

MT 2000/1 - The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number ('ABN')

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Miscellaneous Taxation Ruling

The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number ('ABN')

Preamble

*This document does not rule on the application of a 'tax law' (as defined) and is, therefore, not a 'public ruling' for the purposes of Part IVA of the **Taxation Administration Act 1953**. The document is, however, administratively binding on the Commissioner of Taxation. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

What this Ruling is about

1. This Ruling provides assistance in determining the entitlement to an Australian Business Number ('ABN') for entities, other than Corporations Law companies, government entities and non-profit sub-entities, carrying on an enterprise in Australia.

2. Under subsection 28(2) of the *A New Tax System (Australian Business Number) Act 1999* ('ABNA') the Commissioner of Taxation is the Registrar of the Australian Business Register.

3. The Ruling sets out our views on the meaning of certain key words and phrases used in the ABNA to define:

- an entity (section 37 of the ABNA); and
- an enterprise (section 38 of the ABNA).

4. Included within the meaning of enterprise under paragraphs 38(1)(d), (e) and (f) of the ABNA are all of the activities done by:

- the trustees of funds covered by, or by authorities or institutions covered by, Subdivision 30-B of the *Income Tax Assessment Act 1997* ('ITAA 1997') and to which deductible gifts can be made;
- charitable institutions and the trustees of charitable funds; and

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- religious institutions.

This Ruling does not consider the meaning of these types of entities.

5. The Ruling does not consider the meaning of supplies that are connected with Australia under paragraph 8(1)(b) of the ABNA. 'Connected with Australia' in relation to a supply and 'supply' have the meanings given by sections 195-1 and 9-10 of the *A New Tax System (Goods and Services Tax) Act 1999*.

Date of effect

6. This Ruling applies on and from the date of commencement of the ABNA, being 8 July 1999.

Ruling

7. The ABN is a single, unique business identifier to be used for all dealings with the Commonwealth Government. It is also available to State, Territory and local government regulatory bodies. Identification for taxation law purposes is only one of the objects of the ABNA.

8. Corporations Law companies are automatically entitled to an ABN under subsection 8(2) of the ABNA. Other entities are entitled to an ABN under paragraph 8(1)(a) of the ABNA if they are carrying on an enterprise in Australia or under paragraph 8(1)(b) of the ABNA if, in the course or furtherance of carrying on an enterprise, they make supplies that are connected with Australia. Government entities and non-profit sub-entities are deemed to be carrying on an enterprise in Australia under section 5 of the ABNA.

Entities entitled to an ABN if they carry on an enterprise in Australia (section 37 of the ABNA)

9. Entities, other than Corporations Law companies, government entities and non-profit sub-entities must fall into one of the types of entity listed in subsection 37(1) of the ABNA to be entitled to an ABN. They are:

- (a) an individual;
- (b) a body corporate;
- (c) a corporation sole;
- (d) a body politic;
- (e) a partnership;

- (f) any other unincorporated association or body of persons;
- (g) a trust; or
- (h) a superannuation fund.

10. It is the trustee of a trust or of a superannuation fund (in its capacity as trustee) that is entitled to an ABN (subsection 37(2) of the ABNA).

11. An entity may be entitled to an ABN in its own capacity. However, in addition to acting in its own capacity, an entity may act as trustee for one or more trusts. If that is the case, the entity is acting in each capacity separately and may be entitled to an ABN in each capacity (subsection 37(3) of the ABNA).

12. An entity carrying on more than one enterprise is only entitled to one ABN. It is the entity and not the enterprise that is entitled to an ABN.

13. The general law of agency applies to entities. That is, a thing done by an entity's agent as agent for the entity is a thing done by the entity. An agent is not entitled to an ABN in respect of the enterprise of the principal.

14. Entity is a key concept in determining entitlement to an ABN, and the **Explanations and examples** part of this Ruling provides further guidance in this regard.

Enterprise (section 38 of the ABNA)

15. Section 38 of the ABNA includes certain activities in 'enterprise' and excludes other activities. Carrying on an enterprise also includes activities done in the course of commencement or termination of the enterprise, under section 41 of the ABNA.

16. Section 38 provides an enterprise is an activity, or a series of activities, done:

- in the form of a business;
- in the form of an adventure or concern in the nature of trade;
- on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property;
- by the trustee of a fund that is covered by, or by an authority or institution that is covered by, Subdivision 30-B of the ITAA 1997 and to which deductible gifts can be made;

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- by a charitable institution or by a trustee of a charitable fund;
- by a religious institution; or
- by the Commonwealth, a State or a Territory, or by a body corporate, or corporation sole, established for a public purpose by or under a law of the Commonwealth, a State or a Territory.

17. The following activities are excluded from the section 38 meaning of enterprise:

- activities done by a person as an employee or in connection with earning withholding payments covered by subsection 38(3) (second occurring) of the ABNA (see paragraph 18) unless it is done in supplying services as the holder of an office that the person has accepted in the course of, or in connection with, an activity, or series of activities, of a kind mentioned in the activities included in an enterprise;
- activities done as a private recreational pursuit or hobby;
- activities done by an individual (other than a trustee of a charitable fund) or a partnership (all the members of which are individuals) without a reasonable expectation of profit or gain; and
- activities done as a member of a local governing body established by or under a State Law or Territory law (except a local governing body to which subsection 12-45(3) in Schedule 1 to the *Taxation Administration Act 1953* ('TAA') applies).

18. Subsection 38(3) (second occurring) deals with withholding payments covered by any of the provisions in Schedule 1 to the TAA listed in the table.

Withholding payments covered

Item	Provision	Subject matter
1	Section 12-35	Payment to employee
2	Section 12-40	Payment to company director
3	Section 12-45	Payment to office holder
4	Section 12-60	Payment under labour hire arrangement, or specified by regulations

19. Under section 38 of the ABNA, enterprise activities include the making of supplies by entities to members of the entity, even

where the activities of the entity are limited to making supplies to members of the entity.

‘Activity, or series of activities’

20. For an entity to be entitled to an ABN, it is only necessary to identify one enterprise. Where an entity carries on a number of activities, it is only necessary that one of those activities constitute an enterprise in order for the entity to be entitled to an ABN.

