 2002. While it is accepted that management and staff of the funeral business were all committed Christians, the business was a commercial operation for the purpose of making a commercial profit. As such, I do not accept that [Word] was itself a charitable institution whilst operating that business."

90 The AAT went on to conclude that, under Item 1.1 of s 50-5 of the 1997 Act⁹⁴, Word was nevertheless entitled to be endorsed as exempt from tax as a "charitable institution" following the change that it adopted in 2002. On appeal, the primary judge in the Federal Court rejected the AAT's conclusion that Word

93 *Re Applicant and Federal Commissioner of Taxation* (2005) 60 ATR 1265 at 1269-1270 [10]-[11].

94 (2005) 60 ATR 1265 at 1270 [17].

was not a "charitable institution" before the 2002 change whilst operating its investment and commercial funeral business⁹⁵. The primary judge's conclusion was affirmed by the Full Court⁹⁶.

91 Essentially, the Commissioner urged this Court to characterise Word in the same way as the AAT, namely as an investment and commercial funeral business, notwithstanding the subventions to Wycliffe and other beneficiaries that Word had made from its income. Those beneficiaries were themselves charitable or religious institutions. Ultimately, the question is whether Word, performing what are undoubtedly commercial business activities, could itself qualify as a "charitable institution" with religious purposes and thus be exempt from paying income tax. The answer to that question is to be found in the 1997 Act, read in the way described.

The legislation

92 As the joint reasons explain⁹⁷, the applicable provisions of the 1997 Act are to be found in Div 50 of Pt 2-15. These provisions govern Word's claim to be exempt from the liability that would otherwise attach to it in respect of its income as an investment and commercial funeral business organisation.

93 Word claims to be a "charitable institution". Such an institution is defined as an "entity" by Item 1.1 of the table set out in s 50-5 of the Act. An "entity" is not exempt unless "endorsed", as such, by the Commissioner under subdiv 50-B. The joint reasons explain the way in which the Commissioner is obliged to consider applications for endorsement (twice made unsuccessfully by Word)⁹⁸. It is unnecessary for me to repeat this material.

94 Similarly, the joint reasons explain the particular requirement of s 50-110(5)(a) of the 1997 Act that Word satisfy the "Special conditions" mentioned in Item 1.1 of the table. One of the "Special conditions", required by s 50-50(a), is that the "entity" has:

"a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia".

95 (2006) 64 ATR 483 at 497 [61].

96 (2007) 164 FCR 194 at 196 [1], 209 [65], 223 [107].

97 Joint reasons at [6].

98 Joint reasons at [7].

95 Failure to conform to this condition would mean that Word would not fulfil a necessary requirement of the 1997 Act. It could not, therefore, be an exempt "charitable institution" under Item 1.1 of the table in s 50-5. Accordingly, that "Special condition" was a threshold statutory requirement for Word. Failure to satisfy that requirement would make redundant all other issues in this appeal as litigated. The other anterior questions as to whether, according to the general law, Word qualifies as a "charitable institution" only arise if that "Special condition" is satisfied.

96 This appeal thus presents both a *special* and a *general* statutory question. The *special* question is the applicability of the "Special conditions" identified. The *general* question involves the other arguments raised by the Commissioner against Word's entitlement to be recognised as a charitable or religious institution. Logically, it is appropriate to deal first with the relevant "Special condition". If it cannot be satisfied, everything else said in this appeal constitutes *obiter dicta*.

97 The joint reasons explain in some detail the propounded "Special condition" (described as the "fourth issue")⁹⁹. Specifically, they describe the requirements in s 50-50 of the 1997 Act¹⁰⁰; the legislative context of that provision¹⁰¹; various counterparts for s 50-55(a) elsewhere in the Act¹⁰²; and the powers of the Commissioner to seek information from an entity claiming to be entitled to an endorsement as exempt from income tax and the entity's corresponding obligation to comply with such a request¹⁰³. The joint reasons also describe the earlier provisions of federal income tax law that provided for exemption from income tax of the income of charitable and religious institutions¹⁰⁴. They outline the way the particular language of what is now s 50-50(a) of the 1997 Act came into the *Income Tax Assessment Act 1936* (Cth) ("the 1936 Act") as s 23(e)¹⁰⁵. They set out extracts from the Explanatory

99 Joint reasons at [46].

100 Joint reasons at [50].

101 The table in the 1997 Act, s 50-5. See joint reasons at [49].

102 1997 Act, ss 50-55(a), 50-60(a), 50-65(a), 50-70(a). Joint reasons at [50].

103 1997 Act, s 50-140(1). See joint reasons at [55]-[57].

104 Notably *Income Tax Assessment Act 1915* (Cth), s 11(d); *Income Tax Assessment Act 1922* (Cth), s 14(1)(d); *Income Tax Assessment Act 1936* (Cth), s 23(e); and provisions for exemption of the income of a trust for charitable purposes. See joint reasons at [58]-[61].

105 Joint reasons at [62].

Memorandum that was furnished with the applicable Bill¹⁰⁶. Finally, the joint reasons describe the way in which the requirement now appearing in s 50-50 was inserted in the 1997 Act and outline the relevant Explanatory Memorandum¹⁰⁷. I accept, without repeating, this description of the background. I can now deal with what I regard as the first (and ultimately decisive) issue in the appeal, namely that presented by s 50-50(a) of the 1997 Act. I will then deal with the other issues argued in case my conclusion on the first issue is wrong.

98 It is useful at the outset to set out some general propositions concerned with the approach to be taken to the legal issues in dispute; to collect some of the legal principles that the case raises; and to identify certain considerations of legal policy that need to be considered in deciding all of the applicable issues.

Legal principle and policy

99 *Appellate requirement of error:* The appeal comes to this Court under the Constitution¹⁰⁸. This Court is a court of error. The Commissioner must establish error in the reasons of the court below if this Court is to be authorised to set aside the judicial orders earlier made. Absent established error, it is not the function of this Court simply to decide the matter for itself or to substitute its conclusion on the facts for that reached by the decision-makers below.

100 In the reasons both of the primary judge and the Full Court of the Federal Court, there was a high degree of unanimity on the application of the 1997 Act to the special and general questions raised in the Commissioner's submissions. Although the AAT partly accepted the Commissioner's submissions on the general questions, its conclusion that Word was "not ... itself a charitable institution whilst operating [its] business"¹⁰⁹ was the Commissioner's only victory so far in this protracted litigation.

101 The fact that experienced judges have concluded against the Commissioner's submissions is a reason to pause before deciding that error has occurred and giving effect to a contrary conclusion. However, after a grant of special leave, this Court must consider whether error has been shown and, if so, it must identify and correct that error.

106 Joint reasons at [63]-[64].

107 Joint reasons at [65]-[68].

108 Constitution, s 73(ii).

109 *Re Applicant and Federal Commissioner of Taxation* (2005) 60 ATR 1265 at 1270 [11].

102 *Special and general statutory provisions:* As the statutory materials set out in the joint reasons demonstrate, the 1997 Act incorporates both special and general requirements. These are what must be fulfilled for an Australian entity, otherwise in receipt of taxable income, to be exempt from income tax as a charitable or religious institution. The special provisions are found in the comparatively new and additional requirements now appearing in s 50-50(a) of the 1997 Act.

103 The general provisions arise in the appeal because of the use in the 1997 Act (as earlier in the 1936 Act and indeed the original federal income tax statutes) of concepts such as "charitable purposes", "charitable institution" and "religious institution". These concepts are taken to be derived, through *Pemsel* and other decisions, from the Statute of Elizabeth which gave rise to a "technical" meaning of these phrases. It is common ground that those phrases pick up and apply judicial elaborations of such expressions as found in legislation and other similar legal texts in Australia, the United Kingdom and other countries of the same legal tradition.

104 Section 50-50(a) is a disqualifying provision. "[C]haritable institution" (Item 1.1) and "religious institution" (Item 1.2) are set out in the table to s 50-5 of the 1997 Act. Section 50-50(a) makes it clear that such institutions, even if otherwise satisfying all of the requirements of the Act and of the common law that preceded it, will nonetheless *not* be exempt from income tax if the stated preconditions are not met. The applicable precondition here is that the entity concerned has, at the relevant time, "a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia".

