

# ***TR 1999/D17 - Income tax: necessitous circumstances funds***

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This document has been finalised by TR 2000/9.



## Draft Taxation Ruling

### Income tax: necessitous circumstances funds

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#### ***Preamble***

*Draft Taxation Rulings (DTRs) present the preliminary, though considered, views of the Australian Taxation Office. DTRs may not be relied on by taxation officers, taxpayers and practitioners. It is only final Taxation Rulings which represent authoritative statements by the Australian Taxation Office of its stance on the particular matters covered in the Ruling.*

#### **What this Ruling is about**

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1. This Ruling sets out the views of the Australian Taxation Office ('ATO') on public funds established and maintained for the relief of persons in Australia who are in necessitous circumstances for the purposes of item 4.1.3 of section 30-45 of the *Income Tax Assessment Act 1997* ('ITAA 1997').

2. Item 4.1.3 of section 30-45 of the ITAA 1997 expresses the same ideas as item 4.1.3 of subsection 78(4) of the *Income Tax Assessment Act 1936* ('ITAA 1936').

#### **Class of person/arrangement**

3. This Ruling applies to:
- persons seeking to establish and maintain a necessitous circumstances fund; and
  - persons seeking to claim income tax deductions for gifts made to a necessitous circumstances fund.

#### **Summary of this Ruling**

4. This Ruling deals with the following matters:
- what is the meaning of 'necessitous circumstances'?
  - in what ways may a fund relieve persons who are in necessitous circumstances?
  - how can a fund indicate it is established and maintained for relieving persons in necessitous circumstances?

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- to what extent does a fund have to be for the purpose of relieving persons in necessitous circumstances?
- must the persons receiving relief be in Australia?

5. This Ruling should be read in conjunction with Taxation Ruling TR 95/27, which deals with the requirements for being a 'public fund' and Taxation Rulings IT 2071 and IT 2443 and Taxation Determinations TD 92/110 and TD 93/57, which deal with the meaning of the term 'gift'.

## Ruling

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### ATO endorsement

6. From 1 July 2000, entities not specifically listed in the legislation as deductible gift recipients, can only gain gift deductible status by obtaining an Australian Business Number ('ABN') and endorsement by the Commissioner of Taxation as a 'deductible gift recipient'. Donors of gifts to entities that are not endorsed and not listed by name in the legislation are not entitled to income tax deductions in respect of those gifts.

7. Entities endorsed as deductible gift recipients must maintain a gift fund as provided for in subsections 30-125(4) to (6). The gift fund requirement is set out in draft Taxation Ruling TR 1999/D20.

### What is the meaning of 'necessitous circumstances'?

8. The expression 'necessitous circumstances' refers to financial necessity. It involves some degree of poverty, though it may be less than abject poverty or destitution. Necessitous circumstances do not extend to the absence of merely desirable advantages.

9. A person is in necessitous circumstances where his or her financial resources are insufficient to obtain all that is necessary, not only for a bare existence, but for a modest standard of living in the Australian community. A strong indicator of this would be where a person's level of income is such that they are eligible to receive income tested government benefits. While a person's level of income is a useful guide, it does not on its own indicate necessitous circumstances. For example, a person whose income level exceeds the welfare limit but who could demonstrate special or unusual circumstances which resulted in a marked lowering in their standard of living causing hardship, could still be considered to be in necessitous circumstances.

10. 'Necessitous circumstances' is a relative term having regard to a person's particular circumstances. It has no fixed quantitative

measure but it requires financial hardship. A person's assets, liabilities, family responsibilities, disasters suffered, illness, disability, etc., may cause them to be needy.

11. The death of a family member or the loss of an asset or a business does not necessarily place a person in necessitous circumstances. Regard should be had to the availability the person has to other sources of income or assets, superannuation, insurance, compensation, etc., which might in the particular circumstances enable the person to continue a modest standard of living.

12. Necessitous circumstances do not extend to needs generally. Accordingly, the needs of the sick, incapacitated, aged, etc., do not, on their own, constitute necessitous circumstances. However, it may be that a person's non-financial need causes financial necessity.

13. The particular circumstances giving rise to financial necessity are not necessarily permanent. For example, cyclones, floods and other disasters can cause people to be in financial need in the short term.

### **Relieving necessitous circumstances**

14. To fall within item 4.1.3 of section 30-45 of the ITAA 1997, not only must a fund be for persons in necessitous circumstances, it must also be for the **relief** of persons in those circumstances.

15. A fund's most common method of providing relief to a person in necessitous circumstances is by direct distributions of money or goods to the person.

16. Where services go beyond distributions of money or goods, the organisation is more likely to be characterised as an institution rather than a fund. In this case, the organisation would be considered under item 4.1.1 of section 30-45, which deals with public benevolent institutions.

