FEDERAL COURT OF AUSTRALIA

The Buddhist Society of Western Australia Inc v Commissioner of Taxation (No 2) [2021] 1363

File number:	WAD 118 of 2020
Judgment of:	**MCKERRACHER J**
Date of judgment:	4 November 2021
Catchwords:	**TAXATION** – appeal from a taxation decision under Pt IVC of the *Taxation Administration Act 1953* (Cth) (**TAA**) – where the taxpayer has the burden of proving that the decision 'should not have been made or should have been differently' – whether that burden can be discharged by tendering the record of information that was before the Commissioner – where no other evidence led – consideration of the nature of the appeal right conferred by s 14ZZ of the TAA **TAXATION** – judicial review of a taxation decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) – decision to revoke the taxpayer's status as a Deductible Gift Recipient under subdiv 30-BA of *Income Tax Assessment Act 1997* (Cth) – whether the taxpayer maintained a public fund solely for the purpose of the acquisition, construction and maintenance of a building used as a school – consideration of the 'ordinary meaning' of the word 'school' – *Cromer Golf Club Ltd v Downs* (1973) 47 ALJR 219 applied
Legislation:	*Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5, 5(1)(e), 5(1)(f), 5(2), 16, 16(1)(a), 16(1)(b), 16(1)(d) *Evidence Act 1995* (Cth) ss 48, 60 *Income Tax Assessment Act 1997* (Cth) ss 30-25(1), 30-125(2), subdiv 30-BA *Taxation Administration Act 1953* (Cth) ss 14ZL, 14ZL(2), 14ZP, 14ZQ, 14ZY, 14ZY(1)(b), 14ZY(2), 14ZZ, 14ZZ(1), 14ZZ(1)(a)(ii), 14ZZK(b)(i), 14ZZO, 14ZZO(a), 14ZZO(b)(i), 14ZZO(b)(ii), 14ZZP, 426-40, 426-40(1), 426-55, 426-55(1)(a), 426-55(1)(b), 426-60, Pt IVC
Cases cited:	*Associate Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 *BHP Billiton Direct Reduced Iron Pty Ltd v Duffus, Deputy Commissioner of Taxation* [2007] FCA 1528; (2007) 67

ATR 578

Bosanac v Federal Commissioner of Taxation [2019] FCAFC 116; (2019) 267 FCR 169

Builders Licensing Board and Sperway Constructions (Syd) Pty Ltd and Another [1976] HCA 62; (1976) 135 CLR 616

Channel Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation [2015] FCAFC 57; (2015) 232 FCR 162

Commissioner of Taxation v Australian Airlines Ltd [1996] FCA 935; (1996) 71 FCA 446

Commissioner of Taxation (Cth) v Leeuwin Sail Training Foundation Ltd [1996] FCA 626; (1996) 68 FCR 197

Commissioner of Taxation (Cth) v Lewis Berger & Sons (Australia) Ltd [1927] HCA 11; (1927) 39 CLR 468

Commissioner of Taxation v Sagar [1946] HCA 6; (1946) 71 CLR 421

Cromer Golf Club Ltd v Downs [1971] 1 NSWLR 963

Cromer Golf Club Ltd v Downs (1973) 47 ALJR 219

Federal Commissioner of Taxation v Cassaniti [2018] FCAFC 212; (2018) 266 FCR 385

Fleming v The Queen [1998] HCA 68; (1998) 197 CLR 250

Henderson v Commissioner of Taxation (Cth) (1970) 119 CLR 612

Kajewski v Commissioner of Taxation (2003) 52 ATR 455

Kingham v Sutton (No3) [2001] FCA 1117

Krew v Commissioner of Taxation (Cth) (1971) 45 ALJR 324

Minister for Aboriginal Affairs v Peko- Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24

Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332

National Australia Bank Ltd v Rusu [1999] NSWSC 539; (1999) 47 NSWLR 309

National Institute of Dramatic Art v Chief Commissioner of State Revenue [2016] NSWSC 1471; (2016) 103 ATR 856

Shord v Federal Commissioner of Taxation [2017] FCAFC 167; (2017) 253 FCR 157

The Buddhist Society of Western Australia Inc v Commissioner of Taxation [2020] FCA 1126

Trautwein v Commissioner of Taxation (Cth); R v Commissioner of Taxation (Cth); Ex parte Trautwein [1936] HCA 77; (1936) 56 CLR 63

Division:	General Division

Registry:	Western Australia
National Practice Area:	Taxation
Number of paragraphs:	116
Date of hearing:	29-30 April 2021
Counsel for the Applicant:	Mr DH Solomon
Solicitor for the Applicant:	Solomon Brothers
Counsel for the Respondent:	Ms H Symon QC with Mr JE Scovell
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

WAD 118 of 2020

BETWEEN:	**THE BUDDHIST SOCIETY OF WESTERN AUSTRALIA** Applicant
AND:	**COMMISSIONER OF TAXATION** Respondent

ORDER MADE BY:	**MCKERRACHER J**
DATE OF ORDER:	**4 NOVEMBER 2021**

THE COURT ORDERS THAT:

1. The appeal pursuant to s 14ZZ(1)(a)(ii) of the *Taxation Administration Act 1953* (Cth) be dismissed.
2. The respondent's decision dated 6 April 2020 on the applicant's objection be set aside pursuant to s 16(1)(a) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
3. The matter be referred back to the respondent for further consideration and determination according to law pursuant to s 16(1)(b) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
4. Should the applicant seek its costs, written submissions (not exceeding 5 pages) should be filed within 5 days of the date of this order.
5. The respondent is to file any responsive submissions on costs (not exceeding 5 pages) within 5 days of the applicant's compliance with order 4.
6. Any question of costs be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MCKERRACHER J:

INTRODUCTION

1 The applicant (**Society**) was endorsed as a deductible gift recipient (**DGR Status Holder**) for the operation of the Dhammaloka Buddhist Centre Building **Fund** under subdiv 30-BA of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**). On 4 October 2019, and with effect from that date, the respondent (**Commissioner**) revoked the endorsement of the Society as a DGR Status Holder for the operation of the Fund, pursuant to s 426-55(1)(a) of Sch 1 of the *Taxation Administration Act 1953* (Cth) (**TAA**) (**Revocation**). The Revocation is a 'taxation decision', as that term is defined in s 14ZQ of the TAA.

2 The Commissioner made the Revocation on the ground that the Society is not entitled to be endorsed as a DGR Status Holder for the operation of the Fund under s 30-125(2) of ITAA 1997 because the Fund does not satisfy the requirements of **Item 2.1.10** of the table subjoined to s 30-25(1) of ITAA 1997. In deciding to make the Revocation, the Commissioner applied the construction of Item 2.1.10 propounded in taxation ruling ***TR 2013/2*** *Income tax: school or college Buildings Funds*. The Commissioner's reasons for deciding that the Fund does not meet the requirements of Item 2.1.10 are based on the Commissioner's decision that the buildings at the **Dhammaloka** Buddhist **Centre** are not used as a school or college, within the meaning of Item 2.1.10 construed in accordance with TR 2013/2.

3 On 1 November 2019, the Society objected to the Revocation, pursuant to s 426-60 of Sch 1 and Pt IVC of the TAA (**Objection**). The Objection is a 'taxation objection', as that term is defined in s 14ZL(2) and s 14ZQ of the TAA. On 6 April 2020, the Commissioner decided to disallow the Objection, pursuant to s 14ZY(1)(b) of the TAA. That decision was an '**Objection Decision**', as that term is defined in s 14ZY(2) of the TAA.

PROCESS

4 The Society applies on two separate sources of statutory jurisdiction being:

(a) first, an **Appeal** to the Court against the Objection Decision under Pt IVC of the TAA, pursuant to s 14ZZ(1)(a)(ii) of the TAA; and

(b) alternatively, an application for review by the Court of the Objection Decision under s 5 of *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) (**Review**).

5 There was debate about whether two alternative processes could be included in one proceeding. I addressed this issue in *The Buddhist Society of Western Australia Inc v Commissioner of Taxation* [2020] FCA 1126 (***Buddhist Society (No 1)***).

THE STATUTORY PROVISIONS

6 Relevant sections of the TAA which are discussed in these reasons are:

> **14ZL Part applies to taxation objections**
>
> (1) This Part applies if a provision of an Act or a legislative instrument (including the provision as applied by another Act) provides that a person who is dissatisfied with an assessment, determination, notice or decision, or with a failure to make a private ruling, may object against it in the manner set out in this Part.
>
> (2) Such an objection is in this Part called a ***taxation objection***.
>
> …
>
> **14ZP Division 5—Federal Court appeals**
>
> Division 5 contains provisions about appeals to the Federal Court against decisions by the Commissioner in relation to certain taxation objections.
>
> **14ZQ General interpretation provisions**
>
> In this Part:
>
> …
>
> ***reviewable objection decision*** means an objection decision that is not an ineligible income tax remission decision.
>
> ***taxation decision*** means the assessment, determination, notice or decision against which a taxation objection may be, or has been, made.
>
> ***taxation objection*** has the meaning given by section 14ZL.
>
> …
>
> **14ZY Commissioner to decide taxation objections**
>
> (1) Subject to subsection (1A), if the taxation objection has been lodged with the Commissioner within the required period, the Commissioner must decide whether to:
>
> (a) allow it, wholly or in part; or
>
> (b) disallow it.
>
> …

(2) A decision of the Commissioner mentioned in subsection (1), (1A) or (1B) is an ***objection decision***.