105 Consequently, I will deal first with what the joint reasons describe as the "fourth issue"¹¹⁰. It affords the speediest and most direct route to an outcome favourable to the Commissioner, if his argument on s 50-50(a) succeeds.

106 *Taxpayers' burden of persuasion:* The 1997 Act, like the 1936 Act and others before it, imposes an obligation upon Australian taxpayers to pay income tax on income received during the taxation year. In the circumstances of this case it follows that the burden of persuasion is on Word to establish that it fell within an exemption provided for charitable or religious institutions.

107 In Canada, it has been held that exemption provisions are subject to a "strict construction" in statutes that otherwise impose an obligation to pay a generally applicable tax¹¹¹. This approach may not now generally accord with

110 Joint reasons at [46]-[74].

111 *Kennebecasis Valley Recreational Centre Inc v Minister of Municipal Affairs of New Brunswick* (1975) 61 DLR (3d) 364 at 371.

the Australian approach to the construction of taxing statutes¹¹². However, it remains the fact that Word is attempting to secure for itself a special privilege provided by a statutory exemption of charitable and religious institutions from the general liability to pay tax upon income.

108 Throughout this litigation, it was therefore Word that bore at least the forensic obligation to bring itself within the exempting provisions of the 1997 Act. Word did not contest that burden. It is enough to say that, in approaching any questions of uncertainty in the facts or the governing law, it is Word that is looking for favours under the Act. Certainly, it received income from its investment and commercial funeral business activities. *Prima facie* such income was taxable. Word must establish any exemption.

109 *Importance of income tax:* The first income tax statute in Australia was enacted in Tasmania in 1880 with a withholding tax on dividends, annuities and rents¹¹³, followed by a general income tax statute in South Australia in 1884¹¹⁴. By 1907, all of the States had similarly introduced income tax, whilst the first federal income tax was introduced in 1915¹¹⁵. Since then, the demands upon and activities of the federal government have expanded greatly, with consequent demands on the revenue of the Commonwealth. As Gummow, Hayne and Crennan JJ observed in *White v Director of Military Prosecutions*¹¹⁶, a "modern regulatory state arrived after 1900 and did so with several pertinent consequences". One such consequence was a significant increase in the need for revenue to support the expanding activities of the government of the Commonwealth. Those activities are performed for all people in Australia –

112 The classic approach was for taxation exemption provisions to be construed in favour of the entity claiming the exemption. See *Burt v Commissioner of Taxation* (1912) 15 CLR 469 at 482 per Barton J, 487 per Higgins J; [1912] HCA 74; *Armtyage v Wilkinson* (1878) 3 App Cas 355 at 369-370. More recent authorities have adopted a range of approaches to construction. See *State Transport Authority v Corporation of the City of Adelaide* (1980) 24 SASR 481 at 484 per Wells J; cf *Diethelm Manufacturing Pty Ltd v Commissioner of Taxation* (1993) 44 FCR 450 at 457 per French J. See generally Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 305-306 [9.44].

113 *Real and Personal Estates Duties Act* 1880 (Tas), s 3.

114 *Taxation Act* 1884 (SA), s 9.

115 *Income Tax Assessment Act* 1915 (Cth). See Vann, "Part One: General Description – Australia", in Ault and Arnold, *Comparative Income Taxation: A Structural Analysis*, 2nd ed (2004) 3 at 3.

116 (2007) 231 CLR 570 at 595 [48]; cf at 637-638 [189]-[193]; [2007] HCA 29.

citizen and non-citizen, natural and legal persons, those who are religious and those who are non-religious.

110 Charitable and religious institutions contribute to society in various ways. However, such institutions sometimes perform functions that are offensive to the beliefs, values and consciences of other taxpayers. This is especially so in the case of charitable institutions with religious purposes or religious institutions. These institutions can undertake activities that are offensive to many taxpayers who subscribe to different religious beliefs or who have no religious beliefs. Although the Parliament may provide specific exemptions, as a generally applicable principle it is important to spare general taxpayers from the obligation to pay income tax effectively to support or underwrite the activities of religious (and also political) organisations with which they disagree. This states a reason of constitutional principle for ensuring that any exemption of a "charitable institution" with religious purposes or any specific "religious institution" does not extend beyond an exemption that is clearly provided by law.

111 Any ambiguity as to the ambit of an exemption for such an institution should therefore be construed against the claimed exemption and in favour of liability of that body to pay otherwise generally applicable tax obligations. As Lord Simonds remarked in *Oppenheim v Tobacco Securities Trust Co Ltd*¹¹⁷, "[i]t must not, I think, be forgotten that charitable institutions enjoy rare and increasing privileges, and that the claim to come within that privileged class should be clearly established."

112 *Constitutional secularism:* In the Australian context, the foregoing considerations are reinforced by the language of s 116 of the Constitution. Although, to the present time, this Court has interpreted that provision narrowly¹¹⁸, it is not devoid of meaning or purpose. In several respects it follows the language of the First Amendment to the Constitution of the United States. That Amendment has been interpreted broadly to uphold a separation between religion and the constitutional polity¹¹⁹. Section 116 was obviously included in our Constitution for a similar general purpose. And apart from the section, for clear historical reasons, the secular character of the Commonwealth and its laws

117 [1951] AC 297 at 307.

118 See eg *Krygger v Williams* (1912) 15 CLR 366 at 369; [1912] HCA 65; *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 130-131; [1943] HCA 12; *Attorney-General (Vict) v Ex rel Black v The Commonwealth* ("the *DOGS Case*") (1981) 146 CLR 559 at 579, 604, 612, 653; [1981] HCA 2.

119 See *DOGS Case* (1981) 146 CLR 559 at 614 per Mason J; cf at 610 per Stephen J.

and the separation of the governmental and religious domains constitute settled features of constitutionalism in this country.

113 The decision of this Court in *Combet v The Commonwealth*¹²⁰ considered an analogous requirement for citizens, by their taxation, effectively to support widespread governmental political advertising of opinions with which many citizens might have disagreed. In my reasons in *Combet*, I referred to the opinion of Souter J in the Supreme Court of the United States in *Johanns v Livestock Marketing Association*¹²¹. His Honour there quoted, and applied, Thomas Jefferson's 1779 statement that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves ... is sinful and tyrannical"¹²². Yet exempting charitable and religious institutions from income tax may effectively have the same consequence. Such institutions are the beneficiaries of public services like everyone else. However, unlike everyone else, they are excused from contributing to income tax, the universal liability to which has been such a long-established feature of the general economic success of the Australian Commonwealth.

114 No constitutional objection to the exemption of charitable and religious institutions from income tax was raised in this appeal. However, Word's claim to the statutory exemption falls to be determined in a society, and a system of law, that generally upholds secular government and maintains a divorce between personal religious beliefs and governmental favours.

115 A taxation exemption for religious institutions, so far as it applies, inevitably affords effective economic support from the Consolidated Revenue Fund to particular religious beliefs and activities of some individuals. This is effectively paid for by others. It involves a cross-transference of economic support. The courts must recognise that this is deeply offensive to many non-believers, to people of different faiths and even to some people of different religious denominations who generally share the same faith. As the provision of public economic support can obviously favour particular religions, courts are guardians of neutrality. Courts thus act properly when they approach claims to statutory exemption from the payment of income tax of such charitable and religious institutions with a degree of strictness. Certainly, courts should do this where the relevant income is derived from investment and commercial business

120 (2005) 224 CLR 494; [2005] HCA 61.

121 544 US 550 (2005). See (2005) 224 CLR 494 at 584 [186].

122 544 US 550 at 572 (2005). See also *United States v United Foods Inc* 533 US 405 at 411 (2001).

activities and is to be devoted specifically to proselytising activities, such as translation and distribution of the religious texts of a particular religion.

116 On the face of things, charitable and religious institutions should share with other Australian taxpayers the liability to pay income tax upon their income. Exemption needs to be clearly demonstrated as conformable to law. Any ambiguity should be construed so as to deny a claimed exemption that is not clearly justified in law.