17. As well as distributing directly to persons in necessitous circumstances, a fund may also distribute to other funds or institutions which themselves care for persons in necessitous circumstances. Indirect distributions of monies are acceptable, provided they are used for the purpose of providing relief to those in necessitous circumstances. Where the relief of necessitous circumstances is only one of the recipient fund's or institution's objects or activities, the necessitous circumstances requirement may not be met. Funds established under a will or instrument of trust to provide money, property or benefits to another fund for persons in necessitous circumstances may be accepted as ancillary funds for gift deduction purposes: see item 2 of the table in section 30-15 of the ITAA 1997.

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These gift deductible funds are explained in Taxation Ruling TR 95/27.

18. Where a fund is maintained primarily for the relief of one individual, family or similar group, the fund's constituent documents must clearly indicate that the fund is for the relief of persons in relation to specified circumstances. It should not provide merely that the fund is held on trust for the named individual(s) as it lacks the requisite purpose.

19. The constituent documents should contain an acceptable clause to deal with any surplus assets in the event the fund is wound up or ceases to be endorsed as a deductible gift recipient. Generally speaking, an acceptable clause is one which provides that, upon the winding up of the fund or the ceasing of endorsement, all surplus assets are to be transferred to one or more endorsed funds having similar objects and which come within the scope of section 30-45.

## **Indication of purpose**

20. A fund's purpose should be stated in its constituent documents and its activities should be consistent with its stated purpose.

21. It is preferable, but not strictly necessary, that the constituent documents expressly state that the fund is for the relief of persons in necessitous circumstances.

22. Where not expressly stated, relief of necessitous circumstances may be implied from the constituent documents. Relevant matters include the way potential beneficiaries are described, the general tenor of the documents, references to needs and the common circumstances of potential beneficiaries, including their financial position.

23. It is relevant whether a fund is being, or will be, administered in accordance with its constituent documents. The actual operations and distributions made may indicate if the fund has, in fact, been maintained for the relief of persons in necessitous circumstances. Where a fund's managers distribute regardless of the needs of beneficiaries, the fund is not considered to be maintained for relief of persons in necessitous circumstances.

## **Extent of purpose**

24. A fund must be exclusively, or at least chiefly, for the relief of persons in necessitous circumstances. If a fund gives relief indifferently to persons who are and who are not in necessitous circumstances, it does not qualify.

**In Australia**

25. The persons whose necessitous circumstances are to be relieved must be in Australia. A public fund for the relief of persons in necessitous circumstances is for persons in Australia where:

- the constituent documents expressly limit relief to persons in Australia only;
- it is clearly implied in the constituent documents that only persons in Australia are to be relieved; or
- provided the fund's purpose is to relieve persons in Australia and there is no specific intention to relieve persons outside Australia, the constituent document may recognise genuine exceptional circumstances.

26. A fund established for the benefit of persons in Australia may, in exceptional circumstances, actually provide relief to persons outside Australia. Funds sometimes provide money to persons for an operation or treatment to be carried out overseas because it is not available in Australia. If the persons to be relieved are temporarily out of Australia for such treatment, the fact that funding is provided outside Australia is still considered consistent with item 4.1.3. Constituent documents that recognise genuine exceptional circumstances such as this do not result in the fund being denied its deductible gift status.

**Date of effect**

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27. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

**Explanations**

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**The meaning of necessitous circumstances**

28. The leading cases on the meaning of necessitous circumstances concern estate duty, in particular subparagraph 8(5)(c)(ii) of the *Estate Duty Assessment Act 1914*. Under that provision, duty is not to be assessed upon so much of the estate as is devised or bequeathed 'for the purpose of providing money for the relief of persons in necessitous circumstances in Australia'. We accept that the judicial meaning given to the term 'necessitous circumstances' as it appears in the context of the estate duty legislation is no different from the meaning

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in item 4.1.3. Although the word ‘purpose’ does not exist in item 4.1.3, it is clear from the words ‘public fund **established and maintained for the relief of persons in necessitous circumstances**’ that it must have that purpose.

29. Several principles have emerged from case law on the meaning of necessitous circumstances. These are:

- necessitous circumstances concern financial necessity;
- it involves some degree of poverty, though it may be less than abject poverty or destitution;
- it is relative to a modest standard of living;
- it is a relative term, which has no fixed quantitative measure and it may be relative to particular circumstances; and
- it is distinguished from the inability to afford merely desirable advantages.

## *Financial necessity*

30. The expression ‘necessitous circumstances’ refers to financial necessity. It does not extend to needs generally. Kitto J said in *Ballarat Trustees Executors and Agency Co Ltd v. FC of T* (1950) 80 CLR 350 at 353:

‘It was contended ... that the expression “necessitous circumstances” ... includes any circumstances of need, such as the need for hospital attention, and is not confined to circumstances of financial necessity. In my opinion so wide a construction of the expression should not be adopted, having regard to ordinary usage, the context in which the words appear and the history of the sub-section [8(5) of the *Estate Duty Assessment Act 1914-1942*]. I construe the expression as referring to circumstances characterized by some degree of financial necessity.’