(3) The Commissioner must cause to be served on the person written notice of the Commissioner's objection decision.

7 Relevantly, s 14ZZ of the TAA provides:

14ZZ Person may seek review of, or appeal against, Commissioner's decision

(1) If the person is dissatisfied with the Commissioner's objection decision (including a decision under paragraph 14ZY(1A)(b) to make a different private ruling), the person may:

(a) if the decision is a reviewable objection decision—either:

(i) apply to the Tribunal for review of the decision; or

(ii) appeal to the Federal Court against the decision; or

(b) otherwise—appeal to the Federal Court against the decision.

…

8 Section 5 of the ADJR Act relevantly provides:

5 Applications for review of decisions

(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds:

…

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

…

(j) that the decision was otherwise contrary to law.

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:

(a) taking an irrelevant consideration into account in the exercise of a power;

(b) failing to take a relevant consideration into account in the exercise of a power;

…

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

…

RELIEF SOUGHT

9 In the Appeal, the Society seeks orders, pursuant to s 14ZZP of the TAA, to the following effect:

(a) that the Objection Decision be set aside;

(b) that the Objection be allowed, and that the Commissioner be directed to allow the Objection;

(c) that the Revocation be set aside, and the Commissioner be directed to revoke, with effect from 4 October 2019, the Revocation; and

(d) the endorsement of the Society as a DGR Status Holder for the operation of the Fund be reinstated, with effect from 4 October 2019.

10 In the Review, if the Appeal is unsuccessful, the Society seeks orders to the following effect:

(a) the Objection Decision be quashed, pursuant to s 16(1)(a) of the ADJR Act;

(b) the Commissioner be directed to revoke, with effect from 4 October 2019, the Revocation, pursuant to s 16(1)(d) of the ADJR Act;

(c) the endorsement of the Society as a DGR Status Holder for the operation of the Fund be reinstated, with effect from 4 October 2019, pursuant to s 16(1)(d) of the ADJR Act.

BACKGROUND

11 The Society was formed in 1973 and was incorporated under the *Associations Incorporation Act 1895-1969* (WA) in 1977. It now administers the **Bodhinyana** Monks **Monastery**, the **Dhammasara** Nuns **Monastery**, the **Jhana Grove** Meditation Retreat Centre and the Dhammaloka Centre. On or about 17 November 2017, the Commissioner commenced a review of the Society as a DGR Status Holder in respect of the funds associated with all four buildings. Ultimately, the Commissioner accepted that the Society was a DGR Status Holder in respect of the funds associated with the Bodhinyana Monastery, the Dhammasara Monastery and Jhana Grove on the basis that each of those places are schools. The Commissioner does not consider this to be the case with respect to the Dhammaloka Centre.

12 The Society's Constitution relevantly provides as follows:

> **4. Aims and Objectives of the Association**
>
> 1 The propagation of the teachings of the Buddha and the practice and realisation

of Buddhist Principles, with a special emphasis on morality, meditation, and wisdom and the Theravada tradition.

2 To establish and maintain existing and new teaching and operational facilities to make available to the general public the teachings and practices of the Buddha. These facilities are not limited to buildings and tangible assets and will include media and technologies relating to fulfilling the objectives set out in 4.(1).

3 To further those aims and objectives by:

a. allowing the Sangha to concentrate on their monastic commitments whilst the committee ensure that all operational, regulatory and legal commitments are consistently met;

b. operating on a basis which recognises the inter-dependency and responsibilities of all of the Association's activities;

c. applying donor directed funds for the specific purpose for which they were donated;

d. establishing suitable facilities for and to support the invited Sangha (Buddhist Monk(s) and Nun(s)) so they may act as spiritual guides and teachers for the well-being of the Buddhist community as a whole;

e. establishing and maintaining, for propagation of the teachings of the Buddha:

i. a permanent Buddhist centre or centres in the Perth metropolitan area and in such other places as the Association may determine; and

ii. a forest monastery or forest monasteries in the tradition of the Vinaya (the code of discipline of Buddhist Monks and Nuns) and subject to the guidelines and limitations as laid out in the Vinaya Pitaka of the Pali Canon under the sections dealing with Sangha property, such monastery or monasteries to be under the control of the resident Sangha in all aspects;

f. fostering association with Buddhist societies and organisations with similar aims and objectives as the Association and to show tolerance to:

i. all schools of Buddhist thought; and

ii. other religions; and

g. complying with rule 7 with respect to the Sangha.

5. Additional Powers

In furtherance of the object, but not otherwise, the Association shall have power:

a. To establish, operate and maintain in the State of Western Australia schools and colleges and facilities;

b. To establish and maintain public funds, each of which fund shall be for the exclusive purpose of providing money for the acquisition, construction and maintenance of buildings to be used as a school or college (within the meaning of the *Income Tax Assessment Act 1997*

(CTH) as amended) by the Association without profit or gain for the furtherance of the objects;

…

13 Over a number of years from 2017, the parties engaged in a series of communications in which the Commissioner made requests to the Society for the provision of information and copies of documents. The Society complied with most of these requests by providing information and documents, which the Society contends established that the Dhammaloka Centre:

(a) is the main teaching and administrative centre for the Society;

(b) has its opening hours during 9:00 am to 5:00 pm each day; and

(c) is comprised of the following permanent buildings: new Dhamma Hall, library, meeting room, monks' quarters, offices, existing hall and toilets. The library is Western Australia's largest Buddhist library. The administration and treasury functions of the Society take place in the offices, and they are consistent with the administration and treasury functions in many schools throughout Australia.

14 During the opening hours from 9:00 am to 5:00 pm, the Centre is open to the public to walk around the grounds and use the shrine room for meditation or contemplation. The library and the office at the Centre are only open at specified times throughout the week.

15 In the Objection Decision, the Commissioner summarised the regular activities that take place at the Centre as follows (at [26]):

MONDAY

10.00am – 2.00pm Library Open for sale of Items and membership only.

11:00am – 3:00pm Open Day. A volunteer is available to assist with inquiries & memberships and show visitors around

2:00pm – 3:00pm Guided Meditation classes which are held in the Community Hall

FRIDAY

7:00pm – 7:20pm Chanting

7:30pm – 8:00pm Guided Meditation by a senior monk or nun OR by a guest speaker during Rains Retreat

8:00pm – 9:00pm Dhamma Talk by a senior monk or nun OR by a guest speaker during Rains Retreat

SATURDAY

10:30am Morning Chanting then Dana offering of food to the monks or nuns then a shared lunch for all in the Community Hall (Except during Rains Retreat)

3:00pm – 4:15pm Ongoing Guided Meditation Class with a senior monk or nun (Except during Rains Retreat)

3:00pm – 4:15pm Four Week Beginner's Meditation Class that starts on the 1st Saturday of the month.

5:00pm – 6:00pm Kalyana Mitta discussion and meditation group 'A community of good friends'. The group meets in the room on the right hand side of the Main Hall.

SUNDAY

9:00am – 11:00am Children's Dhamma Classes for ages 3-17

10:30am Morning Chanting then Dana offering of food to the monks or nuns then a shared lunch for all in the Community Hall (Except during Rains Retreat)

3:00pm – 4:15pm Sutta Class or Buddhist Study Group in the Main Hall every second and fourth Sundays of the month (Not held during Rains Retreat)

Weekend Sangha Food Offering (Dana)

10:00am – 10:30am: Guests arrive and drop off food.

10:30am – 11:00am: First chanting and offering of the Five Precepts and Three Refuges. Then alms-round (Pindapata): rice offering to the monks or nuns. Followed by the offering of requisites to the monks or nuns. Lastly Sangha Blessing: after the offerings, a traditional pāli blessing is chanted by the monks or nuns to share the merits of the gifts given.

11:00am – Noon: Shared lunch for all. After the meal, the monks or nuns are available to speak informally with the visitors.

Location and dates: every weekend Saturday and Sunday, except during Rains Retreat in the Community Hall at Dhammaloka.

YouTube instruction and discussion

[The Society] also has an internet and YouTube presence to offer teachings at the Dhammaloka Buddhist Centre worldwide. This includes live streaming's of talks, meditation lessons and Sutra classes.

16 The Commissioner also recorded in the Objection Decision (at [19]-[25]):

19. A senior monastic (male or female), with 2 Monks or 2 Nuns in attendance (if the Assistant Spiritual Director is leading the weekend), will attend the Dhammaloka Buddhist Centre from Friday afternoon to Sunday evening to give multiple teachings, counsel individuals on all manner of problems, teach Suttas and meditation, and hold many [Society] meetings.

20. In 2017 there were approximately 9,600 visitors for the Friday night teachings. Many visitors will be regulars who come as many Fridays as they can.

21. Social cohesion and community goodwill is stressed which allows for networking on community projects, and helping others less fortunate in Perth and beyond.

22. There are regularly 40 attendees at the Saturday meditation group.

23. The Sunday Sutta group normally has 30 or more attendees.

24. For one hour a week the Dhammaloka Buddhist Centre is used for a Yoga class. Yoga has long been viewed as complimentary to meditation.