117 *Context of exemptions:* A wide range of exemptions for charitable and religious institutions is already afforded in Australia under federal and State law. This is an additional consideration to suggest the need for the strict scrutiny of arguments for expanding statutory exemptions to apply to such institutions. The broad ambit of such exemptions is specially notable when contrasted to the international treatment of such non-profit ventures when they engage with other countries in investment or commercial business activities.

118 In 1995, the Australian Industry Commission conducted a review of charitable organisations in Australia¹²³. On the specific issue of the income tax exempt status of charities, the Commission concluded that such exemption did not compromise competitive neutrality between organisations¹²⁴. However, its report reveals that this conclusion was contested by organisations that were in commercial competition with the business arms of such bodies¹²⁵. Referring to the taxation regimes then applicable in Australia, the competitors emphasised that income tax exemptions were not the only such exemptions applicable. The exemptions also included federal sales and fringe benefits taxes, State payroll and land taxes, and other taxes and charges¹²⁶. The report contrasted the international treatment in comparable countries of commercial activities of non-profit organisations¹²⁷. It found that the law in most of those countries subjected non-

123 Australia, Industry Commission, *Charitable Organisations In Australia*, Report No 45 (June 1995) ["Industry Commission Report"]. Appendix K, entitled "CSWOs [Community social welfare organisations] and competitive neutrality", discussed specifically the issue of the exemption of charitable organisations from tax obligations and competitive neutrality.

124 Industry Commission Report at K 5 [K.2.4].

125 See, for example, Industry Commission Report at K 8 [K.3.1] (nursing homes), K 9-K 10 [K.3.1] (fitness providers), K 10 [K.3.2] (hospitals).

126 Industry Commission Report at K 7 [K.3].

127 Austria, Belgium, Israel, Spain, Thailand, the United Kingdom, the United States and West Germany at K 5 [Table K.1].

profit organisations, including charitable and religious institutions, to taxation in respect of income derived from their commercial activities¹²⁸. By this standard, an Australian exemption of such income would appear to be exceptional if expanded to a case such as the present. It is hard to deny that, at the very least, the infrastructure and management costs of providing for tax liabilities in non-exempt investment and commercial business organisations, performing similar functions to Word, would significantly increase costs compared to those of the exempt Word.

119 The scheme of the 1997 Act provides that the exemption claimed by Word is not there just for the asking. A funeral business in competition with the funeral business operated by Word is entitled to expect that the provision to Word of the special exemption from income tax (with consequential savings in infrastructure costs) should be clearly demonstrated where the Commissioner contests it. This is especially so because, despite the high sounding "philosophy" adopted for the conduct of its funeral business, Word specifically acknowledged that it would be run as a "professional ... business" with expansion of its activities into related businesses; an objective of securing a "margin of profit"; a search for "new business opportunities"; and with no confinement of its services specifically to the funerals of Christian believers or Wycliffe supporters.

120 In short, Word's aim was (as it stated) "[to] enable [it] to capture a section of the current market". In a secular society, an exemption will be provided to "charitable institutions" with religious purposes or to religious institutions because such a society respects the religious consciences of persons living there. However, to the extent that such institutions engage in investment and commercial business undertakings with a view to profit, they invite upon themselves a strict scrutiny. In such a case, they are in competition with others in the marketplace who do not enjoy any of the economic advantages that the exemption affords.

121 *Width of "religion"*: There is a further consideration. In respect of the exemption from State payroll tax, this Court has adopted a broad view of "religion"¹²⁹. In his reasons for upholding that view, Murphy J concluded that any attempt "to determine what religion is ... poses a threat to religious freedom"¹³⁰.

128 Industry Commission Report at K 5 [Table K.1].

129 *Church of the New Faith v Commissioner of Pay-roll Tax (Vict)* (1983) 154 CLR 120 at 135, 150, 173; [1983] HCA 40.

130 (1983) 154 CLR 120 at 150.

122 For consistency, it appears inevitable that a similar view would be taken about the "religions" that might become the purpose of a "charitable institution" with religious purposes or a "religious institution" that is granted exemption under the 1997 Act. The classification could not be confined to Christian institutions that generally propound doctrines familiar to the courts. In a society such as Australia, the characterisation would have to extend to a very large range of "religious" beliefs. Then, according to the proposition advanced by Word, it would have to extend to bodies which, although not themselves engaged in propagating religious beliefs, constitute the "commercial arms" of such bodies.

123 The potential significance of the expansion of the category of exemptions immediately becomes plain. It is at least open to doubt that charitable and religious institutions that have traditionally been exempted from income tax liability in Australia would necessarily share their generally tolerant and mutually respectful attitudes with at least some institutions claiming "religious" purposes and objects. Thus, to exempt commercial bodies established to provide subventions for overseas televangelists or for overseas madrasas teaching religion to very specialised groups potentially stretches significantly the application of the exemption in the 1997 Act. At the least, such an exemption presents a serious question as to whether it was truly what the Australian Parliament intended when it enacted s 50-50(a) of the 1997 Act.

124 As it happens, my own religious tradition, and that of many Australians, is that derived from John Wycliffe, the "Morning Star" of the Christian Reformation in England¹³¹. Providing an exemption to an institution such as Wycliffe or Wycliffe International is comprehensible to me and arguably within the Parliament's purposes. However, the issue must be decided neutrally. Expanding the exemption to other unknown "charitable institutions" with religious purposes or to "religious institutions", especially to investment and commercial funeral or like business enterprises established to compete in the market with others and to provide funds for the religious objectives of such institutions, presents concerns that cannot be ignored in the present case.

125 In short, to the extent that the exemption is confined to "institutions" that are *themselves* religious in character, purpose and activities, the law draws what is arguably the intended and limited boundary of the specially privileged class. In a society such as Australia, there are only a limited number of people engaged in such institutions and providing income to them. The class is necessarily greatly expanded if the income tax exemption is expanded to include investment and commercial business activities that are somehow linked with such institutions. This would potentially increase the application of the exemption

131 *Word Investments Ltd* (2006) 64 ATR 483 at 485 [1].

significantly and likewise enlarge the potential revenue thereby lost to the Commonwealth.

126 It follows that, arguably, if the expansion of the exemption to a company such as Word is to be sanctioned by law, it should be done by express legislation enacted for that purpose by the Parliament after a full debate about the issues of principle and policy that are raised. Likewise, in so far as the recent enactment of s 50-50(a) of the 1997 Act may be thought to respond to this new phenomenon, it should be given an interpretation that confines the ambit of the exemption rather than one that would expand it.

The issues

127 The joint reasons accept that there are four issues in this appeal, identified by reference to the Commissioner's arguments¹³². In my opinion, for the reasons already stated¹³³, there are two essential issues. They should be decided in descending order of particularity. They are:

- (1) *The "Special conditions" issue*: If every other requirement for exemption were established, is Word disentitled from being an entity endorsed as exempt from income tax as a "charitable institution" with religious purposes because it does not comply with s 50-50(a) of the 1997 Act? Although Word undoubtedly "has a physical presence in Australia" within that provision, does it "to that extent, incur its expenditure and pursue its objectives principally in Australia"?¹³⁴; and
- (2) *The charitable institution issue*: If Word is an entity that satisfies the requirements of s 50-50(a) of the 1997 Act, is it nonetheless disentitled to an exemption from income tax? There are two aspects of this issue:
 - (a) Is Word not properly characterised as a "charitable institution" within the law governing the meaning of that phrase because Word's own objects are not confined, to the requisite degree, to "charitable purposes"? Are they instead more properly to be characterised, including by reference to Word's actual activities, as

132 Joint reasons at [8].

133 See above, these reasons at [102]-[105].

134 This represents the fourth issue stated in the joint reasons at [46]-[74].

an investment or commercial business corporation deriving income for profit, thus taxable in the ordinary way under the 1997 Act¹³⁵?

- (b) The ultimate disposition of the profits of Word's investment and commercial funeral business activities is to entities that are themselves charitable or religious institutions. If Word would otherwise constitute a "charitable institution", is it entitled to the exemption given that the beneficiaries of its profits are not themselves legally confined as to how they might use the funds¹³⁶?