31. Accordingly, the needs of the sick, incapacitated, aged, etc., do not, on their own, constitute necessitous circumstances. However, it may be the case that a non-financial need causes financial necessity. For example, in *Ryland v. FC of T* (1971) 19 FLR 214 at 224; 71 ATC 4241 at 4247; 3 ATR 34 at 42, Nelson J referred to ‘those who are incapacitated for life to such an extent as to be precluded from earning other than [a] negligible percentage of a living wage’.

32. The meaning of necessitous circumstances can be contrasted with the needs for benevolent relief that are relevant for public benevolent institutions under item 4.1.1 of section 30-45. Unlike necessitous circumstances, such needs are not necessarily financial:

*Commr of Pay-roll Tax (Vic.) v. Cairnmillar Institute* 92 ATC 4307; (1992) 23 ATR 314; *FC of T v. Launceston Legacy* 87 ATC 4635; (1987) 19 ATR 41. Public benevolent institutions may be for the relief of sickness, helplessness, suffering or distress as well as for poverty or destitution: *Perpetual Trustee Co. Ltd v. FC of T* (1931) 45 CLR 224.

### ***Degree of poverty***

33. While necessitous circumstances involve financial necessity, the necessity need not be to the extent of abject poverty or destitution. In *Ballarat Trustees* Kitto J said at 80 CLR 355:

‘The expression “necessitous circumstances” is not defined by the Act, nor has it been judicially interpreted in its present or a comparable context. It does not admit of definition in terms so precise as to provide a yardstick for the determination of every case which may arise. Yet it is an expression which is familiar in common speech, not as limited to cases of abject penury, but as conveying the notion which the Oxford Dictionary endeavours to express as “having little or nothing to support oneself by; poor, needy; hard up”. None of these words or phrases can be selected as by itself precisely defining the expression. “There are degrees of poverty less acute than abject poverty or destitution, but poverty nevertheless”: *Lemm v. Federal Commissioner of Taxation* (1942) 66 CLR 399, at 410 per Williams J; and “necessitous circumstances” refers in my opinion to some degree of poverty.’

### ***Relative to a modest standard of living***

34. Whether a person is in necessitous circumstances depends on whether he or she can obtain a modest standard of living. In *Ballarat Trustees* Kitto J said at 80 CLR 355:

‘... I should say that a person is in necessitous circumstances if his financial resources are insufficient to enable him to obtain all that is necessary, not only for a bare existence, but for a modest standard of living in the Australian community.’

35. A strong indicator, though not the only indicator, can be whether the person is entitled to government welfare assistance. In *Re Heath and Defence Force Retirement and Death Benefits Authority* (1987) 7 AAR 412 at 421, the Administrative Appeals Tribunal accepted the following guidelines of the Authority (set out at 414 and 415) as providing a reasonable yardstick for assessing necessitous circumstances:



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‘8. The Authority is of the opinion that it should not place an unduly restrictive interpretation on the term “necessitous circumstances”. It considers that to be in necessitous circumstances an applicant does not need to demonstrate that she is living in abject poverty or is destitute, but rather that her financial resources are insufficient to enable her to enjoy a reasonable standard of living. Accordingly, not only is an applicant in receipt of a full income tested benefit under the Social Services Act or similar welfare legislation, considered to be in necessitous circumstances, but also an applicant in receipt of partial income tested benefit which has been reduced on account of other income. Further, an applicant not in receipt of any income tested welfare benefit may be in necessitous circumstances where her household income from whatever source, is sufficiently low to prevent her from enjoying a reasonable standard of living.

9. It is considered that the primary guide to the level of income necessary for an applicant to enjoy a reasonable standard of living, should be taken to be that at which income tested Social Security benefits cease to be payable (either at the married couple’s or single person’s rate according to the applicant’s marital situation), as this is the limit at which Parliament has determined that a person no longer requires assistance from the public purse.

10. Whilst it is considered that an applicant’s financial income level may be a useful guide in establishing whether an applicant is in necessitous circumstances, the Authority is of the opinion that an income level above the Social Security income limit may not necessarily preclude an applicant from being in necessitous circumstances. Where such an applicant can demonstrate that there are special or unusual circumstances which result in a marked lowering in her standard of living causing hardship, then she may be in necessitous circumstances. Conversely, the Authority may not be satisfied that an applicant is in necessitous circumstances where her gross household income is less than the financial income limit, (at which income tested Social Security benefits cease to be payable), but the standard of living that the applicant enjoys reflects a lifestyle above that normally commensurate with that household income level.’

36. While we agree that a guide to the level of income necessary for an applicant to enjoy a reasonable standard of living might be the amount at which income tested Social Security benefits cease to be payable, this is not a conclusive factor and there may be other circumstances which need to be considered.