25. In 2018 there were 120 children enrolled in the Children's Dhamma School.

17 Subject to an evidentiary point raised by the Commissioner in relation to the Appeal, the correctness of the information recorded by the Commissioner in the Objection Decision with respect to the regular activities carried out at the Dhammaloka Centre is not contested. The central issues pressed by the Society are first, whether the Commissioner applied the correct construction of the words 'school or college' and secondly, whether the Centre meets the definition, properly construed, of a 'school or college' for the purpose of Item 2.1.10.

THE APPEAL

18 The Commissioner raises a threshold issue against the Society's Appeal to the effect that the Society has failed to discharge the evidentiary onus that it bears by the operation of s 14ZZO(b)(ii) of the TAA. The arguments raised for and against the contention concern the nature of appeal proceedings from an objection decision under Pt IVC, which in turn requires consideration of the proper construction of the statutory provisions that confer the right of appeal: ***Bosanac** v Federal Commissioner of Taxation* [2019] FCAFC 116; (2019) 267 FCR 169 (at [27] and the authorities cited therein); see also *Builders Licensing Board and **Sperway** Constructions (Syd) Pty Ltd and Another* [1976] HCA 62; (1976) 135 CLR 616 per Mason J (at 621-622).

19 It is therefore convenient to set out s 14ZZO of the TAA in full:

> **14ZZO Grounds of objection and burden of proof**
>
> In proceedings on an appeal under section 14ZZ to a court against an objection decision:
>
> (a) the appellant is, unless the court orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates; and
>
> (b) **the appellant has the burden of proving:**
>
> (i) if the taxation decision concerned is an assessment—that the assessment is excessive or otherwise incorrect and what the assessment should have been; or
>
> (ii) **in any other case—that the taxation decision should not have been made or should have been made differently**.
>
> (Emphasis added.)

20 As the Revocation was not concerning an assessment, this case is concerned with subpara (b)(ii) of the provision. Transposing its terms, the Society has the burden of proving

that the Revocation should not have been made or should have been made differently. The Society seeks to do this by demonstrating that the Commissioner has failed to apply the correct legal principles concerning the definition of a 'school or college' under Item 2.1.10 of the table in s 30-25(1) of the ITAA 1997. It contends that it is not required to prove in the Appeal any facts other than the information and documents it provided to the Commissioner. The evidentiary burden is said to be discharged by proving that the Revocation was incorrect based on the facts established by the information and documents provided to the Commissioner.

21 To this end, the Society tendered at the hearing a substantial bundle of documents purporting to be those documents and information that was before the Commissioner. The Commissioner neither consented to or opposed the tender, but observed that the basis for the tender was presumably s 48 of the ***Evidence Act** 1995* (Cth) (the Society did not take issue with this characterisation) and emphasised that although that provision sets out the procedure for adducing the contents of documents, it does not establish the truth of any facts stated in them. The Commissioner relied on the statement of Bryson J in *National Australia Bank Ltd v Rusu* [1999] NSWSC 539; (1999) 47 NSWLR 309 (at 314-315) as cited by Goldberg J in *Kingham v Sutton (No3)* [2001] FCA 1117 (at [127]):

> The tender of the petition, albeit pursuant to s 48(1) of the Evidence Act, is not evidence of the fact that the signature opposite a name was signed by the named person. Section 48 does not have that consequence. Section 48 enables proof of the existence of the petition to be established by a number of methods, but it does not have the effect of establishing evidence, *prima facie* or otherwise, that the signatures on it were in fact signed by the named persons. The limited effect of s 48 was explained in *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309. Bryson J said at 314-315:
>
> > *"Section 51 does not abolish or in any way affect the need to prove that a document tendered is the document which it purports to be, and s 48(1) does not authorise the adduction of evidence merely by tendering a document in the absence of any evidence establishing what the document is. Section 48(1) is not an enactment to the effect that documents are to be received in evidence on the basis of what appears on their own face.* ***Section 48(1) prescribes the means of adducing evidence of the contents of documents, and leaves untouched the need to establish that a document is what it purports to be; it does not mean that documents prove themselves, as if judicial notice must be taken of them****.*
> >
> > *If s 48(1) meant that all that had to be done to establish the authenticity of a document was to tender it, it would dispense with the need to prove the authenticity of a document and put the court entirely in the hands of whatever a document which a party chose to tender purported to be, subject to whatever opportunity another party had of overcoming its apparent effect. I would regard an enactment to that effect as absurd, and I would look for other constructions; however I do not think that s 48(1) has that effect."*
>
> In that case, Bryson J was faced with an issue as to the nature of a document sought to

> be tendered and whether it was a particular type of bank record. His Honour's observations demonstrate that the tender of the petition pursuant to s 48 does not have the result of authenticating the signatures on the petition as having been signed by the persons named opposite the signatures. The applicants' submission misconceives the purpose and effect of s 48.
>
> (Emphasis added.)

22 I allowed the tender of the trial bundle, and both parties accepted that it should be treated as evidence of the documents that were before the Commissioner. There was disagreement however as to whether the tender of the trial bundle was sufficient to discharge the Society's evidentiary burden under s 14ZZO, with the Commissioner contending that the documents are incapable of proving themselves and, without more, can only be considered as assertion. The Society did not attempt, by affidavit evidence or otherwise, to prove the facts asserted in the documents within the trial bundle beyond simply tendering the documents. No one gave evidence as to the authenticity of any of the documents (or at all). Instead, it was contended that once the documents had been tendered as evidence of what was before the Commissioner, the evidence was then covered by the exception to the hearsay rule contained in s 60 of the *Evidence Act*.

23 Further, the Society submits that it is not necessary for it to further prove any of the facts contained in the documents it relies upon because, by virtue of the information gathering processes conducted by the Commissioner prior to making the Revocation, the relevant facts have already been established.

24 Part of the Society's contention is founded on the argument that s 14ZZO(b)(ii) of the TAA should, for the purposes of determining the Appeal, be construed in conjunction with both s 426-40(1) and s 426-55(1)(b) of Sch 1 of the TAA. The Society alleges that, having regard to the operation of those sections, the Commissioner is bound by the 'facts' established by the information and documents he obtained for the purposes of making his decision to revoke the endorsement (the Revocation) because he did not notify the Society that any were rejected or disputed. The Society says it therefore:

(a) is not required to prove in the Appeal any facts other than the information and documents that it provided to the Commissioner; and

(b) must prove that the taxation decision was an incorrect decision based on the facts established by the information and documents which it provided. This is because, in response to the exercise of power under s 426-40(1) of Sch 1 of the TAA, there was full compliance by the Society with all requirements of the Commissioner under s 426-

40(1): the Commissioner made multiple requests to the Society to provide information and documents in respect of the Fund, and the Society complied with all of those requests. The Commissioner did not reject or dispute, and it therefore implicitly accepted, the facts established in the information and documents provided by the Society, and, furthermore, expressly made the taxation decision (i.e. the decision to make the Revocation) based on those facts.

25 The Society says that as a consequence of the Commissioner not notifying the Society that any of the facts were rejected or disputed, it did not include in its Objection any ground of objection based on addressing any contentious facts. The result is that, because the Society is limited to the grounds stated in the Objection (unless the Court orders otherwise) under s 14ZZO(a) of the TAA, the Society says it will suffer prejudice and unfairness if the Commissioner now disputes or rejects, at this late stage, any of the facts established through the process referred to above (**s 426-40(1) Process**).

26 The Society says that for the Commissioner to now dispute the facts previously established would be inconsistent with his duties of fairness and to act as a model litigant: *Federal Commissioner of Taxation v Cassaniti* [2018] FCAFC 212; (2018) 266 FCR 385 per Logan J (at [17]); *Shord v Federal Commissioner of Taxation* [2017] FCAFC 167; (2017) 253 FCR 157 per Logan J (at [165]-[169]).

27 The Society contends this construction of s 14ZZO(b)(ii) of the TAA for determining the Appeal is to be contrasted with the proper construction of s 14ZZO(b)(i) of the TAA, which applies if the taxation decision concerned is an assessment. Under s 14ZZO(b)(i) of the TAA, the appellant has the burden of proving that the assessment is excessive or otherwise incorrect and what the assessment should have been. Accordingly, s 14ZZO(b)(i) of the TAA requires (and entitles) an appellant to establish the facts necessary to prove excessiveness. By contrast, under s 14ZZO(b)(ii) of the TAA, the appellant need only show that the Revocation was incorrect on the facts accepted by the Commissioner in making the Revocation

28 The Society observes that generally, on an appeal by way of rehearing, further evidence may be admitted but the appeal is usually conducted by reference to the evidence at first instance. There is no possible basis, in light of s 14ZZO(b)(ii), for an implication that the appeal is a hearing *de novo*, requiring the power of the Court to be exercised whether or not there was error. That is because the appeal is clearly for the purpose of correcting error. Thus, the Society contends that not only is the nature of the appeal under s 14ZZO(b)(ii) different from that under

s 14ZZO(b)(i), the type of error alleged will also inform what is required to discharge the evidentiary burden. In this case, the Society is asserting a legal error on the part of the Commissioner in applying the principles relating to the assessment of what constitutes a 'school or college'. It is said that beyond establishing the documentary record that was before the Commissioner, questions of proof of facts and evidence are quite barren to an appeal alleging error of this kind.