‘Business’

21. An enterprise includes a business.

22. The definition of business in section 41 of the ABNA is the same as the definition of ‘business’ in subsection 6(1) of the *Income Tax Assessment Act 1936* (‘ITAA 1936’).

23. To determine whether an activity, or series of activities, amounts to a business, the activity needs to be considered against the indicators of a business established by case law.

‘An adventure or concern in the nature of trade’

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

25. An adventure or concern in the nature of trade includes a commercial activity that does not amount to a business. Isolated transactions fall into this category. However, the sale of the family home, car and other private assets are not, in the absence of other factors, adventures or concerns in the nature of trade. The fact that the asset is sold at a profit does not, of itself, result in the activity being commercial in nature.

‘In the form of’

26. The use of the phrase ‘in the form of’ in paragraphs 38(1)(a) and (b) of the ABNA indicates that, as well as activities that constitute a business or an adventure or concern in the nature of trade, an enterprise also includes an activity or activities that is or are in the form of a business or in the form of an adventure or concern in the nature of trade. This includes an activity or series of activities that, if it or they had been done for profit, would satisfy the ordinary concept test of ‘business’ or ‘adventure or concern in the nature of trade’.

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27. These paragraphs contemplate a broader set of activities than simply a business or an adventure or concern in the nature of trade. They include activities that have the appearance or characteristics of activities that would constitute a business or an adventure or concern in the nature of trade.

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

28. An activity is 'regular' if it is repeated at reasonably proximate intervals and 'continuous' if there is no significant cessation or interruption to the activity. Whether an activity is repeated over time on a regular basis is a question of fact and degree.

The Commonwealth, a State or Territory, or a body corporate, or corporation sole, established for a public purpose by or under a law of the Commonwealth, a State or a Territory

29. Any activity or series of activities carried on by the Crown in the right of the Commonwealth, a State or a Territory amounts to an enterprise. Where either a body corporate or a corporation sole, established for a public purpose, carries on an activity, or series of activities, they are carrying on an enterprise. If they were not established for a public purpose, they may still be carrying on an enterprise by satisfying one of the other criteria.

Individuals (other than trustees of charitable funds) or partnerships of individuals without a reasonable expectation of profit or gain

30. The test requires that, in the circumstances, the individual or partners carrying out the activity, or series of activities have a reasonable expectation of profit or gain. A reasonable expectation requires more than a possibility.

31. The reasonable expectation of profit or gain test is not limited to specific years and may cover a number of periods. Some activities do not make profits or gains in the short term. However, the period to be covered by the test must be relevant to the nature of the activity undertaken.

Explanations and examples

Entities entitled to an ABN if they carry on an enterprise in Australia (section 37 of the ABNA)

Individual

32. This term is defined in section 41 of the ABNA to mean ‘a natural person’.

Body corporate, corporation sole, body politic

33. The terms body corporate, corporation sole and body politic as appearing in paragraphs 37(1)(b), (c) and (d) of the ABNA are not defined within the ABNA. They are considered to cover any artificial legal entity having separate legal personality.

34. These entities have perpetual succession. They have the power to act, hold property, enter into legal contracts, sue and be sued in their own name, just as a natural person can.

35. The types of entities falling into these categories are broad and include trading and non-trading, profit and non-profit making organisations, government controlled entities and other entities with less or no government control or involvement.

36. *Butterworths Australian Legal Dictionary* includes in the definition of body corporate entities “created by common law (such as a corporation sole and corporation aggregate), by statute (such as the Australian Securities Commission) and by registration pursuant to statute (such as a company, building society, credit union, trade union, and incorporated association)”.

37. Further examples of entities specifically established under various Acts include:

- (a) The governing bodies of various religious institutions such as the Glebe Administration Board of the Church of England in New South Wales established under the *Anglican Church of Australia (Bodies Corporate) Act 1938* (NSW). This Act also confers the right of the Board to establish other bodies corporate under the Act by ordinance.
- (b) Strata title bodies corporate established under Acts such as the *Conveyancing and Law of Property Act 1884* (Tas) for the purposes of the strata titling of land: see Taxation Ruling IT 2505 (Income tax: bodies corporate constituted under strata title legislation).
- (c) City and shire councils established by a State or Territory Local Government Act (e.g., *Local Government Act 1993* (Qld)) or, in some cases, under

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an Act in their own right, eg., the Brisbane City Council (*City of Brisbane Act 1924* (Qld)).

38. Each State and Territory has legislation that allows various kinds of non-profit bodies to become bodies corporate (e.g., *Associations Incorporation Act 1984* (NSW)). These bodies must have a certain number of members (usually five or more), a committee structure and a set of rules about how the organisation is to be run. Bodies incorporated under these Acts are normally community, cultural, educational or charitable type organisations.

39. Corporations sole must be established either by Act of Parliament or by statutory procedure. See, for example, the Acts in various states constituting the Public Trustee as a corporation sole (e.g., *Public Trustee Act 1913* (NSW), section 7). They can be established for all purposes or limited to certain purposes specified by statute.

40. A corporation sole is a corporation consisting of one natural person only and that person's successors to a particular position. It constitutes an artificial legal person who can sue and be sued in the title of the position and in whom title to property can be vested. In this case, it is the office that is the 'legal person'. The office continues to exist as a legal entity in its own right, regardless of who holds it, or even if it is vacant from time to time. The idea of a corporation sole originally applied to offices in the Church, which is why the classic example of a 'corporation sole' is a bishop. However, not all bishops are corporations sole and corporations sole are not confined to the Church. Ministers of the Crown, for example, may be corporations sole.

41. The term 'body politic' includes the Crown in right of the Commonwealth, or a State or Territory. However, Government departments are not bodies politic in their own right. Instead, they are part of the larger body politic of the Commonwealth or State or Territory. Bodies such as municipal councils are bodies corporate rather than bodies politic.

42. The term 'body politic' is not restricted to Australia in any way, and can also mean a foreign nation and its government.

43. If an entity is not established under an Act of Parliament, or under a statutory procedure of registration, such as the Corporations Law or an Incorporation Act etc., then it generally is not a body corporate. The body should be further examined to see whether it falls into one of the other categories of 'entity'. If it is not a profit making body, it is likely to be an unincorporated association.