***Relative to particular circumstances***

37. Whether a person is in necessitous circumstances depends on their particular circumstances. An objective income level need not, on its own, indicate necessitous circumstances. For example, in *Case X13 90 ATC 165 at 171 Purvis J* did not accept that being in receipt of government social welfare was sufficient evidence of necessitous circumstances:

‘There was not any evidence as to the financial resources of the student beneficiaries other than that their parents or parent were or was in receipt of social security. There was not any evidence of an inability on the part of a parent or the student to afford the necessaries associated with living in Australia.’

38. The assets, liabilities, family responsibilities, health expenses, etc., of particular persons may cause them to be needy. As the Administrative Appeals Tribunal commented in *Re Finlay-Maclarty and Defence Force Retirement and Death Benefits Authority* (1979) 1 ALD 616 at 622:

‘... a person recently widowed with a young family to care for and heavily in debt and without a home and whose only income was \$6785 could well meet a test of necessitous circumstances.’

39. However, the death of a family member or the loss of an asset or business does not necessarily place a person in necessitous circumstances. The availability of other sources of income or assets, superannuation, insurance, compensation, etc., might in the particular circumstances assure a continuing reasonable standard of living.

40. The particular circumstances giving rise to financial necessity are not necessarily permanent. For example, cyclones, droughts and other disasters may cause people to be needy in the short term.

***Distinguished from merely desirable advantages***

41. While necessitous circumstances do not mean absolute destitution, they do not extend to the absence of merely desirable advantages. Persons with financial needs, sometimes pressing ones, are not necessarily suffering from financial necessity. In *Ballarat Trustees* Kitto J said at 80 CLR 355 that necessitous circumstances refer to the:

‘... inability to afford what may fairly be regarded as necessities for persons living in Australia, as distinguished from things which are merely desirable advantages.’

On this view of the matter, I should not be prepared to apply the expression “in necessitous circumstances” to that class of persons in Australia who enjoy a modestly comfortable existence and yet are unable to afford hospital treatment at a cost equal to the fees charged at St Andrew’s. There is a considerable margin between necessitous circumstances and affluence, and in my opinion within that margin fall many cases of inability to afford as much for hospital treatment as a privately-conducted hospital like St Andrew’s has to charge under modern conditions, even though not carried on for profit.’

42. Another example is provided by *Re Heath and Defence Force Retirement and Death Benefits Authority* at 7 AAR 422. In deciding that the applicant was not in necessitous circumstances, the Tribunal commented:

‘... the family fully owns its own home, educates its children at private schools, albeit not at excessive cost, and owns and runs two cars, again on which no moneys are owed. No significant indications of deprivation were evident in the figures given.’

43. Care may be needed where a fund is to be established to support the dependants of a deceased person(s). For example, the loss of a primary income provider does not necessarily involve the dependants in necessitous circumstances. Life insurance, superannuation, ownership of a home and other assets may all play a part in determining whether the dependants are in necessitous circumstances.

### **Relieving necessitous circumstances**

44. Not only must a fund be for persons in necessitous circumstances, it must also be for the **relief** of persons in those circumstances.

45. Not all funds directed towards persons in necessitous circumstances are necessarily for the relief of necessitous circumstances. This was illustrated in *Case X13* 90 ATC 165 where a fund operated to assist in the education of financially underprivileged children attending a particular high school. It was used to make payment to the school in respect of fees that could not otherwise be recovered from parents, and for hobbies and excursions. Purvis J found, at 171, that such payments were not in relief of the necessitous circumstances of students or parents. His Honour referred to the argument that if ‘the Act was here intending to cover expenses of education, then ... the word “relief” would not have been inserted in it.’

46. A fund’s most common method of relieving persons in necessitous circumstances is by direct distributions of money or goods

to them. However, *Union Trustee Co. of Australia Ltd v. FC of T* (1962) 108 CLR 451 illustrates a different way. There, the fund was used to make distributions to institutions which themselves cared for the persons in necessitous circumstances. For the income tax gift provisions, such funds are normally considered under the ancillary fund provision, namely item 2 of section 30-15.

47. Where the services go beyond distributions of money or goods, the organisation is more likely to be characterised as an institution than a fund. Item 4.1.1 of section 30-45, covering public benevolent institutions, may then be relevant.

### **Indication of purpose**

#### ***Purpose expressly stated in constituent documents***

48. A fund's purpose should be stated in its constituent documents and its activities should be consistent with its stated purpose.

49. It is preferable, but not strictly necessary, that the constituent documents expressly state that the fund is for the relief of a class of persons in necessitous circumstances. Funds are strongly encouraged to refer to necessitous circumstances and address the following questions in their constituent documents:

- who is the fund intended to help?
- why do these people need help?
- what help does the fund provide to these people?
- how are the recipients of help selected?
- how does the fund limit its help to people who are in Australia?