29 The Society relies on the decision of the High Court in ***Henderson*** *v Commissioner of Taxation (Cth)* (1970) 119 CLR 612. The case concerned the computation of the assessable income of the partners in a large accounting firm that had transitioned from compiling its income tax returns on a cash receipts basis to an earnings basis. Barwick CJ (with whom McTiernan and Menzies JJ agreed) said relevantly (at 648):

> … having regard to the terms of s. 190, it must rest on the taxpayer in an appeal against an assessment based on the amount of the assessable income so determined to show that the Commissioner's figure for that income is wrong. But the question of onus apart, the issue on such an appeal is what in fact is the assessable income of the taxpayer derived in the relevant year of tax. **No doubt where the Commissioner's figure is the result of the application of some method of computation to figures not otherwise in dispute, the contest may appear to be one as to the appropriate method of computation of the income derived: and the determination of such a method of computation will resolve the issue**, which is what is the amount of the assessable income derived. …
>
> (Emphasis added.)

30 Reliance is also placed on *Krew v Commissioner of Taxation (Cth)* (1971) 45 ALJR 324 in which Walsh J cited *Henderson* with approval and also made general observations about the nature of taxation appeals (albeit in a different statutory context) which the Society contends is most closely analogous to the appeal right now conferred by s 14ZZO(b)(ii) (at 326):

> … The foregoing considerations show that, as Windeyer J. said in *Buckland v. Commissioner of Taxation* (1960), 34 A.L.J.R. 60, at p. 62, the "jurisdiction of this court in an appeal of this kind is peculiar". In that case his Honour considered that if the conclusion of the board was open on the evidence, the appeal must fail whether or not he would have reached the same conclusion. But his Honour had before him only the evidence which had been given before the board and, as I understand the case, he considered that if the conclusion of the board was open to it on the evidence there remained no question of law which could provide the foundation for the consideration by this Court of the facts in order to form its own view about them. The present case is different. **I have stated that I think that there are questions of law which make the appeal competent. I have heard additional evidence to that which was given before the board. In the circumstances of this case I think that I am not limited to the question whether the board's decision was open to it on the evidence which it heard. I have to consider whether or not its decision was right.** In *Commissioner of Taxation v. Miller* (1946), 73 C.L.R. 93, at p. 98, Latham C.J. indicated that the Court should give "due weight" to the board's decisions on questions of fact. But I am

> of the opinion that I am not restricted in hearing this appeal in the way in which appellate courts are restricted, according to established principles, when hearing appeals (by way of rehearing) from a lower court. **I have a duty to reach my own conclusions on the questions of fact which have to be decided and to give effect to those conclusions. I am not limited to asking myself whether the findings of the board were based on a misapprehension of the evidence or of the questions which had to be decided or were manifestly wrong. I must make my own decisions as to the facts.**
>
> …
>
> I think it is clear that the onus of proof in relation to the main issues of fact in the case is on the appellant. Furthermore, it is not sufficient, in my opinion, for the appellant to make it seem probable that the overall discrepancy of about £70,000 disclosed by the betterment statement is not wholly correct. Each year must be considered separately and it must be shown in respect of a particular year that the challenged assessment was wrong. If it is not proved that the whole of the amount of income which is in dispute has been wrongly included as taxable income, then material must be provided upon which the amount of income which should have been excluded can be ascertained. **What I have just stated is subject to the qualification that in some cases it may be enough for a taxpayer to show that the assessment has proceeded upon a wrong basis or upon wrong principles: cf. *Henderson v. Commissioner of Taxation (Cth)* (1970), 44 A.L.J.R. 115.**
>
> (Emphasis added.)

31 The Society also drew the Court's attention to *Commissioner of Taxation (Cth) v Lewis Berger & Sons (Australia) Ltd* [1927] HCA 11; (1927) 39 CLR 468 (at 469) and *Commissioner of Taxation v **Sagar*** [1946] HCA 6; (1946) 71 CLR 421 as authority for the proposition that the Appeal is by way of rehearing directed at correcting error in which the taxpayer *may* adduce further evidence additional to the decisions and record of material before the decision-maker. Particularly relevant to the present case the Society says, Williams J said the following in *Sagar* (at 423-424 and 428):

> … **The appeal is a proceeding in the original jurisdiction of the Court so that, unless the parties agree that the evidence given before the Board shall be used on the appeal, the evidence must be tendered again, and, as the appeal is a rehearing, further evidence can be called.** On this appeal it was agreed that the oral and documentary evidence given before the Board should be regarded as evidence tendered on the appeal, and neither party called any further evidence.
>
> …
>
> The appeal to this Court is a rehearing, but even on a rehearing the Court should not set aside the value placed upon the shares by the Board and substitute its own opinion for that of the Board unless it is satisfied that the Board acted on some wrong principle of law or that the value was entirely erroneous (*Robertson v. Federal Commissioner of Taxation*; *Lee Transport Co. Ltd. v. Watson*; *Rook v. Fairrie*).
>
> (Emphasis added, citations omitted.)

32 In response to these submissions, the Commissioner contends that information and documents provided to the Commissioner do not amount to facts. The Society misconstrues the Commissioner's task. It is an administrative one, to make a decision based on the information available to him. The objection process provided the Society with the opportunity to provide such further information and make such arguments as it thought appropriate to that further exercise of the Commissioner's administrative power. It is not the task of the Commissioner, in exercising administrative power, to make findings of fact. That is the task of the Court, in the exercise of judicial power. As the Society accepts, whatever may be the position at the objection stage, nothing precludes the Society putting before the Court in the Appeal all facts relevant to the determination of the issues; indeed, the Commissioner says that the Society must do so to discharge its onus.

33 As to the asserted effect of the s 426-40(1) process, s 426-40 of Sch 1 of the TAA empowers the Commissioner to seek information or a document from an entity for the purpose of checking their entitlement to the relevant endorsement. The information or document must be relevant to the entity's endorsement and the entity must comply with the requirement. Section 426-55 of Sch 1 then sets out the grounds on which the Commissioner may revoke an endorsement as follows:

(a) at any time after the date of effect of the endorsement, the entity is not, or was not, entitled to be endorsed; or

(b) the Commissioner has required the entity under s 426-40 to provide information or a document that is relevant to its entitlement to endorsement and the entity has not provided the required information or document within the time specified in the requirement; or

(c) the entity has failed to comply with provisions requiring it to ensure that certain things are stated in receipts it issues for certain gifts.

34 The Commissioner in this case exercised the power to revoke pursuant to s 426-55(1)(a) on the basis that the Society was not entitled to be endorsed. After providing a substantial body of information and documents, the Society eventually refused a further request for information. However, the Commissioner did not exercise the power to revoke under s 426-55(1)(b).

35 The Commissioner contends that as a matter of statutory construction, the Society's preferred reading of s 14ZZO by reference to s 426-40 and s 426-55 of Sch 1 has no merit. The Commissioner advances the following arguments which I accept:

(a) there is nothing in the language of the s 14ZZO to suggest that it operates in connection with s 426-40(1) and s 426-55(1)(b) of Sch 1 of the TAA or, as the Society's submission implies, that it operates differently when the Commissioner has exercised a power under those sections;

(b) the structure of the TAA and the objects of the sections provide no reason to construe s 14ZZO(b)(ii) in light of s 426-40(1) and s 426-55(1)(b). Sections 426-40 and 426-55 are concerned with the Commissioner's power in respect of endorsement, relevantly here, as a DGR Status Holder;

(c) section 14ZZO is concerned with the Court's power to review the Commissioner's subsequent decision not to allow the Society's objection to an endorsement as a DGR Status Holder being revoked;

(d) the Commissioner's power to require information pursuant to s 426-40(1) serves his administrative processes with respect to *endorsement* under the TAA;

(e) in contrast, s 14ZZO defines the Court's separate jurisdiction in reviewing the Commissioner's exercise of his administrative power to make an objection decision;

(f) to the extent the Society contends that the Court is to be constrained by the way the Commissioner conducted his administrative processes, the Commissioner contends that submission ought to be rejected; and

(g) if the Court's power were to be exercised on a different basis in cases which concerned s 426-40 and s 426-55 the legislation would say so.

36 The Commissioner says that further support for this analysis is found in the observations of Allsop CJ in ***Channel Pastoral*** *Holdings Pty Ltd v Federal Commissioner of Taxation* [2015] FCAFC 57; (2015) 232 FCR 162 (at [6]), that current income tax legislation is generally characterized by being closely structured and worded, in which case the importance of the text may be paramount:

> Revenue statutes of the detail of the 1936 Act and the [ITAA 1997] may not admit of the flexibility of interpretation that may attend statutes expressed in more general terms: *Delaware & Hudson Company v Commissioner of Internal Revenue* 65 F (2d) 292 at 292-293 (1933 2nd CCA per Learned Hand J). As the same judge said in *Helvering v Gregory* 69 F (2d) 809 at 810 (1934 2nd CCA) "as the articulation of a statute increases, the room for interpretation must contract". In closely structured and finely worded legislation, the importance of the text may be paramount: *Joffe v The Queen* (2012) 82 NSWLR 510 at [36]. Nevertheless, even in such statutes, context and purpose may be important: *Quikfund (Australia) Pty Ltd v Airmark Consolidators Pty Ltd* (2014) 222 FCR 13 at [75]; *Snedden v Minister for Justice* (2014) 230 FCR 82 at [99]. Purpose and policy in such statutes are unlikely to be broad social policies

> embedded in the Act and extrapolated to the case at hand; rather, they will likely be the particular purpose and policy of a section, division or part found in their words and in the context in which the particular provisions appear.