Partnership

44. This term has the meaning of the same term in section 995-1 of the ITAA 1997. That section defines a partnership to mean ‘an association of persons carrying on business as partners or in receipt of ordinary income or statutory income jointly, but does not include a company’.

Any other unincorporated association or body of persons

45. An unincorporated association or body of persons is any association or grouping of persons which does not otherwise constitute an entity for the purposes of section 37 of the ABNA. More than a common aim or purpose is required. In the *Caledonian Employees’ Benevolent Society Case* (1928) SC 633 at 635, the Lord President, referring to the *Companies (Consolidation) Act 1908*, said:

‘It is not, I think, open to doubt that the fundamental and essential characteristic of the whole class of bodies described in the Act as companies, associations, and partnerships, is that they are bodies constituted by some species of contract of society, and founded on the contractual obligations thus undertaken by the members, or socii, *inter se* ...’

46. An unincorporated association or body is not a ‘legal person’. Unlike a body corporate it has no separate legal identity. It consists of the aggregate of its members at the moment and does not have perpetual succession. Because it is not a ‘legal person’, subject to specific legislation, it does not have the right to hold property, or to take or be subjected to legal proceedings in its own name. Rather, the individual members are individually liable for the actions of the body as a whole.

Example 1: unincorporated association of persons

An example of an unincorporated association is the XYZ Chambers for a group of 18 self-employed barristers. The chambers operate pursuant to a contract between its members and employs three staff. The barristers collectively contribute sufficient funds per month to meet the salaries and the other expenses of running the chambers.

The contributions are deposited to a bank account in the name of XYZ Chambers and the salaries, superannuation, library costs and other incidental expenses are met from the account.

The association continues irrespective of changes in the barristers that operate out of the XYZ Chambers.

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Example 2: unincorporated association of persons

The ABC Junior Athletics Club is a not for profit association that conducts athletic meetings for children at weekends. The club has a membership, a committee, a system of rules, and an understanding between the members of their rights, privileges and responsibilities. Members are free to join or leave the association at will and the membership will change over time. The ABC Junior Athletics Club is an unincorporated association for the purposes of section 37 of the ABNA.

Body of persons

47. If there is doubt whether a group of legal persons meets the 'association' description, it can still be regarded as an 'entity' if it is an unincorporated 'body of persons'. This is a broad term that can cover all types of groups of people. It would, however, generally be expected that an unincorporated body would not be carried on for profit-making purposes.

Superannuation fund

48. This term has the meaning of the same term in section 10 of the *Superannuation Industry (Supervision) Act 1993*.

Trustee of a trust or superannuation fund

49. The term entity, as defined in subsection 37(1) of the ABNA, includes groups of legal persons, and other things such as trusts and superannuation funds, that in practice are treated as having a separate identity in the same way that a legal person has.

50. Subsection 37(2) of the ABNA provides that the trustee of a trust or superannuation fund is taken to be an entity consisting of the person who is the trustee, or the persons who are the trustees, at any given time. As subsection 37(1) also includes a trust as an entity, the relationship between subsections 37(1) and (2) needs to be considered.

51. Rights or obligations cannot be conferred or imposed on an entity that is not a separate legal person. Trusts and superannuation funds are not separate legal persons. For example, the obligation to provide information under section 15 of the ABNA cannot be imposed on a trust. To overcome this, subsection 37(2) of the ABNA confers the rights and imposes the obligations in respect of the trust or superannuation fund on the trustee or trustees of the entity. The trustee is therefore taken to be the entity carrying on the trust enterprise for the purposes of the ABNA and is the entity entitled to the ABN in its capacity as trustee for that trust.

Example 3: family trust operating a small business

For example, John Smith, a self-employed plumbing contractor, is also the trustee for a family trust that operates a small hardware store.

John Smith is an entity under paragraph 37(1)(a) of the ABNA. He is entitled to an ABN under paragraph 8(1)(a) of the ABNA as he is carrying on an enterprise, the plumbing business.

The family trust is an entity under paragraph 37(1)(g) of the ABNA.

John Smith, in his capacity as trustee of the trust, is taken to be an entity under subsection 37(2) of the ABNA. This entity is taken to be a different entity to John Smith in his individual capacity.

Although the family trust is an entity, it is the trustee for the family trust that is entitled to the ABN for the trust enterprise.

If John Smith ceases to be trustee, the ABN would continue to be used by any new trustee.

Government entity

52. This term is defined in section 41 of the ABNA to mean:

- (a) a Department of State of the Commonwealth; or
- (b) a Department of the Parliament; or
- (c) an Executive Agency, or Statutory Agency, within the meaning of the *Public Service Act 1999*; or
- (d) a Department of State of a State or Territory; or
- (e) an organisation that:
 - (i) is not an entity; and
 - (ii) is either established by the Commonwealth, a State or a Territory (whether under a law or not) to carry on an enterprise or established for a public purpose by an Australian law; and
 - (iii) can be separately identified by reference to the nature of the activities carried on through the organisation or the location of the organisation;

whether or not the organisation is part of a Department or branch described in paragraph (a), (b), (c) or (d) or of another organisation of the kind described in this paragraph.

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Non-profit sub-entity

53. This term is defined in section 41 of the ABNA. A non-profit sub-entity is a branch of an entity. For the branch to be a non-profit sub-entity, the entity must have chosen to apply Division 63 of the *A New Tax System (Goods and Services Tax) Act 1999*, and that choice still has effect. The branch must also:

- (a) maintain an independent system of accounting; and
- (b) be separately identified by reference to:
 - (i) the nature of activities carried on through the branch; or
 - (ii) the location of the branch; and
- (c) be referred to in the entity's records to the effect that it is to be treated as a separate entity for the purposes of the GST law.

Other relevant entity definitions

Company

54. This term is defined in section 41 of the ABNA to mean:

- (a) 'a body corporate; or
- (b) any other unincorporated association or body of persons;

but does not include a partnership'.