50. For people intending to establish a fund in the immediate aftermath of a disaster or accident, these questions may also help them focus and clarify their aims and strategies.

51. Where a fund is maintained primarily for the relief of one individual, family or similar group, its constituent documents must clearly indicate that the fund is for the relief and assistance of the persons in relation to specified circumstances. They should not provide merely that the fund is held on trust for the named individual(s) as it lacks the requisite purpose. The constituent documents should also contain an acceptable dissolution clause. Generally speaking, an acceptable dissolution clause is one which provides that, upon the winding up of the fund, all surplus assets are to be transferred to one or more endorsed funds, having similar objects and which come within the scope of section 30-45 (see TR 95/27 at paragraphs 11 to 13 and 27 to 29). These conditions help ensure that

the fund is used only to provide relief and not merely for the private benefit of the individual, family or group, and is consistent with income tax exemption under items 1.5 to 1.5B of section 50-5 (which express similar ideas to subparagraph 23(j)(ii) of the ITAA 1936).

***Purpose implied from constituent documents***

52. If it is not expressly stated, a purpose to relieve necessitous circumstances may be implied from the constituent documents and common circumstances of the potential beneficiaries: *Union Trustee Co* 108 CLR 451 at 456 and 458; *Downing v. FC of T* (1971) 125 CLR 185 at 193; 71 ATC 4164 at 4166; (1971) 2 ATR 472 at 474.

53. In finding whether the relief of persons in necessitous circumstances is implied in the constituent documents, relevant matters include the ways potential beneficiaries are described, the general tenor of the documents, references to needs (such as for amelioration, assistance, care, distress), and common circumstances of the potential beneficiaries, including financial position.

54. For example, in *Union Trustee Co* Taylor J considered the words used in the will, the types of institution involved and their traditional operations. His Honour said at 108 CLR 458:

‘Under either set of trusts the recipient of any benefaction must answer the description either of a “charitable” institution or of a “religious” institution. Additionally, it must be an institution which has as an object “the care, comfort and maintenance of elderly and/or aged people” and, finally, it will be required to “expend” its share on the care, comfort and maintenance of persons in this category. In the face of these considerations is it possible to say that the purpose of the residuary gift was not the relief of persons in necessitous circumstances? I think it is not. Traditionally, the reason for the concern of institutions of the character in question with aged or elderly people is the privation, suffering or distress which results not from age alone but from a combination of age and indigence. Such institutions may provide shelter for the reception and care of such persons or they may minister to the aged in their own homes but whether one course or the other be followed, or whether both be combined, it cannot, I think, be supposed that the only qualification for relief is age. Upon this consideration alone I would be inclined to think that the gift fell within s 8(5)(c)(ii) [of the *Estate Duty Assessment Act 1914-1957*]. But the matter is carried somewhat further by the fact that the object of the gift is the “care, comfort and maintenance” of elderly or aged people. When one takes into account the form of administration chosen by the deceased and the explicit direction that each benefaction shall be expended for this

purpose it is, I think, clear that the deceased's testamentary intention was to make provision for the relief of those elderly or aged people as institutions of the character in question should, in the exercise of the discretion reposed in them by the will, think in need of "care, comfort and maintenance". That being so, it is, I think, impossible to resist the conclusion that the object of the gift was the relief of persons in necessitous circumstances in Australia.'

55. In *Downing* the High Court considered a gift that included purposes 'for the relief of persons in necessitous circumstances in Victoria, or for the amelioration of the condition of the dependants of any member or ex-member of Her Majesty's naval military or air forces ...'. Walsh J, with whom the other members of the court agreed, concluded that the latter provision was also for persons in necessitous circumstances. It was for the relief of poverty. His Honour relied on the meaning of 'amelioration' and the terms of the gift as a whole to reject the argument that a 'person might be, for example, a dependant of a wealthy ex-member of the forces, with ample resources available for his maintenance and advancement, and yet it would be permissible to apply funds for the "amelioration" of his "condition".' His Honour said at 125 CLR 194; 71 ATC 4166; 2 ATR 475:

'When the clause refers to the amelioration of the condition of dependants, I think it is right to regard those words, in their context as part of the whole trust which, in my opinion, has a character which is predominantly charitable, as indicating that the object of the amelioration clause is to benefit persons whose lot needs improvement.'

That is, they would be persons suffering some degree of poverty.

56. Two provisions in a will in *Ryland* also illustrate the point. One provided for:

'the relief assistance or support of the former officers and members of the naval, military or air forces of the Commonwealth who are sick, wounded, disabled or out of employment or for the relief assistance or support of their dependants or of the dependants of officers and members who have lost their lives directly or indirectly in or in connexion with any war ...'.