The "Special conditions" issue

128 *The issue stated:* The first question is whether Word is an entity that is entitled to endorsement as exempt from income tax, complying with the requirements of s 50-50(a) of the 1997 Act. Specifically, to the extent that Word "has a physical presence in Australia", the question is whether it "incurs its expenditure and pursues its objectives principally in Australia".

129 The courts below, and now a majority in this Court, have concluded that Word has fulfilled all of the conditions for the application of the exemption. I agree (and it has not been contested) that Word has a "physical presence in Australia". Thus the relevant question is whether, to that extent, Word "incurs ... and pursues its [charitable] objectives principally in Australia".

130 The majority in this Court answer this in the affirmative by taking a narrow view of what is involved in Word's incurring its expenditure and pursuing its objectives *within* Australia. Their approach is that the "objectives" are as stated in Word's constituting document. As far as Word is concerned, it fulfils its objectives (and incurs its expenditure) *in* Australia when it pays income to Wycliffe (and to Wycliffe International and other charitable beneficiaries as required by its constituting document) so that no difficulty arises in complying with s 50-50(a) of the 1997 Act. This approach sees no difficulty in the fact that

135 This represents an amalgam of the first and second issues stated in the joint reasons at [13]-[34], [35]-[39].

136 This represents an amalgam of the third issue stated in the joint reasons at [40]-[45] and of arguments based on reasoning in the Supreme Court of Canada in *R v The Assessors of the Town of Sunny Brae* [1952] 2 SCR 76 at 92 ("the *Sunny Brae Case*"). That Court emphasised that the "ultimate destination" where a body directs its income is not a determinative criterion of the character of a "charitable" or "religious institution".

the destination of the income that is subject to the tax exemption is (and always was intended to be) principally *outside* Australia¹³⁷.

131 This is an erroneous reading of the requirement of s 50-50(a) as demonstrated by the language of the provision, its apparent purpose, its history, its stated objectives and its reasonable application in Australia, applied in light of the general considerations of legal principle and policy that I have already mentioned. The proper conclusion is that the requirement of s 50-50(a) was not satisfied in this case. Word is not therefore an "entity" entitled to exemption from income tax as a "charitable" or "religious institution".

132 For obvious reasons, Word framed its argument in terms of its suggested status as a "charitable institution". No doubt, it considered that it would be more difficult to satisfy the courts that it was a "religious institution", given the colouration of its character by its investment and commercial funeral business activities. However, Word's claim to be a "charitable institution" is based upon provisions in its constituting document that express objects and purposes argued to be for the advancement of religion, a recognised "charitable purpose". Thus the fundamental dilemma posed for the proper characterisation of Word persists. How could a company engaged in investment and commercial funeral business activities for a profit truly be a "charitable enterprise" merely because it ultimately disburses parts of its income to religious institutions?

133 *Charitable institutions and non-charitable objects:* Federal income tax statutes in Australia, since 1916, have drawn a distinction between the income of religious, scientific, charitable and public educational institutions and the income of a fund established for public "charitable purposes"¹³⁸. The legislation has specifically required the income of such a fund to be applied for the purposes for which the fund was established. There is no such requirement for an exempt "institution". By inference, this is because the very character of the "institution", without more, means that it will be "an establishment, organization, or association, instituted for the promotion of some object, especially one of public utility, religious, charitable, educational etc"¹³⁹.

134 Obviously, a "charitable institution" may have some non-charitable objects. The presence of these will be accepted but only so long as they are incidental or ancillary to the institution's charitable objects. The introduction of

137 Joint reasons at [73].

138 See the legislation set out in the joint reasons at [60]-[61].

139 *Stratton v Simpson* (1970) 125 CLR 138 at 158 per Gibbs J (citing *The Shorter Oxford English Dictionary*); [1970] HCA 45.

the relevant statutory provisions governing "charitable institutions", in the tabular form set out in the 1997 Act, did not change the substance of the previously enacted provisions. It must be assumed that the Parliament intended to continue to apply the institutional provisions stated in *Stratton v Simpson*¹⁴⁰ to the analogous exemptions enacted by the 1997 Act.

135 The Explanatory Memorandum distributed with the Taxation Laws Amendment Bill (No 4) 1997 (Cth) explains the purpose of altering s 23(e) of the 1936 Act. That amendment inserted the additional requirements for obtaining a tax exemption that later became the "Special conditions" contained in ss 50-50 and 50-60 of the 1997 Act¹⁴¹. The Explanatory Memorandum cites two reasons for amending the 1936 Act to remove the tax exemptions for (among others) charitable and religious institutions that are "located or pursue their objects offshore". It was¹⁴²:

"[T]o prevent:

- certain tax avoidance arrangements which could use these organisations to shift untaxed funds overseas; and
- a transfer of revenue from Australia to a foreign country where income is exempted in Australia but not in the organisation's country of residence."

136 Previous requirements were retained, but a number of stronger requirements were added. In particular, a precondition for exemption was added¹⁴³, namely that charitable and religious institutions must establish that they have a physical presence in Australia and, to that extent, incur their expenditure and pursue their objectives principally *in* Australia. Analogous requirements were introduced for "charitable purpose" funds¹⁴⁴. At the same time separate provision was made for a "prescribed" institution to be exempted if it had a

140 (1970) 125 CLR 138 at 159-160 citing *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 375 at 442, 450; [1952] HCA 48; *Oxford Group v Inland Revenue Commissioners* [1949] 2 All ER 537; *In re Harpur's Will Trusts* [1962] Ch 78 at 87.

141 See above, these reasons at [97] and joint reasons at [65]-[68].

142 Explanatory Memorandum, Taxation Laws Amendment Bill (No 4) 1997 (Cth) at [5.25].

143 Section 23(e)(i) of the 1936 Act; s 50-50(a) of the 1997 Act.

144 Section 23(j)(ia) of the 1936 Act; s 50-60 of the 1997 Act.

physical presence in Australia and incurred its expenditure and pursued its objectives principally *outside* Australia¹⁴⁵.

137 *The objects of s 50-50(a) of the 1997 Act:* The submissions of the Commissioner were correct concerning the meaning and operation of s 50-50 as it applied to a propounded "charitable institution" such as Word. There were several objects of the dual requirements of physical presence in Australia and the pursuit of objectives principally in Australia:

- (1) To avoid or reduce the risk of such exemptions being used for tax avoidance where income, freed from income tax liability within Australia, could be transferred offshore. Once in another jurisdiction, the Commissioner's power to check the deployment of the funds as claimed would be seriously reduced or lost altogether;
- (2) To ensure that the entity seeking exemption could establish, by its presence and activities *in* Australia, an entitlement to the exceptional privilege of exemption as deemed necessary by the Parliament for the application of the exemption;
- (3) To reconcile the provisions of s 50-50(a) and the arrangements contemplated by s 50-50(d), a "charitable institution" that incurs its expenditure and pursues its activities principally *outside* Australia may still be exempt from tax otherwise applicable to its Australian income. However, this will only be so if the institution is expressly prescribed by regulation for that purpose. The objective of s 50-50(d) is explained in the Explanatory Memorandum to the Taxation Laws Amendment Bill (No 7) 1997 (Cth)¹⁴⁶ (which amended the 1997 Act). The requirements for explicit prescription, as contemplated by s 50-50(d), provide a dual protection to the revenue. First, the prescription-maker must consider any exemption on a "case by case basis". Secondly, the Parliament may then examine the type, designation and number of such prescribed institutions. These are important protections against excessive, inappropriate, suspicious (or, for that matter, inadequate) exemptions by prescription for "charitable institutions" carrying out their activities principally *outside* Australia. The "case by case" provision for such institutions affords a strong argument against the narrow reading of s 50-50(a) now adopted in the joint reasons¹⁴⁷; and

145 Section 23(e)(iv) of the 1936 Act; s 50-50(d) of the 1997 Act.

146 See at [3.21], [3.22].

147 See joint reasons at [73].

- (4) Does the obligation to carry out charitable activities principally *within* Australia (and to have a physical presence *in* Australia) represent an unduly xenophobic reading of s 50-50(a)? Does it neglect the interests of a country such as Australia to support the need for charitable activities overseas? Any criticism of such a reading of s 50-50(a) is adequately met by the Commissioner's legitimate need to secure added protections to prevent turning charitable exemptions into a means of tax avoidance; the greater potential for avoidance in offshore activities; and the safety hatch provided by the power to prescribe offshore charitable activities specifically on a "case by case" basis. It was open to the Parliament to grant exemptions for charitable activities principally pursued (with the consequent expenditure incurred) *in* Australia. The Parliament provided this by the clear language of s 50-50(a). This conclusion is understandable given the principle and policy considerations already mentioned. This is especially the case for "charitable institutions" pursuing *religious* purposes offshore. Such activities have no immediate advantage for Australians who are instead reliant on revenues substantially raised by income taxes for the provision of government services.