Corporations Law company

55. This term is defined in section 41 of the ABNA to mean 'a body registered as a company under the Corporations Law'. Such companies have an Australian Companies Number ('ACN'). Bodies with an Australian Registered Body Number ('ARBN') are not Corporations Law companies. If a registered body becomes registered as a company under Chapter 5, Part 5B.1 of the Corporations Law or a corresponding law, it ceases to be a registered body.

Enterprise (section 38 of ABNA)

'Activity, or series of activities'

56. An enterprise may comprise one activity or a series of activities. To determine whether or not an entity is carrying on an enterprise, the relevant activity, or series of activities, of the entity needs to be identified.

57. The ABNA does not define an ‘activity, or series of activities’. In the absence of a statutory definition, an ‘activity’ is essentially an act or series of acts that an entity chooses to do. Entities can undertake a wide range of activities with varying degrees of interrelationship. The meaning of an ‘activity, or series of activities’ for an entity can range from a single transaction to groups of related activities or to the entire operations of the entity.

58. Where there are a number of separate activities, the entity may be carrying on more than one enterprise. From a practical point of view it is not necessary to identify every enterprise an entity is carrying on. It is only necessary to establish that there is one enterprise for the entity to be entitled to an ABN.

Example 4: an activity that is an enterprise

Doctor Jones is a medical practitioner who runs her own practice as a sole practitioner. She also has a primary production activity that is a hobby that she conducts as an individual.

Doctor Jones is entitled to an ABN in respect of the medical practice that is an enterprise.

The hobby activity, which is a separate and distinct activity from the practice, is not an enterprise.

Example 5: employee carrying out separate enterprise activities

Bill is a salaried motor vehicle mechanic who works full-time during the week.

Bill owns a fishing boat (inherited from his uncle) and, during the weekend and his holidays, Bill operates this vessel on charter for fishing trips. This venture is very profitable and is so successful that Bill is seriously considering giving up his full-time employment and concentrating solely on charter work.

Bill would be entitled to an ABN on the following basis:

- Bill is carrying on a series of activities, full-time employment and charter work;
- the employment is excluded from the meaning of ‘enterprise’ under paragraph 38(2)(a) of the ABNA; and
- the charter work is considered to be an enterprise because of the nature of the activity and the manner in which it is being carried on.

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Example 6: more than one enterprise carried on by an entity in its own right

A partnership, DEF, owns and runs two hotels, a restaurant and a wholesale liquor outlet, all of which operate in different locations.

The partnership applies for and is granted an ABN.

DEF carries out four series of activities, each of which constitutes a separate enterprise, but is still only entitled to one ABN.

Example 7: provision of services by a personal services entity

Jim is a computer analyst who contracts his services through his family trust.

The trust currently has a contract with a large bank to provide computer programming services. Under that contract Jim's services as a programmer are provided to the bank and he works on the bank premises during normal business hours.

The trust receives all of its income from this contract and Jim is paid a salary by the trust.

The trustee for the family trust is carrying on an enterprise and is entitled to an ABN. The relevant enterprise activity is the provision of computer programming services by the family trust to the bank.

Example 8: provision of services by a holding company

A Ltd. is a holding company for three subsidiaries that conduct enterprises in Australia. A Ltd. provides management services to the group and in return receives fees from each of the subsidiaries.

A Ltd. is carrying on an enterprise by providing management services to the group.

Example 9: no provision of services by a holding company

B Ltd. is a holding company for three subsidiaries that conduct enterprises in Australia. B Ltd. holds all shares in each of the subsidiaries and provides no services to the group.

B Ltd. is not carrying on an enterprise.

'Business': a business, as defined, is an enterprise

59. Paragraph 38(1)(a) of the ABNA includes in the definition of 'enterprise' any activity, or series of activities, done in the form of a business. Therefore, an entity carrying on a business is carrying on an

enterprise. What constitutes an activity, or series of activities, in the form of a business is discussed below.

Definition

60. 'Business' is defined in section 41 of the ABNA:
'business includes any profession, trade, employment, vocation or calling but does not include occupation as an employee'.

The definition is the same as the definition of 'business' in subsection 6(1) of the ITAA 1936.

61. The ITAA 1936 meaning of business is considered in Taxation Ruling TR 97/11. Although TR 97/11 deals with carrying on a primary production business, the principles discussed in that Ruling apply to any business. As this Ruling does not add to the discussion in TR 97/11 on carrying on a business, TR 97/11 can be referred to for a fuller discussion on whether a particular activity constitutes the carrying on of a business.

62. TR 97/11, in paragraph 12, makes the point that 'whilst each case might turn on its own particular facts, the determination of the question is generally the result of a process of weighing all the relevant indicators'. There is no single test of whether a business is being carried on.

Indicators of a business

63. TR 97/11 discusses the main indicators of carrying on a business and provides examples for the indicators. The indicators are:

- a significant commercial activity;
- purpose and intention of the taxpayer in engaging in the activity;
- an intention to make a profit from the activity;
- the activity is or will be profitable;
- repetition and regularity of activity;
- the activity is carried on in a similar manner to that of the ordinary trade;
- the activity organised and carried on in a businesslike manner and systematically - records are kept;
- size and scale of the activity;
- not a hobby, recreation or sporting activity;

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- a business plan exists;
- commercial sales of product; and
- taxpayer has knowledge or skill.

‘An adventure or concern in the nature of trade’

Enterprise includes activities done in the form of an adventure or concern in the nature of trade

64. Paragraph 38(1)(b) of the ABNA includes in the definition of ‘enterprise’ an activity, or a series of activities, done in the form of an adventure or concern in the nature of trade. As paragraph 38(1)(a) of the ABNA includes in ‘enterprise’ an activity, or a series of activities, done in the form of a business, paragraph 38(1)(b) covers commercial activities of a trading nature that do not amount to activities in the form of a business.

65. There is no definition of ‘trade’ or ‘adventure or concern in the nature of trade’ in the ABNA.

66. The word trade is commonly used to denote operations of a commercial character by which the trader provides to customers, for reward, some kind of goods or services.