57. The court accepted that this provision was for the relief of persons in necessitous circumstances on the grounds, at 19 FLR 226; 71 ATC 4248; 3 ATR 43, that:

'It is difficult to conceive of any need common to all three classes [of potential beneficiaries] which could call for relief assistance or support, other than financial need, and I have no doubt that the intention of the testatrix was to provide for the

financial relief assistance or support of those in any of the classes who were in need of such financial relief, assistance or support.’

58. For another provision in *Ryland*, at 19 FLR 223-224; 71 ATC 4247-4248; 4 ATR 41-42, Nelson J considered the terms of the gift and the likely financial circumstances of the potential beneficiaries. The provision was for members of the Totally and Permanently Disabled Soldiers’ Association who were suffering distress. The distress was taken to be financial distress, given the persons who could be eligible and the other terms (at FLR 224; ATC 4245; ATR 38-39). In accepting that the fund was for the relief of persons in necessitous circumstances, Nelson J said:

‘The fact that the eligible class is limited by definition to those who were incapacitated and who would predominantly consist of persons who had no means of livelihood other than governmental assistance, and the fact that the benefit is limited to cases of distress in that unfortunate class, in my opinion leave no doubt ...’.

59. The conclusions and reasons of Nelson J were accepted by the High Court on appeal: *Ryland v. FC of T* (1973) 128 CLR 404 at 409-410; 73 ATC 4107 at 4110; (1973) 4 ATR 40 at 43.

### ***Purpose based on activity***

60. The rules, etc., by which the fund’s managers or trustees are bound indicate a fund’s purpose. In some circumstances it may also be necessary to consider the actual operations of the fund and whether the fund is being, or will be, administered in accordance with those rules. Where the managers, in fact, distribute the fund regardless of the needs of potential beneficiaries, the fund is not being maintained for the relief of persons in necessitous circumstances.

61. This does not mean that the managers must, in all circumstances, investigate the financial resources of each individual beneficiary. Sometimes, it may be apparent from the common attributes of the potential beneficiaries that they are in necessitous circumstances.

62. For example, it is unlikely to be necessary for a fund relieving the immediate distress of persons affected by bushfires, floods, storms, etc., to inquire into the financial circumstances of the beneficiaries: CITCM 806 at paragraph 37. The necessitous circumstances of such persons immediately after the disaster are commonly apparent from their presence in the affected area, the general lack of amenities, the state of their homes and other possessions, and their requests for relief. However, as time passes it is likely that fund managers will inquire more closely into the

applicants' necessitous circumstances because of the shrinking fund, competing claims, insurance recoveries, differences between individual circumstances, etc.

### **Extent of purpose**

63. The public fund must be exclusively, or at least chiefly, for the relief of persons in necessitous circumstances: *Ballarat Trustees* at 80 CLR 353. If the fund may give relief 'indifferently to persons who are and to persons who are not in necessitous circumstances' it does not qualify: *Ballarat Trustees* at 80 CLR 353.

### **In Australia**

64. Item 4.1.3 in section 30-45 requires that the persons whose necessitous circumstances are to be relieved must be in Australia. A public fund for the relief of persons in necessitous circumstances is for persons in Australia where: the constituent documents expressly limit relief to persons in Australia only; it is clearly implied by the constituent documents that only persons in Australia are to be relieved; or the fund's purpose is to relieve persons in Australia and there is no specific intention to relieve persons outside Australia. A recognition of genuine exceptional circumstances of the type referred to in paragraphs 25 and 26 does not deny the entity's exempt status.

65. Express provision in the fund's constituent documents that relief is limited to persons in Australia assists the fund in maintaining its purpose and its deductible gift status in the long term.

66. An example of an implied limitation would be where a fund is established to alleviate financial distress caused by a storm or cyclone that occurred in Australia. Or, as in *Union Trustee Co*, the institutions that were to care for the elderly persons were required by the bequest to be in Queensland. It is implicit that the beneficiaries also would have been in Queensland.

67. The requirement that persons must be 'in Australia' is not a strictly rigid test and exceptional circumstances may still satisfy the requirement. An example of this is provided by *Ryland* at 128 CLR 410-412; 73 ATC 4110-4112; 4 ATR 43-45 per Barwick CJ and at CLR 414-416; ATC 4113-4114; ATR 46-47 per Menzies J. In this case, a gift was made to the Returned Services League for 'the relief assistance or support of the former officers and members of the naval, military or air forces of the Commonwealth who are sick, wounded, disabled or out of employment or for the relief assistance or support of their dependants or of the dependants of officers and members who have lost their lives directly or indirectly in or in connexion with any war ...'. Although it could be expected that only a very small



proportion of beneficiaries would ever be outside Australia, there was no specific restriction to Australia, and a benefaction to a person outside Australia would not be in breach of the trust.