138 *Errors of the contrary conclusion:* The majority's conclusion about the meaning of s 50-50(a) is, with respect, erroneous. It is a result of reading the requirements of s 50-50(a) without giving sufficient attention to the language of the provision, its history and its stated purposes.

139 It is irrelevant to argue, as the joint reasons do, that the tax avoidance purpose of s 50-50(a) is immaterial because "[t]he Commissioner did not suggest in the present appeal that Word and Wycliffe were engaged in 'tax avoidance'"¹⁴⁸. This confuses the relevance of the purpose of anti-avoidance and the purpose of a particular taxpayer or exempt entity's activities. The present question is what the Parliament was seeking to do through the language of s 50-50(a). That understanding assists in giving an accurate meaning to the provision. The section is then interpreted so as to apply equally to those who are engaged in tax avoidance and those who are not.

140 Once this fact is recognised, the obligation in s 50-50(a) becomes more understandable. It is an obligation imposed *inter alios* on Word. The joint reasons state that the charitable objectives were easily fulfilled by what Word did in Australia alone¹⁴⁹. Unless that conclusory approach is adopted, the need to

¹⁴⁸ Joint reasons at [63].

¹⁴⁹ Joint reasons at [73].

give an informal meaning to the new requirement of pursuing the charitable "objectives principally in Australia" remains. In the factual circumstances of the present case, the "charitable purposes" pursued by Word were principally overseas, not in Australia. By way of contrast, the purposes of Word *in* Australia were investment and commercial funeral business activities.

141 The Commissioner's interpretation of s 50-50(a) is convincing and is to be preferred once it is appreciated that the object of s 50-50(a) was to afford the Commissioner a means of preventing, or responding to, the risk of tax avoidance; to provide a means of tracing effectively the money trail alleged to be "charitable" and keeping it principally at home; and to provide for "case by case" approval where the money trail leads to charitable activities principally pursued *outside* Australia.

142 *A further error:* An additional error of the joint reasons appears in the narrow reading of s 50-50(a)¹⁵⁰. This is said to produce a conclusion that the language of s 50-50(a) is "intractable". I agree; but I reach exactly the opposite outcome.

143 The starting point, which I do not accept, is that Word escapes the propounded *meaning* of s 50-50(a) by demonstrating that it was not itself involved in tax avoidance. Word argued that decisions to pay moneys (to Wycliffe, Wycliffe International and other bodies) were made in Australia. Nothing in s 50-50(a) obliged such organisations (including Wycliffe and Wycliffe International) actually to expend their moneys *in* Australia. It was said that s 50-50(a) draws no distinction between direct and indirect effects. Section 50-50(a) instead requires that for an "entity" to gain an exemption as a "charitable institution" (as distinct from the investment or commercial funeral business that Word otherwise appears to be) it must demonstrate the dual requirements of s 50-50(a).

144 Word had to pursue its charitable objectives (and incur its expenditure) "principally in Australia". Moreover, that phrase is to be understood in light of its objects to minimise the risks of tax avoidance; to permit scrutiny and effective investigation by the Commissioner; and normally to confine the objectives to those that are pursued principally *in* Australia. If they were to be pursued principally *outside* Australia, this had to be authorised individually, as s 50-50(d) contemplated.

145 Word made the claim that it was pursuing "charitable purpose" objectives. As a precondition to endorsement of exemption from income tax, the language and object of s 50-50(a) required Word to incur its expenditure and pursue its

150 Joint reasons at [73]-[74].

objectives "principally in Australia". The interpretation adopted in the joint reasons does not give effect to the apparent purpose of the provision.

146 *A still further error:* The joint reasons also err in their stated opinion that the Commissioner's contention that Word's submission would present him with difficulty in monitoring funds is "exaggerated in the light of s 50-145"¹⁵¹.

147 In support, the joint reasons argue that, if "the Commissioner had reason to suspect that funds given by Word to Wycliffe were not being expended on charitable objects", he had the "power to request ... information and documents" and to subject Word (in the case of default) to criminal liability. There are many reasons why this argument is unconvincing.

148 First, the objective of s 50-50(a) is to provide a precondition to entitlement. Its purpose is to avoid the necessity of *ex post* interrogation where, inevitably, the Commissioner and his officers would be at an informational disadvantage. By confining the pursuit of the charitable objectives to be "principally in Australia", as s 50-50(a) does, the Commissioner is not forced to rely on questioning and invoking criminal sanctions to overcome the information deficit. Within Australia, the Commissioner has his own employees and agents to perform such investigations. He enjoys much more available means than elsewhere for investigating the payments for allegedly "charitable purposes" to parties other than the entity in question itself.

149 Secondly, the joint reasons repeat the mistake of assuming that the *meaning* of s 50-50(a) is to be derived by reference to the imputed behaviour of Word alone. It is not. The purpose of s 50-50(a) is to enable the Commissioner to deal systematically with alleged entities who may have attempted to use the entity exemption for "charitable" or "religious institutions" as a means of tax avoidance. Section 50-50(a) must be interpreted to give effect to its large institutional and anti-avoidance purpose. It must not be confined to the particular application to Word.

150 Thirdly, even in the case of an honest entity like Word, there is an enlarged risk that its payment of subventions for the pursuit of Word's charitable objectives overseas may haemorrhage. They may do so in ways that Word, Wycliffe and Wycliffe International never intended. Section 50-50(a) was introduced into the 1997 Act to prevent and redress that potential problem.

151 It is impossible to deny that the Commissioner can monitor and ensure the integrity of a flow of funds much more easily where the pursuit of the objectives is principally in Australia rather than overseas. To do so overseas might be

151 Joint reasons at [72].

difficult, or even impossible. It is a small comfort to answer this contention by saying that the Commissioner can always pursue local criminal sanctions against the entity present in Australia. This does not address the institutional or organisational needs of the Commissioner, with his legitimate obligations to defend the revenue and to redress and discourage tax avoidance.

152 *Factually: principally overseas objectives:* If the interpretation of s 50-50(a) urged by the Commissioner is adopted, do the facts of Word's case warrant a conclusion that Word's charitable objectives were pursued principally *outside* Australia?

153 The investment and commercial funeral business activities of Word that were conducted wholly within Australia did not involve charitable objectives that would attract exemption under the Act. Any charitable "objectives" were pursued mainly through Wycliffe and Wycliffe International which arranged the Bible translations. They were not performed by Word itself.

154 The evidence before the AAT and the agreed facts in the Federal Court reveal that some Bible translation for indigenous peoples with hitherto unwritten languages took place in Australia, out of Darwin and Alice Springs. However, it was conceded that this activity was "now less active than it was previously". As the joint reasons state, the uncontested evidence was that Wycliffe and Wycliffe International were seeking to spread the Christian religion through particular activities "in developing countries, and among sections of the population who have no written language"¹⁵².

155 More specific evidence from Word about these activities indicated how Word "achieves its religious objects in practice", by securing the publication of the Bible "in the mother tongue or 'heart language' of peoples in all parts of the world ... [including] the Australian Aborigines, the indigenous people of Papua New Guinea, and people in Indonesia, Africa and South America". The pursuit of the same objective in the Philippines was also mentioned.

156 It follows that the only conclusion available from this evidence, including the particularisation of the claim for exemption by Word's lawyers, is that the "charitable purposes" relied on by Word were pursued principally outside Australia. Once Australia's Aboriginal peoples are effectively excluded, the very nature of the "charitable purposes" relied on confined the pursuit of Word's charitable objectives to overseas activities. On this issue, the evidence spoke with a single voice.