37 The Commissioner contends, and I accept, that s 426-55(1) might be said to be an example of the kind of 'closely structured and finely worded legislation' to which Allsop CJ was referring in *Channel Pastoral*. It provides (by the use of the word 'or') a number of separate and distinct bases on which the Commissioner may revoke the endorsement of an entity. Further, it is clear that the power given to the Commissioner by s 426-55(1)(a) is not predicated on any exercise of his power under s 426-40. The Commissioner determined to exercise the power to revoke under subpara (a) and not, as was open to him, under subpara (b) of s 426-55(1). It cannot follow that he is bound by the 'information and documents' on which the decision appealed from was made or that he has implicitly accepted as facts, material which might be contained in the information provided by the Society. He was not bound to exercise, or exhaust, the power to obtain information under s 426-40 and the fact of its exercise in this case cannot alter the evidentiary burden which the Society must discharge in its Appeal to this Court.

38 Accordingly, there is no warrant to construe the burden imposed on the Society under s 14ZZO(b)(ii) to demonstrate on this Appeal that the Revocation should not have been made or should have been made differently by reference to the exercise of the Commissioner's power to gather information under s 426-40 of Sch 1. That the Commissioner utilised this power to gather information does not amount to the acceptance of those facts as a matter of evidence for the purposes of the Appeal in circumstances where the Society bears the onus.

39 The Commissioner also contends that where a taxpayer seeks to challenge an assessment in the Administrative Appeals **Tribunal** or this Court, s 14ZZK(b)(i) and s 14ZZO(b)(i) of the TAA effectively reverse the burden of proof, and impose on the taxpayer the burden of proving that the Commissioner's assessment is excessive and what the assessment should have been. The rationale for this reversal of the burden of proof is generally said to be that 'the facts in relation to [the taxpayer's] income are peculiarly within the knowledge of the taxpayer' and:

> there is every reason to assume that the legislature did not intend to confer upon a potential taxpayer the valuable privilege of disqualifying himself in that capacity by the simple and relatively unskilled method of losing either his memory or his books.

(*Trautwein v Commissioner of Taxation (Cth); R v Commissioner of Taxation (Cth); Ex parte Trautwein* [1936] HCA 77; (1936) 56 CLR 63 per Latham CJ at 87–88.)

40 In *Buddhist Society (No 1)*, I referred to the requirements of s 14ZZO (at [8]-[9]) as expressed by:

(a) the Full Court in *Bosanac* (at [47]) that the:

> … Court is to determine the claim on the evidence presented to it in accordance with its usual practice and procedure for applications in its original jurisdiction.

(b) And:

> …The court does not simply receive the record before the Commissioner on the objection and make its decision on that basis. Nor does it consider whether there has been error demonstrated in the decision by the Commissioner. …

(c) Drummond J in *Kajewski v Commissioner of Taxation* (2003) 52 ATR 455 (at [6]) that:

> … it has long been accepted that it is necessary for the taxpayer to prove, by proper evidence put before the appeal court, what is the correct amount of the taxpayer's taxable income in respect of which the Commissioner should have made his assessment ...

41 Further (at [10]), I noted:

> … In the present case, the Pt IVC appeal is concerned with whether the decision 'should not have been made or should have been made differently': s 14ZZO(b)(ii) of the TAA. Nonetheless there seems no reason that the above outline from *Kajewski* of the features of a Pt IVC appeal, would not usually apply generally to any Pt IVC appeal from an objection decision in relation to a taxation decision other than an assessment. …

Consideration

42 I have already indicated above that, for the reasons given by the Commissioner, the s 426-40(1) Process does not bear upon the construction of the appeal right conferred by s 14ZZO(b)(ii).

43 Both parties contend that an appeal under s 14ZZO(b)(ii) is by way of rehearing, however the Society argues that the Commissioner's submission that the Society has not discharged its evidentiary onus could only hold true if the appeal was by way of a hearing *de novo*. I do not consider this to be the case.

44 The phrase 'by way of rehearing' does not have a fixed meaning and is used to describe various appeal processes that are given specific content by their statutory context such that the phrase is of limited assistance absent consideration of the relevant provision: *Fleming v The Queen* [1998] HCA 68; (1998) 197 CLR 250 (at [21]). Usually the phrase describes an appellate process that is somewhere in between an appeal in the strict sense and a hearing *de novo*. It can also however equate directly to a hearing *de novo*: *Bosanac* (at [29]), citing *Sperway* (at 621).

45 The Full Court's decision in *Bosanac* gave detailed consideration to the nature of an appeal under s 14ZZO and the Commissioner relies on it heavily, and indeed contends it is dispositive of the issue. Counsel for the Society went to some length at the hearing to distinguish the decision on the basis that it was concerned only with an appeal from an assessment decision under s 14ZZO(b)(i) and did not deal at all with s 14ZZO(b)(ii). The Society thus relied on the series of older authorities referred to above. Care must be exercised when considering decisions concerned with taxation appeals brought in a different legislative context to that which now applies: *Bosanac* (at [46]).

46 Albeit in the context of considering an assessment appeal under s 14ZZO(b)(i), the Full Court in *Bosanac* made the following observations about the nature of the appeals under s 14ZZO (at [35]-[36] and [47]-[48]):

> 35 As we have noted, s 14ZZ simply provides that a person dissatisfied with the Commissioner's objection decision may appeal against the decision. There is no reference to a rehearing. There is no reference to a right to receive further evidence. **There is no reference to the status of materials presented to the Commissioner on the objection or factual matters determined by the Commissioner for the purposes of dealing with the objection. Significant contextual aspects are that there is no requirement for the Commissioner on an objection to convene a hearing, to receive sworn evidence, for the evidence to be tested or for there to be an adjudication akin to that conducted by a court**. Further, the TAA provides that the appeal, unless the court otherwise orders, is confined to the grounds stated in the taxation objection, thereby giving significance to the way the case was advanced by the taxpayer on the objection. **Also, the taxpayer as appellant has "the burden of proving" that the assessment is excessive or otherwise incorrect and what the assessment should have been. This is significant for two reasons. First, it contemplates that there will be a process in which matters will be proved on the appeal.** Second, the focus is on whether the assessment is excessive, not on whether there was error in the objection decision. **This points to a fresh hearing on review in which the court reaches its own view as to whether the assessment is excessive regardless of error. However, the fresh hearing is confined to an adjudication of the issues raised by the objection, unless the court makes an order allowing a broader inquiry**.
>
> 36 Further, for the following reasons, on the hearing of the appeal the court receives evidence in accordance with its usual procedures where the original jurisdiction of the court is invoked.
>
> …
>
> 47 Having regard to the issues raised in the present appeal, we would summarise the nature of an appeal under s 14ZZ in the following terms. Although s 14ZZ provides for an "appeal", it confers an original jurisdiction to determine a review claim "against the decision" by the Commissioner on an objection. **The Court is to determine the claim on the evidence presented to it in accordance with its usual practice and procedure for applications in its original jurisdiction**. The onus is on the appellant to prove that the assessment

> the subject of the objection decision was excessive or otherwise incorrect and what the assessment should have been. As stated by Dowsett J in *Weyers v Federal Commissioner of Taxation* (2006) 63 ATR 268 at [146], "[t]he Commissioner need not justify the decision, save in response to an appropriate attack upon it". The grounds that may be relied upon are confined to those raised before the Commissioner in the objection, unless the court otherwise orders. **So, the evidence that may be led to discharge the onus is likewise confined. It is a matter for the parties whether they stipulate the correctness of factual matters before the Commissioner. However, in the absence of such matters being agreed or such matters being presented as evidence of the truth of those matters without objection, it is for the appellant to provide the necessary evidence on the hearing before the court on the "appeal". The court does not simply receive the record before the Commissioner on the objection and make its decision on that basis.** Nor does it consider whether there has been error demonstrated in the decision by the Commissioner. Even less so does it consider whether an amended assessment issued after the objection decision is correct. Therefore, as noted by Greenwood J in *Aurora Developments Pty Ltd v Federal Commissioner of Taxation (No 2)* (2011) 196 FCR 457 at [32], "an appeal under s 14ZZ(c) bears some of the characteristics of an appeal by way of a hearing de novo in that the taxpayer has an extensive, though not unqualified, right to put additional evidence before the Court".
>
> 48 The above views are consistent with the reasons of Pagone J (Robertson and Bromwich JJ agreeing) in *Zappia v Federal Commissioner of Taxation* (2017) 106 ATR 875 at [3] in considering the nature of the question for the Court hearing a tax appeal (which reasons were cited and applied by the primary judge):
>
>> Proof of the amount upon which tax was to be levied is not established by showing error by the Commissioner in the evidentiary, factual or legal basis of assessment … **Statements made by the Commissioner in an objection decision do not establish the facts upon which tax was to be levied and do not bind the Commissioner, or the operation of the taxing provisions, except (perhaps) where the parties in proceedings have agreed to the facts for the purposes of the proceedings. The recital of facts found in an objection decision are not themselves the facts they purport to recite and their recitation does not bind the Commissioner, or the operation of the taxing statute, where a taxpayer is required to discharge the burden imposed by s 14ZZO to prove that an assessment is excessive. That can be done only by establishing the facts upon which the liability depends.**
>>
>> (Emphasis added.)