68. The High Court decided that it was for the relief of persons in Australia. Barwick CJ, with whom McTiernan J agreed, said at CLR 411; ATC 4111; ATR 44:

‘... so long as the predominant purpose of the fund is to afford relief to persons in Australia and there is no specific intention to include persons out of Australia within the scope of the gift, the fact that consistently with the language of the gift, relief might possibly be given out of the fund to persons not in Australia, will not in my opinion prevent the gift from qualifying ...’.

69. Factors that supported this conclusion, apart from the wording of the gift, included choosing the Returned Services League as trustee and the very small proportion of beneficiaries who might be outside Australia.

70. The proportion of persons benefiting is not, however, determinative. As Barwick CJ said in *Ryland* at CLR 411; ATC 4111; ATR 44:

‘... the necessary purpose will be absent if by the language of the gift it can be seen that beneficiaries out of Australia are intended to be included in the ambit of the fund.’

71. The circumstances in *Downing* provide an example. There, the gift was for ‘the amelioration of the condition of the dependants of any member or ex member of Her Majesty’s naval military or air forces or the naval military or air forces of the Commonwealth’. Although it included persons with a connection with Australia (the Commonwealth forces), it also specifically extended to persons of other countries (Her Majesty’s forces). Menzies J, who was a member of the court that decided *Downing*, said in *Ryland* at 128 CLR 415-416; 73 ATC 4114; 4 ATR 47:

‘It was, I think, rightly taken for granted that without such a limitation [as “in Australia”] a gift for the purpose set out could not be described as one for the purpose of “the relief of persons in necessitous circumstances in Australia”.’

## **Examples**

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72. For the purposes of the following examples, it has been assumed that the structure and operation of each fund meets the public fund requirements set out in Taxation Ruling TR 95/27.

**What are necessitous circumstances?*****Example 1***

73. While on holidays interstate, Jennifer was seriously injured in a car accident. All her medical expenses are being met by her travel insurance. Jennifer is suffering from loneliness and is facing a lengthy stay in hospital before she can return home. A local service club wishes to raise funds to fly Jennifer's mother interstate to comfort her daughter.

74. Would the money raised constitute a necessitous circumstances fund? No. Jennifer's needs are not financial in nature. The fund is not for a person who is in necessitous circumstances.

***Example 2***

75. Geoff is 17 years old and was permanently incapacitated while playing football. He requires 24 hour care for the rest of his life. He was not insured and his parents cannot meet the costs. The local community wishes to set up an appeal fund for Geoff. The money raised is to be used to pay for necessary modifications to his parent's home and for the services of a carer.

76. Would this be a necessitous circumstances fund? Yes. Geoff's parents do not have the means to provide the facilities and care that he requires. His condition has placed his family in immediate and on-going financial need. They would be considered to be in necessitous circumstances.

***Example 3***

77. During recent floods, three volunteer workers were killed while carrying out a rescue. None of the three volunteers had any financial dependants.

78. Would a fund set up to raise money for the volunteers' families be a necessitous circumstances fund? No. The tragedy did not place any of the volunteers' families in financial necessity. The fund would not be for persons who are in necessitous circumstances.

***Example 4***

79. Mrs Lupton has a small child and was recently widowed when her husband was killed in the line of duty as a police officer. Her husband's life insurance policy will pay out the mortgage on their home. Mrs Lupton also receives a superannuation pension which covers her on-going expenses and she has a moderate amount of cash

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in a savings account. The local community has launched an appeal to assist the family financially.

80. Would the appeal fund be a necessitous circumstances fund? No. Even though Mrs Lupton is not enjoying her previous standard of living, she has sufficient funds for her immediate needs and is able to maintain herself and her child on her modest income, without the support of welfare benefits. Mrs Lupton is not considered to be in necessitous circumstances.

## **Relieving necessitous circumstances**

### *Example 5*

81. A fund provides scholarships for students who are attending a particular school. The scholarship pays for a student's field trips, sporting and cultural activities. Preference for scholarships is given to students who are in necessitous circumstances.

82. Is this a necessitous circumstances fund? No. While the fund may be for persons in necessitous circumstances, it is not providing 'relief' of those circumstances. The intention of the fund is to further the education of students and not to relieve their poverty.

### *Example 6*

83. The employees of a government department wish to raise money for five particular staff members whose homes were badly damaged in a bushfire. The rules of the fund state that the money is for 'food, clothing, emergency shelter and urgent essential repairs to enable them to occupy their homes'.

84. Would this be a necessitous circumstances fund? Yes. Even though the fund is to benefit a small group of specific individuals, they are not benefiting in their capacity as friends, colleagues or employees. They are benefiting in their capacity as persons who are in necessitous circumstances.

### *Example 7*

85. Smithville has been devastated by a cyclone. A mayoral appeal has been launched to provide short term financial assistance to address the needs of those residents who were victims of flood and cyclone damage.