152 Joint reasons at [2].

157 With this conclusion, it is impossible for Word to comply with the requirement stated for endorsement as an "entity" exempt from income tax under s 50-50(a) of the 1997 Act. Word had a physical presence *in* Australia. But in so far as it pursued any charitable objectives, it did so principally *outside* Australia. It was therefore not an entity entitled to exemption.

158 *Conclusion on s 50-50(a) of the 1997 Act:* The foregoing conclusion is fatal to Word's case. The other ingredients necessary for exemption as a "charitable institution" under the general law might attract the operation of the other provisions of the 1997 Act. But without compliance with s 50-50(a), Word was disentitled. The entity could not then be endorsed as exempt from income tax.

159 This conclusion is not surprising once the language and purposes of s 50-50(a) (read with s 50-50(d)) are understood. The exemption is exceptional. Without saying anything about Word, the exemption it sought is susceptible to misuse, dishonesty and tax avoidance. To that end, the Australian Parliament has enacted "Special conditions" designed to enhance the Commissioner's capacity to monitor the money trail of expenditures on claimed "charitable purposes" and the pursuit of such objectives. One such express requirement is that the pursuit of the charitable objectives should be "principally in Australia". In so far as Word had charitable objectives (as distinct from investment and commercial funeral business objectives for profit) it did not pursue those "objectives principally in Australia". It pursued them through other entities and principally overseas. It was therefore not qualified for exemption from income tax. The Commissioner was correct to so decide.

160 Even assuming all other considerations might be found in favour of Word, the foregoing conclusion requires that the Commissioner's appeal be allowed.

The "charitable institution" issues

161 *Remaining issues in the appeal:* Mine is a minority opinion and my reasons thus far are sufficient to sustain the orders that I favour. However, it is appropriate for me to address the other issues argued in support of the Commissioner's submissions. Out of respect for the importance of these issues, the careful arguments of the parties and my disagreement with the joint reasons, I will respond to the question whether, in the facts of this case, Word otherwise qualified as a "charitable institution" for the purposes of the 1997 Act.

162 The 1997 Act (like its predecessors) does not define the term "charitable institution". However, it is settled law in this Court that, if the entity claiming exemption from income tax is an "institution" for the purposes of the law, it is

"charitable" if it has "charitable purposes"¹⁵³. It was common ground in this appeal that, absent any statutory modification or definition, the word "charitable" in this context takes on a "technical meaning". It is a meaning that can be traced to the law of trusts and, ultimately, to the preamble to the Statute of Elizabeth¹⁵⁴.

163 *Characterising charitable institutions:* To determine whether a propounded "institution" or its purposes are "charitable", it is necessary in every case for the decision-maker to engage in an act of characterisation. This is not a simple task. First, there is uncertainty as to which factors may be considered when classifying the purpose of a propounded institution. Secondly, the characterisation may, in the particular case, involve a finely balanced determination of the facts, upon which informed decision-makers might disagree. Thirdly, institutions typically have many purposes pursued through a range of activities. Some such purposes and activities may be charitable, whereas others may not. Some may be major whereas others may be minor or incidental.

164 Without statutory guidance, characterisation of an institution typically requires the decision-maker to consider a mass of cases and search for the most analogous decisions. In today's society, this must be done in circumstances where the activities of charities, their purposes, objectives and mode of operation are changing. Such changes result partly from new and different social conditions. They partly flow from the attempt of putative "charitable institutions" to carry out new, larger and different objects but within legislation that was substantially enacted in earlier times, traceable to much earlier times, and addressed to charitable activities somewhat different from those now often undertaken by not-for-profit bodies.

165 Care must be observed in citing *dicta* from the reasons of judges given in earlier times, especially in foreign courts, to decide the correct operation of a local income tax statute such as the 1997 Act. As the joint reasons point out, many of the cases cited in argument by both parties arose in a context involving "charitable purposes" that was different to the way that phrase becomes relevant to the application of the 1997 Act to resolve Word's "charitable institution" claim¹⁵⁵.

153 *Incorporated Council of Law Reporting (Q) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 666 per Barwick CJ (McTiernan J concurring) and at 671 per Windeyer J; [1971] HCA 44.

154 (1971) 125 CLR 659 at 666-667.

155 See joint reasons at [17].

166 Special care must also be taken in applying general judicial observations in both local and overseas cases. Sometimes such observations have been written with a close eye to the particular statutory scheme under consideration. For example, *R v The Assessors of the Town of Sunny Brae*¹⁵⁶ considered s 4(1) of the *Rates and Taxes Act 1927* RSNB (Canada), c 190. That provision exempted from taxation:

"(d) Every building of a religious organization used *exclusively* ... for the religious, philanthropic or educational work of such organization" (emphasis added).

167 The Supreme Court of Canada was closely divided about the application of that statute¹⁵⁷. The Court held that a building, which included both a school and a public laundry service conducted by the school, was not entitled to exemption from the relevant rates and taxes. To a very large extent, the respective opinions of all the Canadian judges turned on the adverb "exclusively". Self-evidently, it would be somewhat risky to derive from such a case any general proposition of immediate application to the definition of a "charitable institution" in the 1997 Australian Act. With so many context-specific decisions on the availability of exemptions from taxation in this corner of the law, special care must be taken in invoking earlier cases. Often, those cases reflect no more than the judicial response to particular facts; specific legislation; changing social circumstances in which charities operate; and (sometimes) apparent preferences towards some charities rather than others¹⁵⁸.

168 Both words in the expression "charitable institution" are inherently ambiguous. There is a wealth of judicial authority on this expression and a diverse range of the statutory provisions applied in that authority. It is thus inevitable that considerations of legal principle and policy will operate, even if unconsciously, in decisions about contested claims to charitable status arising in new situations. For that reason, I have attempted to identify some of the considerations that operate in the claim by Word to be a "charitable institution". It has made that claim even though Word does not itself perform any charitable

156 [1952] 2 SCR 76.

157 *Rand, Kellock, Estey and Locke JJ; Rinfret CJ, Kerwin and Cartwright JJ dissenting.*

158 Thus charities favourable to the professional interests of lawyers have often been well received. For example, charities concerned with the law, including law reporting and women lawyers' interests, have generally enjoyed a favourable response. See, for example, *Incorporated Council of Law Reporting* (1971) 125 CLR 659 and *Victorian Women Lawyers' Association Inc v Commissioner of Taxation* [2008] ATC ¶20-035.

activities (except writing cheques); performs instead well-recognised investment and commercial funeral business activities; and only performs its "charitable purposes" through other distinct entities (corporations) which, separately and themselves, might be entitled to classification as "charitable institutions".

169 *The entity's business activities:* There are several possible reasons why, in this context, Word should be characterised as a business entity liable to income tax in the ordinary way. Its claim for exemption as a "charitable institution" from income tax liability should be rejected.

170 First, there is the need to avoid an abuse of claims to be a "charitable institution" and the potential misuse of such claims for the purposes of tax avoidance. Secondly, there is a legitimate concern of competitors operating in the same market as the actual business operations of Word. By linking the business operations of Word with the "charitable purposes" of Wycliffe or Wycliffe International, Word is allegedly afforded an unfair economic advantage that its competitors in the investment and commercial funeral business market do not enjoy. This concern was raised in the inquiry by the Australian Industry Commission in 1995¹⁵⁹ and was also considered by the Australian Charities Definition Inquiry in 2001¹⁶⁰.

171 The economic issue so described is not new in Australia. The Parliament debated it when considering the provision of the Bill that later became the section of the 1936 Act that exempted charitable and religious institutions from income tax¹⁶¹. If the economic transfer costs of the exemption for "charitable" and "religious institutions" have divided the Parliament and official inquiries in the past, it is little wonder that courts, including this Court, have also been divided in deciding such cases. One such example is *Roman Catholic Archbishop of Melbourne v Lawlor*¹⁶². That case involved a contested gift by will to establish a Roman Catholic daily newspaper. It resulted in an even division in this Court¹⁶³. Consequently, the decision of the Full Court of the Supreme Court of Victoria

159 The Industry Commission Report. See above, these reasons at [118].

160 Australia, Charities Definition Inquiry, *Report of the Inquiry into the Definition of Charities and Related Organisations* (June 2001) at 230.