47 In my view, although the observation in *Bosanac* did not expressly apply to an appeal of this nature, the same considerations must apply. There is no relevant statutory or principled basis for any distinction between an assessment appeal under s 14ZZO(b)(i) and an appeal under s 14ZZO(b)(ii). Just as the Court must consider whether an assessment decision is 'excessive' and if so, form its own view as to what the assessment should have been, in the present case the Court is tasked with forming its own view as to whether the Revocation 'should not have

been made' or 'should have been made differently'. In neither instance is the Court's power strictly confined, or conditioned, on the identification of error. There is no warrant to read the language of s 14ZZO(b)(ii) as conferring a different form of appeal right to that contained in s 14ZZO(b)(i) as explained by the Full Court in *Bosanac*. The Appeal is a fresh hearing in the Court's original jurisdiction in which evidence is received according to usual procedures. Importantly, additional evidence may also be received, provided that such evidence does not address matters additional to the grounds stated in the taxation objection.

48 In the original jurisdiction the facts must be proven, and the Society has not put any material before the Court that is in a form capable of discharging its burden under s 14ZZO. Proving what the Society *said* were the relevant correct facts does not prove the facts themselves, and the mere tender of the materials before the Commissioner will not, without more, prove the truth of their contents.

49 I do not accept the argument that the Commissioner is bound by the facts provided to him by the Society. No legislative provision or precedent suggests this.

50 As there is no relevant evidence in support of the Appeal, it must be dismissed.

THE REVIEW

51 Independently of its Pt IVC Appeal, the Society has also brought a Review of the Objection Decision under the ADJR Act. The Court's task on the Review differs in important respects from a Pt IVC Appeal, and is here concerned with whether the *Objection Decision* (not the Revocation) is attended by error of the kinds described in s 5 of the ADJR Act. The inquiry on such a review is therefore limited to a consideration of the record of information that was before the Commissioner. This means that the Society is not confronted with the evidentiary burden imposed on it in the Appeal.

52 As noted above, the Society's grounds of review are founded on s 5(1)(e) (construed with s 5(2)) and s 5(1)(f) of the ADJR Act. It is alleged that the Objection Decision was an improper exercise of the Commissioner's power and/or involved an error of law. Alternative grounds alleging unreasonableness and irrationality are also present however, in my view, the real question is whether the Commissioner made an error of law on the material before him as to the definition of 'school'. If that is established then the Society is entitled to relief. It was not suggested otherwise by the Commissioner. If that error is established, questions of

unreasonableness are unnecessary to resolve, indeed, these alternative arguments were not pursued at all in oral argument.

The Objection Decision and the Commissioner's arguments

53 In dismissing the Society's objection, the Commissioner concluded in the Objection Decision that the Dhammaloka Centre was not a building used as a school because:

(a) it was not a 'school' within the ordinary usage of that word, as it was not a place with the primary function of providing regular, ongoing and systematic instruction in a course of non-recreational education; and

(b) any school use was not substantial. Other uses of the building precluded the conclusion that it had the character of a school building.

54 The relevant portion of the Objection Decision in relation to the finding at [53(a)] above appears at [50]-[57] as follows:

> 50. **None of the Dhammaloka Buddhist Centre's activities, apart from perhaps the Childrens' Dhamma Class, is a school or college according to the factors put forward by Sundberg and Merkell JJ in *Australian Airlines*. Neither do the centre's activities satisfy the majority of the factors for a school listed in paragraph 18 in [TR] 2013/2 (see paragraph 33 in this decision)**.
>
> 51. It is accepted that suitably qualified persons provide the instruction, however apart from the childrens' class there is no specific curriculum or syllabus. The activities also do not show some form of assessment that leads to a qualification that is transportable and recognised outside of the organisation.
>
> 52. A school for DGR purposes is a structured activity where there is adherence to a curriculum and attendance at the school is regular. These characteristics are not present as attendance at the centre appears to be more on a causal [sic] basis.
>
> 53. **The chanting, guided meditation, discussion, Dana, YouTube and yoga, do not have the appearance of a school, as many of the factors of a school espoused by Sundberg and Merkell JJ in *Australian Airlines* and TR 2013/2 are not there**.
>
> 54. The activities can be likened to the examples provided at paragraph 145 of Taxation Ruling TR 2013/2 where adult religious education, a Bible study centre, a theological college and a yoga school are described.
>
> 55. In the Taxation Ruling it is accepted the Bible study centre and the like may be may be [sic] a 'school or college' for the purposes of Item 2.1.10, **provided it is established with the purpose of providing regular, ongoing and systematic instruction in a course of training. Such a purpose could be represented by, for example, a formal curriculum towards a qualification recognised by the related church or more widely.**

> 56. A yoga school is not usually a school for the purposes of Item 2.1.10. Yoga is a recreational activity and does not necessarily involve systematic instruction or study having the purpose of imparting knowledge as such.
>
> 57. Apart from the Childrens' Dhama Class, it is not apparent that the Dhammaloka Buddhist Centre provides **regular, ongoing and systematic instruction in a course of training, of the type described in *Australian Airlines* and TR 2013/2**.
>
> (Emphasis added.)

55 The finding at [53(b)] above followed directly after at [58]-[61]:

> 58. Paragraph 30 of TR 2013/2 states that a weighing of various factors is required to determine whether a building has the character of a school building.
>
> 59. Paragraph 31 of TR 2013/2 states that in order for a building to be a school building its school use must be substantial.
>
> 60. Paragraph 32 of TR 2013/2 states that a building will not be regarded as a school building where its non-school use is of such kind, frequency or relative magnitude as to preclude the conclusion that a building has the character of a school building.
>
> 61. Based on the evidence provided and information obtained on the [Society's] website, **we conclude less than 5% of the total hours of the operation of the Dhammaloka Buddhist Centre are dedicated to activities that resemble teaching or instructing**.
>
> (Emphasis added.)

56 Other relevant findings made in the Objection Decision included that:

(a) the Society failed to provide any specific curriculum for the Dhammaloka Centre, only a curriculum for the Childrens' Dhamma Class. Evidence was provided of the 'seven types of knowledge' that comprise the teachings at the Centre which are immense and from which the senior monk selects the particular are of knowledge for a given year (in lieu of a formalised curriculum) (at [34]-[37]);

(b) volunteers and office bearers who give advice at the Centre when formal instruction is not being provided by the Abbots/senior teachers were providing neither instruction nor training (at [38]-[42]);

(c) only the Childrens' Dhamma Class conducted on Sunday mornings had a formal enrolment process requiring the payment of a non-refundable fee. No evidence was provided of any formal enrolment process for the Friday night teachings or the Saturday meditation group or the Sunday Sutta group (at [43]-[44]);

(d) a review of the Society's website and responses to the Commissioner's requests revealed that no formal assessment or qualification is gained by visitors attending senior monastic teachings at the Centre or visiting the Centre more generally.

57 In order to reach these conclusions, the Commissioner relied upon the information provided by the Society, in particular in its response letter dated 16 January 2018 and an undated response letter received on 7 December 2018. The Commissioner sought a considerable amount of additional information from the Society, along with posing questions for the Society to answer. The Society refused to provide some information requested by the Commissioner in making the Objection decision as to 'non-school' uses of the Dhammaloka Centre, including as to in which part of the Dhammaloka Centre buildings school activities were undertaken; how space was used when instruction and teaching hours coincided with religious services; how non-school activities were separated from school activities; the purpose of the section designated on a floor plan as an administrative office and the percentage usage of each area of the Dhammaloka Centre. Instead, the Society directed the Commissioner to decide the Objection on the basis of the information already provided.

58 The Commissioner decided that, for the purposes of Item 2.1.10, 'school' carries its ordinary meaning. He contends this conforms with the relevant authorities to that effect: ***Cromer Golf*** *Club Ltd v Downs* (1973) 47 ALJR 219; *Commissioner of Taxation (Cth) v* ***Leeuwin*** *Sail Training Foundation Ltd* [1996] FCA 626; (1996) 68 FCR 197 and *Commissioner of Taxation v* ***Australian Airlines*** *Ltd* [1996] FCA 935; (1996) 71 FCA 446.

59 The Commissioner contends that the ordinary meaning of 'school' is a place where one finds 'regular, ongoing and systematic instruction' in a course of non-recreational education. There is an extent to which the Commissioner now disclaims the 'non-recreational' requirement and contends that nothing turns on it in this case. I will return to this point below. The Commissioner also says that a building must be 'substantially' used as a school to meet the requirements of Item 2.1.10. It is submitted that, in addition to faithfully applying the ordinary meaning of 'school' set down in *Cromer Golf*, the decisions in *Leeuwin* and *Australian Airlines* established additional factors and *indicia* which regard should be had to when determining whether there is substantial use of a building for the purpose of regular, ongoing and systematic instruction.