86. Would the appeal be a necessitous circumstances fund? Yes. Residents whose homes have been damaged can reasonably be expected to have extraordinary needs including food, shelter and clothing. In the immediate short term, the circumstances of the

disaster itself would indicate the need for financial relief. During this period, a close consideration of the potential beneficiaries' finances would not be necessary. In the longer term, however, once banks have reopened, insurance monies are paid, etc., it would be expected that the fund managers would look closely to determine that the people seeking relief are, in fact, in necessitous circumstances.

### ***Example 8***

87. The Cawarra community group wishes to set up a fund to provide interest-free loans. Loans are only to be made to persons on low incomes who cannot afford to purchase essential goods such as whitegoods, heating and medical appliances. The loans must be used to purchase these types of goods. Applicants must complete an application form setting out details including the purpose of the loan, the amount required and a fortnightly budget of their income and expenses.

88. Would the fund be a necessitous circumstances fund? Yes. The fund restricts loans to people who are in financial need. The loans enable people to obtain items regarded as necessities for people living in Australia, rather than merely desirable advantages. There are degrees of poverty and necessitous circumstances are not confined to those who are destitute.

### **Indication of purpose**

#### ***Example 9***

89. A trust deed shows a trust's purpose is "to provide money, property or benefits to physically incapacitated persons who are in need of assistance".

90. Would the trust be a necessitous circumstances fund? No. The fund's objective, as currently stated, is too vague. There is no indication that recipients have to be in financial need. The fund's objective should be clear that relief is to be provided based on a recipient's financial need and not by reason of physical incapacity alone. The inclusion of an express reference to necessitous circumstances is recommended as well as the inclusion of eligibility criteria to assess the financial need of potential recipients.

### **In Australia**

#### ***Example 10***

91. A fund has been set up to provide immediate assistance (in the form of money, food and clothing) to victims of a recent earthquake in New Zealand.

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92. While the fund is providing relief of necessitous circumstances, it is not for the relief of persons ‘in Australia’. It is not a necessitous circumstances fund.

***Example 11***

93. Justin is a 10 year old Australian boy with cancer. The most appropriate treatment is available at a clinic in Germany. Justin’s parents had to sell the family home to pay for his treatment to date and cannot afford the trip to Germany.

94. Would a fund set up to send Justin, and a parent, to the clinic be a necessitous circumstances fund? Yes. Justin’s illness has placed the family in necessitous circumstances. Justin’s offshore treatment would be considered a means of relieving the necessitous circumstances of a person in Australia.

**Detailed contents list**

95. Below is a detailed contents list for this draft Taxation Ruling:

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## **Your comments**

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96. We invite you to comment on this draft Taxation Ruling. We are allowing until **3 March 2000** for comments before we finalise the Ruling. If you want your comments to be considered, please provide them to us by this date.

<b>Comments by Date:</b>	<b>3 March 2000</b>
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## Commissioner of Taxation

22 December 1999

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*Previous draft:*

Not previously released to the public in draft form

*Related Rulings/Determinations:*

CITCM 806; IT 2071; IT 2443; TD 92/110; TD 93/57; TR 95/27

*Subject references:*

- gifts and donations
- gifts to individuals
- gifts to organisations
- necessitous circumstances

*Legislative references:*

- EDAA 1914 8(5)
- EDAA 1914 8(5)(c)(ii)
- ITAA 1936 23(j)(ii)
- ITAA 1936 78(4) Item 4.1.3
- ITAA 1997 30-15 Item 2
- ITAA 1997 30-45
- ITAA 1997 30-45 Item 4.1.1
- ITAA 1997 30-45 Item 4.1.3
- ITAA 1997 30-125(4), (5) & (6)
- ITAA 1997 50-5 Item 1.5
- ITAA 1997 50-5 Item 1.5A
- ITAA 1997 50-5 Item 1.5B

- Commr of Pay-roll Tax (Vic) v. Cairnmillar Institute 92 ATC 4307; (1992) 23 ATR 314
- Downing v. FC of T (1971) 125 CLR 185; 71 ATC 4164; 2 ATR 472
- FC of T v. Launceston Legacy 87 ATC 4635; (1987) 19 ATR 41
- Lemm v. Federal Commissioner of Taxation (1942) 66 CLR 399
- Perpetual Trustee Co. Ltd v. FC of T (1931) 45 CLR 224
- Re Finlay-Maclarty and Defence Force Retirement and Death Benefits Authority (1979) 1 ALD 616
- Re Heath and Defence Force Retirement and Death Benefits Authority (1987) 7 AAR 412
- Ryland v. FC of T (1973) 128 CLR 404; 73 ATC 4107; (1973) 4 ATR 40
- Ryland v. FC of T (1971) 19 FLR 214; 71 ATC 4241; (1971) 3 ATR 34
- Union Trustee Co. of Australia Ltd v. FC of T (1962) 108 CLR 451
- Case X13 90 ATC 165

*Case references:*

- Ballarat Trustees Executors and Agency Co Ltd v. FC of T (1950) 80 CLR 350

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ATO references:

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