67. Generally, a business includes a trade that is engaged in on a regular or continuous basis, while an adventure or concern in the nature of trade may be an occasional or one-off transaction that does not amount to a business. This is the view of Jacobs J in *AB v. FC of T* (1997) 37 ATR 225 at 242; 97 ATC 4945 at 4961:

‘See also the discussion in R W Parsons, *Income Taxation in Australia*, The Law Book Company Limited, Sydney, 1985, p 159-63 in which the learned author expresses the view that “an adventure in the nature of trade” is equivalent to an “isolated business venture” as opposed to a continuing business. I respectfully agree. I also accept that such a transaction must “exhibit features which give it the character of a business deal” (*McClelland v. FC of T* (1970) 120 CLR 487 at 495; (1970) 2 ATR 21 at 26; 70 ATC 4115 at 4120).’

68. An adventure or concern in the nature of trade is a concept used in United Kingdom taxation law. United Kingdom law proves a useful starting point when considering the meaning of adventure or concern in the nature of trade in the ABNA: see also *FC of T v. The Myer Emporium Ltd* (1987) 163 CLR 199; (1987) 18 ATR 693; 87 ATC 4363; *FC of T v. Whitfords Beach Pty Ltd* (1982) 150 CLR 355; (1982) 12 ATR 692; 82 ATC 4031; *McClelland*; *AB v. FC of T*.

Trade v investment assets

69. United Kingdom cases categorise assets as either trading assets or investment assets. Assets purchased with the intention of holding them for a reasonable period of time, to be held as income producing assets or to be held for the pleasure or enjoyment of the person, are more likely to be purchased for investment purposes rather than trading purposes: see *Johnston v. Heath* [1970] 3 All ER 915.

70. Investment assets may be used by entities in carrying on enterprises. To determine whether or not the use of these assets constitutes an enterprise, reference needs to be made to the enterprise definition and factors such as the indicators of a business and the meaning of 'in the form of a business'.

71. Examples of investment assets are rental properties, business plant and machinery, the family home, family cars and other private assets. The realisation of investment assets does not amount to trade. Certain types of assets, such as land and shares, can be purchased for either investment purposes or trading purposes. However, they cannot be held at the same time for both purposes, see *Simmons (as liquidator of Lionel Simmons Properties) v. IR Commrs* [1980] 2 All ER 798. The character of an asset can, however, change from trade to investment or from investment to trade.

72. United Kingdom cases where it was found that there was an adventure or concern in the nature of trade include:

Edwards (Inspector of Taxes) & Anor v. Bairstow [1956] AC 14; 36 TC 207; [1955] 3 All ER 48

Bairstow and Harrison purchased a complete cotton spinning plant in 1946 with the object of selling it as quickly as possible at a profit. They had no intention of holding it by using it as an income producing asset and it was not purchased for their pleasure or enjoyment. It was eventually sold in five separate lots over a fifteen month period.

Johnston v Heath

Heath was offered non-income producing land that had planning permission but had not been developed because of drainage difficulties. He had insufficient funds to purchase the land and his intention was to resell the land as soon as possible after acquisition. The lack of funds was not an obstacle to the purchase, as Heath found a buyer for the land before he contracted to buy it from the original owner. The land was purchased and sold.

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Wisdom v. Chamberlain [1969] 1 All ER 332; [1969] 1 WLR 275

Wisdom had assets worth between £150,000 and £200,000 and was concerned about a devaluation in sterling. His accountant considered that silver bullion would be a suitable hedge against devaluation. Silver bullion of £200,000 was eventually purchased using borrowed funds rather than realising existing assets. The devaluation did not occur and a profit of £48,000, after deducting interest of £7,000, was made on disposal of the silver bullion. There was a transaction entered into on a short-term basis for the purpose of making a profit out of the purchase and sale of a commodity. If Wisdom had disposed of his existing investment assets to finance the purchase then the case may have been different. The purchase of the silver bullion may then have been an investment transaction rather than a trading transaction.

IR Commrs v. Fraser (1942) 24 TC 498

Fraser, a woodcutter, purchased in 1937 a large quantity of whisky in bond for £400 with the sole object of resale at a profit. He did not take delivery of the whisky, with the purchase and sales taking place through an agent. Fraser had no special knowledge of the whisky trade and had not previously traded in whisky. Lord Normand, at 502, said:

‘But the purchaser of a large quantity of a commodity like whisky, greatly in excess of what could be used by himself, his family and friends, a commodity which yields no pride of possession, which cannot be turned to account except by a process of realisation, I can scarcely consider to be other than an adventurer in a transaction in the nature of a trade; ... Most important of all, the actual dealings of the Respondent with the whisky were exactly of the kind that take place in ordinary trade.’

73. The above cases show that more than a mere realisation of an investment asset is required and that the character of the activity as a whole needs to be considered.

Commerciality

74. Whether or not there is a trade or an adventure in the nature of trade is a question of fact and degree. It should have the characteristics of a business deal.

Example 10: an adventure in the nature of trade

James, a salaried systems analyst, works for a financial institution. During his leisure time he develops some unique software and licences the copyright in the software to a software house for \$250,000.

James is entitled to an ABN in respect of the development of the software on the basis that he is:

- an individual carrying out an activity that is an adventure or concern in the nature of trade.

He may not have had a commercial intention when he first started to develop the software but his intention changes at the time he decided to licence it and look for a prospective buyer.

Example 11: subdivision that is not an adventure in the nature of trade

Jack and Jill live on a 2.5 hectare lot that is becoming too much to maintain.

They decide to sell part of the land and apply to subdivide the lot in half. The survey and subdivision are approved. They retain the subdivided lot containing their house and the other is sold.

Jack and Jill are not entitled to an ABN in respect of the subdivision on the basis that:

- the activity is not in the form an adventure or concern in the nature of trade; and
- it is the mere realisation of a private asset.

Example 12: subdivision that is an adventure in the nature of trade

Bob inherits a farm from his parents. He decides not to retain it and hires a surveyor to survey the 500 hectare property to establish how many 15 hectare lots it can be subdivided into. Having received approval for the subdivision from the local council, he proceeds to hire an engineer and, in turn, a contractor to build access roads for the lots and to install services such as electricity, sewerage and water. The lots are then sold at auction.

Bob is entitled to an ABN on the basis that:

- the activities are in the form of an adventure or concern in the nature of trade;
- they have a commercial flavour because of the way in which they have been undertaken.