60 The Commissioner expressed this interpretation of the ordinary meaning of 'school' at [32] of the Objection Decision:

> The Commissioner's view on the meaning of 'school' for the purposes of section 30-15 of the ITAA 1997 is stated in *Taxation Ruling TR 2013/2 Income tax: school or college building funds*. The Commissioner considers that the words 'school' and 'college' take their meaning from their ordinary usage, and considers a school to be both a place of assembly (as described in *Cromer*), and an educational organisation which has a distinct identity and has a primary function or essential purpose of providing regular, ongoing and systematic instruction in a course of non-recreational education (paragraphs 13, 14 and 137).

61 The conclusion that a school is an 'educational organisation which has a distinct identity' is supported, the Commissioner argues, by *Australian Airlines* (per Lockhart J at 450 and Sundberg and Merkel JJ at 461) where all members of the Court had regard to the definition of 'school' in *The Oxford English Dictionary* (2nd ed, 1989), as follows:

> I. Place or establishment for instruction.
>
> 1 An establishment in which boys or girls, or both, receive instruction.
>
> …
>
> 3 An institution in which instruction of any kind is given (whether to children or adults). Often with defining word indicating the special subject taught, as *dancing, music, riding school*.
>
> 4(a) A place, environment, etc, where one gains instruction or training in virtue, accomplishments, or the like; a person or thing regarded as a source of instruction or training.

62 Lockhart J (at 450), also had regard to the *Macquarie Dictionary*, which defined 'school' as including the following:

> 1. A place or establishment where instruction is given, [especially] one for children.
>
> 2. The body of students or pupils attending a school.

63 In relation to 'regular, ongoing and systematic instruction', the Commissioner had regard to the factors which the Commissioner contends formed the basis of the conclusion of Sundberg and Merkel JJ in *Australian Airlines* (at 463). They are that:

(a) the institution in question had defined syllabuses for each course of instruction;

(b) the institution in question had defined programs of instruction and qualified instructors;

(c) there was external certification of the syllabuses, training exercises, instructors and equipment;

(d) the centre had a physically identifiable location, its own administration and was established for the sole purpose of instruction; and

(e) qualifications obtained at the conclusion of training were portable.

64 The Commissioner also relied upon the factors said to indicate that an organisation is providing instruction as a school that are set out in TR 2013/2 (at [18]) which appear to derive from the factors in *Australian Airlines*:

(a) a set curriculum, instruction or training provided by suitably qualified persons;

(b) the enrolment of students;

(c) some form of assessment and correction; and

(d) the creation of a qualification or status that is recognised outside of the organisation.

65 Moreover, the Commissioner says that the matters which the Commissioner took into account are supported by *Leeuwin*. There, Northrop and Finn JJ (at 199-200) approved the Tribunal's findings on the nature and purpose of the taxpayer's activities which gave it the character of a school. They referred to the Tribunal's reference to specific training programmes and set out in full the Tribunal's description of the personal development programme which seemed to account for about 70 per cent by time of the taxpayer's training activities and in which successful participants were given a certificate of achievement.

66 The Commissioner contends that all these matters support his construction of 'school' as having a primary function of providing regular, ongoing and systematic instruction.

67 In contrast, the Commissioner submits that the material provided to the Commissioner indicated that teachings at the Dhammaloka Centre were offered on a limited and informal basis to casual attendees in that:

(a) senior monastics attended the Dhammaloka Centre from Friday to Sunday to give multiple teachings, provide counselling and hold meetings. Amongst these weekend activities was a regular Friday night teaching, a Saturday meditation group, a Sunday Dhamma school and a children's Sunday school;

(b) attendees were described as 'visitors', 'first-time visitors', 'regular attendees' and 'long-time practitioners'. 'Many visitors will be regulars who come as many Fridays as they can'. The information provided to the Commissioner included 'regular numbers' attending the meditation, study groups and Sunday school. Accordingly, it may be concluded that attendees did not enrol or otherwise commit to a programme although 'syllabuses' were provided for the Sunday school and Sunday Dhamma senior class;

(c) people were not assessed on the contents of the teachings, nor did they achieve any qualification or certificate for attending; and

(d) the material indicated that a library at the Dhammaloka Centre was not a 'school' facility. Rather, it was a general lending library as well as being open for readings, memberships and sales (of both books and merchandise). It was open for very limited hours on only three days of the week.

68 The Commissioner emphasises that, by contrast, the Society operated two Monasteries (Bodhinyana and Dhammasara) and the Retreat Centre (Jhana Grove), each at separate premises. The material as to the separate training provided at the Monasteries was extensive. It was described as preparing candidates for ordination and, eventually, to qualify as a 'Minister of Religion'. The Monasteries' detailed curricula were provided as well as information as to the commitment required of candidates, their assessment and qualifications of instructors. Similarly, Jhana Grove is a dedicated meditation centre offering 15 retreats a year, from two to nine days. Attendees are referred to as students and made bookings (open three months before prescribed retreats) in order to attend.

69 The Commissioner contends the above information indicates that the Dhammaloka Centre does not have the character of a school rather than a place where Buddhist teachings are made available to the general public. The character of what is offered there is quite distinct from the formal training undertaken by the monks and nuns of the Monasteries or the formal activities offered at Jhana Grove. The notion of providing the public with general access to the Buddha's teachings is said to be apparent throughout the material:

(a) 'Lay people can self-study most of these important subjects themselves';

(b) 'a lay person can access any part of the Monastic Discipline … and ask questions';

(c) teachings are available world-wide to anybody via the internet, YouTube and the streaming of live talks, meditation lessons and Sutta classes at the Dhammaloka Centre. The Society 'therefore assists students of the Dhamma in the provision of daily updates and immediate connection with the teachings'; and

(d) day visitors attend the monasteries, mainly at lunchtime, and may meditate in the main hall during their visit.

70 The Commissioner argues that the principle underlying the ordinary meaning of 'school' is instruction in some area of knowledge or activity, which necessarily implies some structure or progression in the teaching of, or training in, that body of knowledge. In contrast, the Commissioner says that the information provided to him indicated that the teaching sessions at

the Dhammaloka Centre are limited to a few hours a week, whilst the Centre remains open the rest of the week for other activities. The Objection Decision recorded, from an examination of the Society's website, that the more formal activities, which might be described as teaching, comprised a one hour Kalyana Mitta discussion on Saturday afternoon, a one hour Dhamma talk by a senior monk or nun on a Friday evening, a two hour Children's Dhamma Class on Sunday morning and a one hour and fifteen minute Sutta Class/Buddhist Study Group on a Sunday afternoon, (amounting to a total of 5 hours and 15 minutes a week) as well as 4 hours of 'guided meditation' and 'beginners meditation classes' per week.

71 Beyond the more formal activities, the monks and nuns attending the Dhammaloka Centre from Friday to Sunday made themselves available for multiple teachings and counselling sessions and held '[Society] meetings' which were distinguished from teaching Suttas and meditations.

72 In addition, the Dhammaloka Centre is open every day for meditation, quiet contemplation and walking in the garden. The library can be accessed during office hours with the assistance of administrative staff.

73 Indeed, the Commissioner says critically, the Dhammaloka Centre is described as the Society's 'main administrative centre' and the '[Society] administrative staff (3 part-time employees) are based at Dhammaloka and provide coverage over six days of each week for all the administrative and financial needs of the four schools (Bodhinyana, Dhammasara, Jhana Grove and Dhammaloka)'. A site plan disclosed that the Dhammaloka Centre houses offices.

74 The Commissioner says the Society's Constitution and initial response indicate that the Society's remit was to, on the one hand, train monks and nuns and, on the other, make Buddhist teachings available to the general public, including through the support of other Buddhist centres world-wide. Accordingly, the Commissioner says it might be concluded that the administrative activities of the Society's staff, housed at the Dhammaloka Centre, were not confined to supporting the schools.

75 The Commissioner contends that so much is evident from the Society's accounts:

(a) whilst the Society's profit and loss statement for the 2017 year showed income for the 'Dhamma School' of $3,490, there was extensive other income from donations, memberships and sales and royalties, with total income of about $1.8 million;

(b) the Society has established an internet and YouTube presence to offer teachings to anyone in the world and streams the talks, meditation lessons and Sutta classes

conducted at the Dhammaloka Centre. The 2017 profit and loss statement showed 'IT expenses' of some $10,000. The 2017 profit and loss statement also recorded travel, visa and passport expenses amounting to more than $60,000 and wages of $79,277.75; and

(c) wages were not paid in respect of the activities offered at the Dhammaloka Centre. Those activities were conducted by the monks and nuns and volunteers.

76 The administrative activities undertaken at the Dhammaloka Centre served the broader organisational needs of the Society in making available to the general public the teachings of the Buddha. The Commissioner says that making available the teachings of the Buddha evidently went beyond training monks and nuns and offering teaching at the Dhammaloka Centre. Even if it was conceded that some of the activities offered there were 'school' activities (and it was not), the Commissioner says it was open to him, having regard to the wider, particularly administrative, functions of the Dhammaloka Centre, to conclude that it was not a building used substantially as a school, and to decide the Objection on that basis.