161 Clause 23(e). See Australia, Senate, *Parliamentary Debates* (Hansard), 20 May 1936 at 1893-1894 (Senator Leckie); cf at 1894 (Senator A J McLachlan).

162 (1934) 51 CLR 1; [1934] HCA 14.

163 Gavan Duffy CJ, Evatt and McTiernan JJ held that it was a charitable purpose; Rich, Starke and Dixon JJ *contra*.

was affirmed¹⁶⁴. That case illustrates the opacity of the applicable legal principles and the necessity to provide transparency as to the real reasons for decisions which go beyond formal explanations and legal fictions.

172 To reduce the influence of undisclosed considerations for individual judicial attitudes to particular "charitable institutions" or "charitable purposes", several decisions have adopted the course of analysing the constituting document of the propounded "charitable institution". This is the approach taken by the joint reasons. That document has thus become an influential, if not the dominant, factor in characterising the institution's purpose. It is typically the starting point for legal analysis¹⁶⁵.

173 *Identifying the entity's real purposes:* With respect, there are real dangers in assigning too much importance to the constituting document. This is especially so now that the doctrine of *ultra vires* in relation to companies has been discarded as an important element in Australian corporations law¹⁶⁶.

174 The constituting document can obviously be drafted widely or ambiguously. Its language may generate uncertainty as to the true purposes of the institution propounded as charitable. It may contain multiple purposes but not indicate whether they are all of equal importance or whether some purposes are subsidiary to others. The document may not identify the outer limits of the purposes which the institution may pursue. For these reasons, in my opinion, the real *discrimen* for the characterisation of an entity propounded as a "charitable institution" is what that entity actually does and what purposes it actually pursues. I take this to be the reason why, in *Incorporated Council of Law Reporting (Q) v Federal Commissioner of Taxation*¹⁶⁷, Barwick CJ said:

164 *In re Lawlor; National Trustees, Executors and Agency Co of Australasia Ltd v Lawlor* [1934] VLR 22.

165 See eg *Royal Australasian College of Surgeons v Federal Commissioner of Taxation* (1943) 68 CLR 436 at 443, 447, 448, 450, 451; [1943] HCA 34; *Oxford Group* [1949] 2 All ER 537 at 539, 540-541; *Sunny Brae Case* [1952] 2 SCR 76 at 81-82; *McGarvie Smith Institute v Campbelltown Municipal Council* [1965] NSW 1641 at 1643-1644; *Christian Enterprises Ltd v Commissioner of Land Tax* [1968] 2 NSW 99 at 101-102, 107; *Incorporated Council of Law Reporting* (1971) 125 CLR 659 at 661-664; *Attorney-General v Ross* [1986] 1 WLR 252 at 264; [1985] 3 All ER 334 at 344.

166 *Corporations Act* 2001 (Cth), s 124; cf *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 98 [122]; [2006] HCA 52.

167 (1971) 125 CLR 659 at 666 (emphasis added).

"If its purposes are charitable, it will be such an institution for the nature of the institution inheres in the purposes it is created to *and does* pursue."

175 Courts, including this Court, should take the constituting purposes into close account, however they should not be blinded by them. Courts should view the stated purposes in the context of determining what the propounded entity actually does to fulfil the stated purposes. In his reasons in *Attorney-General v Ross*, Scott J (a judge with much experience in this field) explained why this was the correct approach¹⁶⁸:

"The question whether under its constitution the union is or is not charitable must, in my view, be answered by reference to the content of its constitution, construed and assessed in the context of the factual background to its formation. This background may serve to elucidate the purpose for which the union was formed. ...

I must not be taken to be expressing the opinion that the activities of an organisation subsequent to its formation can never be relevant to the question whether the organisation was formed for charitable purposes only. *The skill of Chancery draftsmen is well able to produce a constitution of charitable flavour intended to allow the pursuit of aims of a non-charitable or dubiously charitable flavour. In a case where the real purpose for which an organisation was formed is in doubt, it may be legitimate to take into account the nature of the activities which the organisation has since its formation carried on.* ... The activities of an organisation after its formation may serve to indicate that the power to carry on non-charitable activities was in truth not incidental or supplementary at all but was the main purpose for which the organisation was formed. In such a case the organisation could not be regarded as charitable."

176 Similarly, the reasons of Starke J in *Royal Australasian College of Surgeons v Federal Commissioner of Taxation*¹⁶⁹ may be considered. Although in dissent as to the outcome, Starke J held that it was permissible to examine the actual activities of the College to clarify whether "non-charitable purposes" (such as promoting professional interests) were simply incidental to the accepted "charitable purposes" (of promoting surgical knowledge and practice)¹⁷⁰.

168 [1986] 1 WLR 252 at 263; [1985] 3 All ER 334 at 343 (emphasis added).

169 (1943) 68 CLR 436.

170 (1943) 68 CLR 436 at 448.

177 The actual activities of Word were indisputably conducting investment and commercial funeral business activities for profit. If such activities are available for consideration in characterising Word for the purposes of the 1997 Act, it is obvious to me that Word's own activities were not themselves charitable. What was charitable was the ultimate proposed destination of the profits that Word derived from its investment and commercial funeral business activities.

178 If, then, the focus is upon Word (as distinct from the recipient beneficiaries of its profits after they were accrued by Word) a clear line for the purposes of characterisation may be drawn. The separate corporate "entity", Word, was established to, and did, make profits from investment and commercial funeral business activities. Unless the ultimate destination of the designated profits to other independent corporate entities (including Wycliffe and Wycliffe International) applies retrospectively to colour the characterisation of Word by reason of its subventions, the 1997 Act demands that Word itself be characterised as a business for profit. The ultimate destination of that profit or part of it cannot alter that conclusion.

179 Inevitably, borderline cases have arisen and Australian courts have addressed the question whether corporate entities, propounded as "charitable institutions", were disentitled to that status because some of their activities were capable of characterisation as professional or commercial business activities for profit¹⁷¹.

180 *Relevance of unrelatedness:* Later Australian decisions have considered the revenue raising business activities of propounded "charitable institutions". This course of authority suggests that courts are reluctant to characterise an institution as "charitable" where it pursues major revenue-raising business activities that are not related to the propounded "charitable purpose". In such a case, the business activity has commonly been classified as non-charitable in character. If it is an important activity of the propounded "charitable institution", the *unrelatedness* of the revenue-raising activity, for "charitable purposes", will deprive the entity of characterisation as a "charitable institution". For example, selling ice cream or laundry services to raise funds for a religious institution would no doubt be an unrelated activity. By contrast, a Law Reporting body selling law reports would be a related activity¹⁷².

171 Instances include *Incorporated Council of Law Reporting* (1971) 125 CLR 659 at 666, 671-672 and *McGarvie Smith* [1965] NSW 1641 at 1646-1647.

172 See, for example, *Incorporated Council of Law Reporting* (1971) 125 CLR 659.

181 This was the distinction applied by the majority of the Court of Appeal of New South Wales (Priestley JA with McHugh JA concurring; Lee AJA dissenting) in its influential decision in *Glebe Administration Board v Commissioner of Pay-roll Tax*¹⁷³. A similar approach was taken by Hardie Boys J in New Zealand in *M K Hunt Foundation Ltd v Commissioner of Inland Revenue*¹⁷⁴. His Honour explained¹⁷⁵:

"[I]f this company existed for the ... 'specific charitable purposes' already quoted from object A of the memorandum, it would be a charitable body. But the Court's task here is to examine the memorandum and ask whether the real object of the company is charitable or whether its real purpose is that of a speculative subdivider of land, building houses thereon for sale. The fact that the company or its members intend to devote the proceeds of their activities to some worthy cause does not, in my view, assist in deciding what is the real purpose and object of the company."

182 *English and Canadian authority*: These and similar decisions¹⁷⁶ are consistent with the approach taken by the House of Lords in *Oxfam v Birmingham City District Council*¹⁷⁷. There, the appellant charity had the relief of poverty as its main object, a recognised "charitable purpose". It operated gift shops used for sorting and selling donated articles of clothing as well as selling products made in the developing world. All of the profits of such shops were devoted to the charity's purposes. However, their Lordships held that the premises were not being "used for charitable purposes".