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'In the form of'

75. There is no judicial guidance in Australian or United Kingdom case law concerning the phrase 'in the form of'. The ordinary meaning of the phrase, however, is considered to support a view that 'in the form of', in conjunction with 'business' or 'adventure or concern in the nature of trade', includes an activity or series of activities that, if it or they had been done for profit, would satisfy the ordinary concept test of 'business' or 'adventure or concern in the nature of trade'.

76. This interpretation would bring within the scope of the subsection activities that the Courts have held to be something less than either a 'business' or 'an adventure or concern in the nature of trade' but which, nevertheless, is taken by a particular statute or regulation to be a 'business' or 'an adventure or concern in the nature of trade'. For example, the *Bank Account Debits Tax Administration Act 1982* (Cth) treats certain organisations that are not for ordinary concepts purposes a business (due to an incapacity to profit) as if they were a business.

77. In *State Superannuation Board (NSW) v. Federal Commissioner of Taxation* (1988) 82 ALR 63; (1988) 19 ATR 1264; 88 ATC 4382 the activities, although not amounting to a business, had many of the hallmarks of business activity and were in the nature of a business. In that case the Board undertook a range of activities including receiving contributions, paying benefits, providing information and other services to members, investing the assets of the fund and managing the assets. In managing the assets the Board employed property managers. Sheppard J said in the context of that case at 82 ALR 74; 19 ATR 1275; 88 ATC 4391:

'All this activity plainly involved the applicant engaging in a regular and systematic course of conduct. What was, however, absent from its activities was the conduct of a commercial enterprise in which that expression is understood in ordinary language. The applicant was an organ of government. Although it invested moneys and received interest and dividends and also surpluses on sale of investments, it was not intended to make a profit. ...

However large a trust may be, it does not necessarily follow that the trustee administering it is carrying on a business. In most cases he will not be unless there are amongst the assets of the trust, specific assets which themselves may be described as businesses. If the question were whether the applicant was carrying on a business, using that expression in the sense indicated by the dictionaries and the authorities to which

reference has been made, I would have reached the conclusion that the question should be answered in the negative.’

78. His Honour then went on to conclude that, although the NSW State Superannuation Board was not a business for ordinary concepts purposes, it did satisfy a test of an activity ‘in the nature of a business (whether or not for profit)’.

Example 13: investment assets in a trust

The assets of the Paul Trust comprise shares and term deposits from which dividends and interest are received. The trust also incurs expenses including bank fees, accountancy fees and brokerage. The net income of the trust is distributed to the beneficiaries of the trust, Paul’s children and grandchildren. The shares are held for investment purposes.

The trustee is a Corporations Law company. The shareholders and directors of the company are Paul and his spouse.

Occasionally underperforming shares in the portfolio are sold and the proceeds reinvested in other shares or deposits. The trust has no other activities.

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

Example 14: investment assets and activities in the form of a business

The XYZ public trust, in contrast to the Paul Trust, is a trust created for commercial reasons by a fund manager (or alternatively a life company or other investment business). Subscriptions to this trust are often sold either through a sales force or other marketing activity to attract funds.

A number of investors, who may include institutional investors, subscribe for an interest in a pool of investments that is professionally managed. The relationship between the investors and the fund manager that is selling the interest or product is governed by a trust deed, a prospectus or other offer document and the Corporations Law.

The pool of investments held by the trust (for example, a diversified portfolio of securities or commercial real estate), is managed by a fund manager, which has a commercial relationship with the trust and charges a fee for this management service. Other service providers are appointed to provide services on behalf of the trust (for example, custodians, valuers, brokers etc.). Other expenses incurred include legal, accounting and audit fees as well as administration expenses.

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The fund manager is required to comply with an investment mandate for the trust. In addition, if the trust is a Managed Investment Scheme pursuant to the *Managed Investments Act 1998*, it will be subject to a compliance committee. Investors regularly receive reports on the performance of the trust (whether monthly, quarterly, half yearly or annually). A unit registry is maintained and confirmation statements, transaction statements and tax statements are sent in relation to investments in the trust.

In this situation, the trustee is entitled to an ABN as trustee of the XYZ public trust as there are activities done in the form of a business.

Mutual organisations

79. Organisations or associations whose receipts consist entirely of mutual receipts have been held not to be a 'business' or 'an adventure or concern in the nature of trade' but rather activities that may be, in a sense, trading activities. In this context, there is an incapacity to profit because the objective or outcome is not profits, but rather a desire to cover expenditure and to return any surplus directly or indirectly, sooner or later, to the members (*Fletcher v. Income Tax Commr* (1971) 3 All ER 1185). The trading activities of these organisations amount to activities in the form of a business.

80. Subsection 38(3) (first occurring) of the ABNA makes it clear that an entity can carry on an enterprise even though it may only make supplies to members of the entity. Subsection 38(3) (first occurring) states:

'For the avoidance of doubt, the fact that activities of a body are limited to making supplies to members of the body does not prevent those activities being in the form of an adventure or concern in the nature of trade within the meaning of paragraph (1)(b).'

Non profit clubs and associations

81. Non-profit clubs and associations are similar to mutual organisations in that their activities may involve trading activities (e.g., bar facilities of a sporting club) and provision of services to members. However, there is an incapacity to profit because the objective or outcome is not to derive profits (in the ordinary sense) but merely to cover expenditure and apply any surplus directly or indirectly, sooner or later, to the benefit of the membership as a whole.

82. A non-profit club or association might, therefore, have activities that may be categorised as either a 'business' or an 'adventure or concern in the nature of trade' but, due to the incapacity

to profit, are not. The activities of these non-profit clubs or associations are 'in the form of a business' or 'in the form of an adventure or concern in the nature of trade' for the purposes of subsection 38(1) of the ABNA.

83. Subsection 38(3) (first occurring) of the ABNA is also relevant to non-profit clubs and associations.

Example 15: enterprise activities of a club

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

Membership fees amount to \$10,000 per annum. The club attempts to cover its expenditure by running a bar at its clubhouse and this has an annual turnover of \$30,000 with a net profit of just over \$8,000.

The bar is staffed on a voluntary basis and, in addition to beer, wine and spirits, sells some finger food.

The club maintains records of its income and expenditure.

The club is entitled to an ABN on the basis that it is:

- an unincorporated association of persons; and
- carrying on an enterprise - activities in the form of a business.

As part of its operations, the club is carrying out a series of activities that would include the fielding of sporting teams and other member related activities. Some of these activities would be considered to be in the form of a business. Irrespective of the other activities, the bar trade would, by itself, comprise an enterprise being carried on by the club.

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

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

84. Paragraph 38(1)(c) of the ABNA includes in the definition of an 'enterprise' an activity, or a series of activities, done on a regular or continuous basis, in the form of a lease, licence or other grant of interest in property. The paragraph does not cover trading in the assets but rather the activity of participating as a lessor or grantor of the interest in the property.

85. This Ruling does not consider the meaning of 'lease', 'licence' or 'other grant of an interest in property'.

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Regular or continuous basis

86. To be an enterprise the grant of a lease, licence or other grant of interest in property must be done on a regular or continuous basis. The grant need not be done on both a regular and a continuous basis. An activity will be continuous if there is no significant cessation or interruption to the activity. As for the regularity of activity, there must be repetition of the activity at reasonably proximate, but not necessarily fixed, intervals.

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

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

88. In paragraph 38(1)(c) the terms ‘a lease, licence or other grant of interest in a property’ have their normal meaning. The phrase ‘in the form of’ is not considered to broaden these terms beyond their ordinary meaning.

Example 16: rental of property that is not on a regular nor continuous basis

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

They use the holiday home extensively for family purposes but, on occasions, they let it out for a limited period of time to cover costs such as rates and taxes and ongoing maintenance costs. The extent of the leasing is never more than a few weeks, spread over the year on an ad hoc basis.

Brian and Joan are not entitled to an ABN because the leasing of the holiday home is neither on a regular nor on a continuous basis.

The activity may also not qualify as an enterprise on the basis that there is no reasonable expectation of profit or gain (paragraph 38(2)(c) of the ABNA).

Example 17: rental of property that is on a regular or continuous basis

Greg and Sue run a pastoral property that has been quite profitable until the last two years, during which there has been a severe drought. There are two old cottages on the property, one of which Sue

repainted and refurnished with spare furniture from the property's main house.

Sue places a sign on the main road advertising this for short term lease to tourists. The cottage is also used regularly by their friends and relatives at no charge but the cottage is leased out for a fee on average about 20 weeks of the year. There is a reasonable expectation of profit or gain.

Greg and Sue (a partnership for tax purposes) are entitled to an ABN in respect of the leasing activity on the basis that the property is leased out at regular intervals.

The Commonwealth, a State or a Territory, or a body corporate, or corporation sole, established for a public purpose by or under a law of the Commonwealth, a State or a Territory

89. An activity or series of activities done by the Crown in the right of the Commonwealth, a State or a Territory is an enterprise. The 'public purpose' test is limited to bodies corporate or corporations sole established under a law of the Commonwealth, a State or a Territory.

90. The term 'public purpose' is not defined in the ABNA. However, in the *Butterworths Australian Legal Dictionary* the term is defined as:

'Purposes relating to the public interest. The term "public purposes" is wider than "government purposes": *Australian Tape Manufacturers Association v. Commonwealth* (1993) 176 CLR 480; 112 ALR 53 at 61. Accordingly, it is sufficient if the purpose is one which benefits a select group or groups in the public interest such as the relief of necessitous farmers (*Attorney-General (NSW) v. Homebush Flour Mills Ltd* (1937) 56 CLR 390), or the compensation of relevant copyright owners (*Australian Tape Manufacturers Association v. Commonwealth* (1993) 176 CLR 480 at 505; 112 ALR 53), rather than the public generally.'

91. Thus, the activities to be carried out by the entity must be for the benefit of the public generally or an identifiable section of the public.

92. From the wording of the paragraph, it is necessary that the corporate body or corporation sole must be established with the requisite purpose in mind. If the entity is established for the requisite purpose, any activity by the entity is sufficient to satisfy the paragraph.

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Employee or earner of withholding payments covered by subsection 38(3) (second occurring) of the ABNA

Meaning of employee

93. For a discussion on what is meant by an employee, reference should be made to Taxation Ruling TR 1999/13. That Ruling discusses the meaning of the term 'employee' as it is used in Division 2 of Part VI of the ITAA 1936. Division 2 provides the legislative framework for the PAYE system. Although the PAYE system is being replaced by the PAYG system on 1 July 2000, the Ruling and explanation on 'employee', within the ordinary meaning of that expression, is still relevant.

Employee or subsection 38(3)(second occurring) withholding payment earner activities

94. The activities of an employee or earner of withholding payments covered by subsection 38(3) (second occurring) of the ABNA are not an enterprise within the meaning of section 38 of the ABNA unless they are done in supplying services as the holder of an office that the employee or withholding payment earner has accepted in the course of or in connection with an activity or series of activities of the kind mentioned in subsection 38(1) of the ABNA. The withholding payments covered by subsection 38(3) (second occurring) of the ABNA are:

- payment to an employee;
- payment to a company director;
- payment to an office holder (such as a member of Parliament, the Defence Force or police forces); and
- payment under a labour hire arrangement, or specified by regulations.

Example 18: Sole practitioner accountant

John, an accountant, is a sole practitioner who acts as a director of a client company from which he is paid directors' fees.

John is entitled to an ABN in respect of his accountancy practice and the directors' fees are received in respect of supplying services as the holder of an office that John has accepted in connection with his business.

The activity of acting as a director is not an enterprise in its own right.

Private recreational pursuit or hobby*Background*

95. Hobbies and recreation are discussed in paragraphs 86 to 93 of Taxation Ruling TR 97/11, which considers the meaning of ‘business of primary production’ in the ITAA 1936. They are discussed in TR 97/11 as an indicator of when a business is not being carried on. The pursuit of a hobby is not the carrying on of a business for taxation purposes. Examples and indicators of a hobby are also provided in TR 97/11.