183 Lord Cross of Chelsea¹⁷⁸ said that their Lordships should:

173 (1987) 10 NSWLR 352 at 365.

174 [1961] NZLR 405.

175 [1961] NZLR 405 at 407.

176 See eg *Christian Enterprises Ltd* [1968] 2 NSW 99 at 103-104 per Walsh JA (Asprey JA concurring) and *In re Smith, decd; Executor Trustee and Agency Co of South Australia Ltd v Australasian Conference Association Ltd* [1954] SASR 151 at 159 per Ligertwood J.

177 [1976] AC 126.

178 [1976] AC 126 at 146 (Lords Simon of Glaisdale, Edmund-Davies and Fraser of Tullybelton agreeing).

"[draw] the line so as to exclude from relief user for the purpose of getting in, raising or earning money for the charity, as opposed to user for purposes directly related to the achievement of the objects of the charity".

To secure an exemption from the land taxes in issue in that case, the propounded "charitable institution" had to demonstrate that it was using the property for the actual fulfilment of the identified "charitable purposes". Their Lordships instead held that the shops are used for an activity which is not inherently charitable¹⁷⁹.

184 If a similar criterion is applied in the present appeal, the investment and commercial funeral business activities of Word were not, by any stretch of the imagination, "inherently charitable". They did not relate to Word's propounded "charitable purposes", namely the propagation of religion. They were distinct and separate. A fair reading of the judicial authority relied on by the Commissioner sustains his submission. The reasons of the majority of this Court in this appeal represent a heterodox extension of the ambit of the previous understanding of the requirements for a "charity" to constitute a "charitable institution" that is entitled to exemption from income tax.

185 Allowing fully for the differences in the applicable language of the respective legislation, several Canadian decisions have adopted an approach to the central issue presented in this appeal similar to that in the above Australian, New Zealand and United Kingdom cases. For example, the decision of the Supreme Court of New Brunswick in *Kennebecasis Valley Recreational Centre Inc v Minister of Municipal Affairs of New Brunswick*¹⁸⁰. In that case, five communities incorporated a property to establish a local recreational centre and it was hired out on commercial terms for events to derive profits. The Court there held that it was not used solely for charitable activities as required by the statute¹⁸¹. The Court drew a distinction between exempted charitable activities and those of "a company which operates a business on a regular basis and in an efficient business-like manner"¹⁸². If the same, or a similar, criterion were applied to Word, the actual objectives that it pursued, in practice, were the running of a commercial enterprise for profit. It did so by way of investment and

179 But see also [1976] AC 126 at 139 where Lord Cross of Chelsea held that premises would be exempt from land tax if:

"not being used for the actual relief of poverty ... if ... the use which it makes of them is 'wholly ancillary to' or 'directly facilitates' the carrying out of its charitable object ... [such as] the head office of Oxfam."

180 (1975) 61 DLR (3d) 364.

181 (1975) 61 DLR (3d) 364 at 372 per Bugold JA (Ryan JA concurring).

182 (1975) 61 DLR (3d) 364 at 373 per Bugold JA (Ryan JA concurring).

commercial funeral business activities, apparently conducted in a business-like manner.

186 Several decisions of the Supreme Court of Canada take a similarly strict view towards claims for exemption from general legal obligations otherwise applicable on the propounded ground of the existence of charitable objects or purposes¹⁸³. In one such decision, Gonthier J (although in dissent) differentiated between the identified primary, collateral or independent purposes and merely incidental or ancillary purposes of a propounded "charitable institution". His Lordship said¹⁸⁴:

"To qualify as charitable, the purposes of an organization or trust must be exclusively charitable. ... The exclusivity requirement is also reflected in the [Tax Act] itself. ...

It has long been accepted that the pursuit of purposes which, though not charitable in themselves, are merely ancillary or incidental to the fulfilment of the primary, charitable, purposes of an organization will not cause the organization to run afoul of the exclusivity requirement. At a certain point, of course, a purpose may grow to assume a collateral rather than incidental nature. If so, it will no longer be a means to the fulfilment of the organization's primary purposes, but will have become an end in itself."

Gonthier J continued¹⁸⁵:

"In the law of charity, the courts' primary concern is to determine whether the purposes being pursued are charitable. It is these *purposes* which are essential, not the *activities* engaged in, although the activities must, of course, bear a coherent relationship to the purposes sought to be achieved."

187 *Conclusion: proper characterisation:* From the foregoing authorities, which on the general approach are largely consistent, it follows that the propounded charitable institution's purposes, as stated in its constituting document, will only take a decision-maker so far. This is at least the case when

183 *Composers, Authors and Publishers Association of Canada, Ltd v Kiwanis Club of West Toronto* [1953] 2 SCR 111 at 115; *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at 111 per Iacobucci J.

184 *Vancouver Society* [1999] 1 SCR 10 at 44-45.

185 [1999] 1 SCR 10 at 52 (emphasis in original).

the decision-maker is faced with the obligation of characterisation as required by legislation such as Div 50 of Pt 2-15 of the 1997 Act.

188 The decision-maker is obliged to decide objectively whether a propounded entity is pursuing business or charitable purposes. Given that the only cases likely to reach the courts (especially final courts) are those in which there is evidence both ways, it is necessary to draw the resulting line. Are the non-charitable purposes of the "charitable institution" merely "incidental" or "ancillary" to the primary "charitable purpose"? If so, the institution can be characterised as "charitable". Or are there distinctive factual features, significant to and related to any actual charitable performance, that make the business activities distinguishable from the "charitable purposes" so as to deny the entity the classification of "charitable institution"?

189 The business activity will more readily be characterised as "ancillary" or "incidental" to the "charitable purpose" that is propounded by the "charitable institution" where it is directed to the charitable activity that first existed¹⁸⁶. The revenue-raising activity, however, is likely to deprive the entity of characterisation as a "charitable institution" where it is an unrelated activity that pursues a separate and independent purpose (such as running an ice cream parlour or laundry to raise funds for a religious institution).

190 On the authorities, *unrelated* revenue-raising activities are more likely to evidence two distinct purposes: a "charitable purpose" (to raise funds for the charity) and a commercial purpose (to conduct a business at a profit). The common law has long insisted that, to be a "charitable institution", the purpose of the institution must be *exclusively* charitable (with non-charitable activities no more than ancillary). Thus, dual characteristics will be sufficient to deprive the institution of classification as a "charitable institution". Is that the situation in the case of Word?

191 *Word is not a charitable institution:* Applying the foregoing criteria rather than a purely formal analysis by reference only to the purposes which a legal draftsman stated in Word's constituting document, Word's argument that it was a "charitable institution" ought to have been dismissed. Application of established decisional authority observed in this country, and in many others of the same legal tradition, required its rejection.

192 This conclusion provides a separate and additional ground for upholding the Commissioner's appeal. I have thus found for the Commissioner on the substance of each of the issues presented in this appeal. It is unnecessary for me to decide all of the other arguments that the Commissioner presented to support

186 As it was in *McGarvie Smith* [1965] NSW 1641 at 1647.

his submission that the Federal Court departed from established authority in elucidating the character of a "charitable institution". That Court erred in misapplying the "Special condition" of s 50-50(a) of the 1997 Act, thereby allowing Word to fall within the exemption from income tax. It also erred in finding that Word was a "charitable institution", despite the substantial business activities of Word that were unrelated to its "charitable purposes", except as a means of raising income.

Orders

193 The appeal should be allowed. The judgment of the Full Court of the Federal Court of Australia should be set aside. In its place, this Court should order that the appeal from the judgment of the primary judge be allowed; the cross-appeal to the Full Court be dismissed; and the decision of the Administrative Appeals Tribunal made on 27 September 2005 be set aside. In place of the AAT's decision, the Commissioner's objection decision should be confirmed.

194 Special leave was granted to the Commissioner on the basis that he would not seek to disturb any costs orders made in the Federal Court and would pay Word's costs of the appeal to this Court. The only costs order in respect of the proceedings should therefore be that the Commissioner pay Word's costs of the appeal.