96. As this Ruling does not add to or change the discussion in TR 97/11 on hobbies and carrying on a business, TR 97/11 can be referred to for a fuller discussion on whether a particular activity constitutes the carrying on of a hobby.

97. There are no statutory definitions of ‘private recreational pursuit’ or ‘hobby’. They take their ordinary meaning. *The Macquarie Dictionary* defines hobby to be ‘a spare time activity or pastime, etc., pursued for pleasure or recreation’ and ‘recreation’ to have a number of meanings including ‘refreshment by means of some pastime, agreeable exercise’ and ‘a pastime, diversion, exercise, or other resource affording relaxation and enjoyment’.

98. The nature of a private recreational pursuit or hobby has been considered in a New Zealand case. In *Case N27* (1991) 13 NZTC 3229, Bathgate DJ described a private recreational pursuit, at 3240, to be:

‘in essence, a private pastime of the sort carried on for the personal refreshment, pleasure or recreation of the person (or persons) concerned.’

Private recreational pursuit or hobby is not an enterprise

99. An activity, or activities, of a private recreational pursuit or hobby is not an enterprise within the meaning of section 38 of the ABNA.

Pursuit of a hobby is not carrying on a business

100. As stated by Bowen CJ and Franki J in *Ferguson v FC of T* (1979) 9 ATR 873 at 877; 79 ATC 4261 at 4265:

“... if what he is doing is **more properly described as the pursuit of a hobby or recreation or an addiction to a sport**, he will not be held to be carrying on a business, even though his operations are fairly substantial.” (emphasis added)

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Indicators of private recreational pursuit or hobby

101. Whether an activity is a private recreational pursuit or hobby is a question of fact. There are a number of indicators that are relevant to determining whether the activities amount to a private recreational pursuit or hobby. Paragraph 87 of TR 97/11 lists the following indicators:

- 'it is evident that the taxpayer does not intend to make a profit from the activity;
- losses are incurred because the activity is motivated by personal pleasure and not to make a profit and there is no plan in place to show how a profit can be made;
- the transaction is isolated and there is no repetition or regularity of sales;
- any activity is not carried on in the same manner as a normal, ordinary business activity;
- there is no system to allow a profit to be produced in the conduct of the activity;
- the activity is carried on a small scale;
- there is an intention by the taxpayer to carry on a hobby, a recreation or a sport rather than a business;
- any produce is sold to friends and relatives and not to the public at large.'

A hobby can become a business and an enterprise

102. A hobby can turn into a business and therefore also an enterprise as the nature and extent of the activities change. The change would be reflected in changes to the indicators of private recreational pursuits and hobbies. For example, there may be an increase in the scale of the activities, the introduction of businesslike systems, an intention to make a profit and a move away from a private pastime.

Example 19: recreational pursuit or hobby

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

Linda is not entitled to an ABN on the basis that:

- the activity is a hobby; or
- it is an activity undertaken without expectation of profit or gain.

Individuals (other than trustees of charitable funds) or partnerships without a reasonable expectation of profit or gain

Activities not an enterprise

103. An activity, or activities, of an individual (other than a trustee of a charitable fund) or a partnership (all the members of which are individuals) without a reasonable expectation of profit or gain is not an enterprise within the meaning of section 38 of the ABNA.

104. The words ‘individual’ and ‘partnership’ are defined in the ABNA. An ‘individual’ means a natural person and a ‘partnership’ takes the meaning given by section 995-1 of the ITAA 1997. That section defines a partnership to mean ‘an association of persons carrying on business as partners or in receipt of ordinary income or statutory income jointly, but does not include a company’.

Reasonable expectation

105. The reasonable expectation of a profit or gain is not limited to an expectation for the current year. Profits or gains are unlikely in the short term for some activities, such as tree farming, but expected over the long term. However, the period to be covered by the test must be relevant to the nature of the activity undertaken.

106. The phrase ‘reasonable expectation’ has been considered in a number of cases. In *News Corporation Ltd v. National Companies and Securities Commission* (1984) 57 ALR 550; (1984) 5 FCR 88 at ALR 561; FCR 101, Woodward J said:

‘A reasonable expectation of an event requires more than a possibility, risk or chance of the event occurring.’

See also *FC of T v. Peabody* (1994) 181 CLR 359; (1994) 28 ATR 344; 94 ATC 4663.

107. The test is an objective test; see *FC of T v Arklay* (1989) 85 ALR 368; (1989) 20 ATR 276; 89 ATC 4563; *Eastern Nitrogen Ltd v FC of T* (1999) FCA 1536; (1999) 43 ATR 112; 99 ATC 5163.

Example 20: reasonable expectation of profit

Michael, a public servant, is made redundant in his employment and purchases half of his father-in-law’s farm (200 hectares), including some farm equipment, with the redundancy pay out. While the 200

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hectares has consistently made profits, the 100 hectare lot is uneconomical in its own right and he and his father in law continue to farm both lots jointly, sharing in any profits. Prior to making the purchase, Michael had lived with his wife on her father's property and helped him operate the farm on weekends and during holiday breaks. In order to prepare him for this, he completed a distance learning course at an agricultural college in farm management.

Michael and his father-in-law would be entitled to an ABN as a partnership on the basis that the activity would constitute a business activity and, because of the circumstances preceding and following the purchase of the property, the activity would not be classified as one without a reasonable expectation of profit or gain.

Members of local governing bodies***Activities of members of local governing bodies are not enterprises***

108. The section 38 of the ABNA definition of 'enterprise' does not include an activity or series of activities done as a member of a local governing body established by or under a State law or Territory law (except a local governing body to which subsection 12-45(3) in Schedule 1 to the TAA applies).

Members of local governing bodies and the PAYG system

109. A 'local governing body' is usually a municipal or shire council. State or Territory laws, such as the *Local Government Act 1993* (Qld), establish most councils.

110. If a local government body wants to be part of the PAYG system, it can pass a special resolution to become an 'eligible local governing body' for the purposes of the PAYG provisions. When this has been done, all the payments made to members of the eligible body are payments subject to PAYG withholding. This makes the members office holders and brings their activities within the activities covered by paragraph 38(2)(a) of the ABNA.

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- unique business identifier
- withholding payments

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