The Society's arguments

77 The Society disagrees both with the Commissioner's statements of principle in TR2013/2 and his assessment of the relevant authorities, as well as the factual conclusions drawn from the information provided by the Society as to the nature (and extent) of the activities conducted at the Dhammaloka Centre. It says the Dhammaloka Centre is used by the Society to teach the teachings of the Buddha (the **Buddha-Dhamma**) and to provide a place for those who receive that instruction to develop their understanding and practice of the Buddha-Dhamma. The Society emphasises that the Centre has not been used for any other purpose than that of a school.

78 It is submitted that it is not part of the Buddhist tradition to provide written qualifications or certificates. An experienced abbot or spiritual teacher is able to assess the mental development of an individual and deem whether that individual has reached an adequate standard of qualification. A key operating principle of the Centre is to convey the considerable detail of the texts found in the Buddhist Pali Cannon, which is comprised of an external set of volumes, often likened to the equivalent of 12 Christian Bibles, dating back more than 2,500 years.

79 Thus, the Dhamma teachings and meditation classes given at the Dhammaloka Centre are said to encourage the teaching, practice and realisation of Buddhist principles in accordance with

the Society's aims and objectives under its Constitution. Those principles include the seven types of knowledge in Buddhism as follows:

(a) adherence to the monastic discipline;

(b) comprehension of the Discourses;

(c) proficiency in Buddhist Pali language;

(d) comprehensive and sustained meditation practice;

(e) intensive and sustained character development;

(f) proficiency in the performance of pastoral services; and

(g) the development and competency to teach many aspects of Buddhism.

80 Although the Society agrees that the relevant authorities for the purpose of construing the definition of 'school or college' are those relied upon by the Commissioner (*Cromer, Leeuwin* and *Australian Airlines*), it contests the Commissioner's interpretation of these authorities. It also asserts that various parts of TR2013/2 are inconsistent with these authorities, and purport to impose requirements additional to those set down in the cases that a building must satisfy to be considered a 'school or college'. Specifically in relation to the reasoning in the Objection Decision, the Society takes issue with the following paragraphs of TR2013/2:

> 14. In order for there to be a school for the purposes of Item 2.1.10, there must also be an educational organisation which:
>
> - has a distinct identity; and
> - provides regular, ongoing and systematic instruction in a course of non-recreational education.
>
> …
>
> 18. The presence of the following factors indicate that an organisation is providing instruction as a school for the purposes of Item 2.1.10:
>
> - a set curriculum;
> - instruction or training provided by suitably qualified
> - persons;
> - the enrolment of students;
> - some form of assessment and correction; and
> - the creation of a qualification or status which is
> - recognised outside of the organisation.
>
> 19. The instruction provided by a school must not be, or must not be more than

incidentally, recreational in character.

…

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

81 The Society says these assertions are clearly inconsistent with the authorities, particularly to the extent that any distinction is made between recreational and vocational instruction. The Society says the cases demonstrate that a school can do either, and it is not a relevant distinction for the purpose of determining whether a building has the character of a 'school or college'. It also says that the other factors set out in [18] of TR2013/2 were rejected by the Full Court in *Leeuwin* and also in *National Institute of Dramatic Art v Chief Commissioner of State Revenue* [2016] NSWSC 1471; (2016) 103 ATR 856 (***NIDA***) per White J (at [39]).

82 The Society says that not only can schools teach both recreational and non-recreational subject matters, the characteristics of the school will differ in each case; indeed, it is said that a requirement that a school provide 'regular, ongoing and systematic instruction' is an inappropriate (and legally incorrect) yardstick when considering recreational education. Instead, the Society contends that the ordinary meaning of school is that set down in *Cromer Golf* and that any reading of the subsequent authorities that draws out additional requirements or factors which must be present is to put an impermissible gloss on the concept that necessarily excludes many places of teaching and education from DGR Status.

83 Finally, the Society points out that taxation rulings such as TR2013/2 are nothing more than a public expression of the Commissioner's opinion on certain matters. They are not a species of delegated legislation and do not have legal force: *BHP Billiton Direct Reduced Iron Pty Ltd v Duffus, Deputy Commissioner of Taxation* [2007] FCA 1528; (2007) 67 ATR 578 per French J (at [98] and [104]). The Commissioner does not suggest otherwise, but maintains that TR2013/2 is consistent with the authorities as they have developed since *Cromer Golf.*

Consideration: the proper construction of 'school'

84 The central question in the Review is whether the Commissioner's interpretation of the ordinary meaning of 'school' is supported by the authorities. If it is not, then the Commissioner proceeded on a misunderstanding of the law in making the Objection Decision and thus committed an error of law. The Commissioner says a building must have as its primary function the provision of regular, ongoing and systematic instruction in a course of non-recreational education and further, that its use for this purpose must be 'substantial'. The Society contends

that nothing in the authorities was intended to narrow or alter the 'ordinary meaning' of 'school', and that the reasoning in *Leeuwin* and *Australian Airlines* simply applied the principles from *Cromer Golf* and was specific to the very different facts considered in each case.

85 As a preliminary point, Item 2.1.10 (and the broader statutory regime) provides that DGR Status is available for a building fund if the building is 'used, or to be used, as a school or college'. Although it was not submitted otherwise in this case, it is to be observed that the co-location of the words 'school' and 'college' does not have the effect of narrowing or confining the types of buildings that are schools. An argument to that effect was rejected by the Full Court in *Leeuwin* (at 203D-203F per Northrop and Finn JJ and at 210F-210G per Carr J). The reasoning of Northrop and Finn JJ is illustrative of the point:

> We turn now to the effect of the collocation of the words "university" and "school". Even if the word "university" is suggestive of one particular type of educational institution performing a relatively accepted core function in the educational arena (ie the provision of a range of tertiary qualifications to students and the conduct of research), we are unable to accept that the consequence should follow that in construing Item 109 we should strive to isolate an activity or function more narrow than is suggested by the dictionary/*Cromer Golf Club* definitions to which we have referred for no more obvious purpose, it would seem to us, than to give a meaning to the two words which overall would describe little if anything more than the traditional primary, secondary and tertiary institutions of educational instruction in this country.
>
> It has not been suggested to us that there is something inherent in the purpose of this particular exemption from sales tax which should incline us to such a view. It is not at all apparent why in any event we should seek to dissect in an arbitrary way the types and forms of educational instruction provided by what are "schools" in the sense in which that term is used in the OED and *Cromer Golf Club*.
>
> If Parliament had intended that the beneficiaries of the Item 109 exemption in the educational sector were to be constituted only by universities and by schools having particular attributes, it could have said so. It has not.

86 The High Court's decision in *Cromer Golf* concerned the resumption of land owned by a golf course in the Northern Sydney for the purpose of establishing a 'National Fitness Camp'. The exercise of the relevant statutory power required the resumed land to be resumed, *inter alia*, 'for school sites'. The National Fitness Camps provided facilities where students from primary and secondary schools could attend over a number of days for the purpose of physical education and instruction in the physical and social sciences. Those activities were described in detail by the judge at first instance in *Cromer Golf Club Ltd v Downs* [1971] 1 NSWLR 963 (at 967C-968B):

> The activities carried on at most of the national fitness camps, and in particular at the

> Narrabeen National Fitness Camp, on and before May 1967, fell into various classes. In the first place, primary and secondary school camps were conducted at the camp sites. The primary school camps were normally held over a period of five days, and primary schools from both metropolitan and country districts of New South Wales sent pupils to these camps together with a group of their own teachers, one primary school making use of the centre at a time. The permanent staff of the centre, which at Narrabeen comprised its director, one other permanent teacher, and a number of recreation officers, helped give instruction to the pupils, the rest of the instruction being given by the teachers who came to the camp from the primary school with its pupils. The instruction included courses in physical education and physical sciences, and also in what have been called the social sciences. The secondary school camps were conducted on a fairly similar basis, with an emphasis on geology and geography as well as physical instruction. In addition what are called vocational guidance camps for secondary pupils were held. These appear to have been primarily for country schools which sent their pupils to the camp as a centre in which to live over the relevant period and at which to hear lectures from Commonwealth vocational guidance officers. As well as these lectures at the camp itself, the pupils were shown over factories and similar institutions as part of the vocational guidance course.
>
> **In addition to these educational camps, all of which were held during school terms, vacation camps were held during school holiday periods, including sports coaching camps and recreational activities camps**. Special purpose training camps were also held from time to time for the purpose of training officers and leaders, including students at teachers colleges. **The activities I have described were all activities relating to special aspects of education, and were organized by or in conjunction with the Department of Education**. Once a camp had been designated as a school for specific purposes, much the same course was followed and the same work done, but the instruction was given by the permanent staff of teachers appointed to the camp rather than by teachers from the primary or secondary schools from which the pupils came.
>
> **Apart from these educational activities, there was and still is much activity at the camps, including the Narrabeen camp, which is not directly related to or organized by the Department of Education**, although all of it is carried on with the Department's consent. **Thus the centre at Narrabeen has been used for a Girl Guides Jamboree, for Rotary camps at which youth seminars are conducted and for the training and sometimes the housing of Olympic and other athletic teams. Bowling greens have been constructed which are used by old-aged pensioners and members of an organization called the Wakehurst Foundation, which raises funds for and otherwise assists the centre. There are tennis courts which are let out to local women's groups when not being used for the camp, and various adult organizations play basket ball in the arena in the gymnasium. At times hockey games have been played by outside groups, and the Outward Bound Movement has made use of the camp. There is a picnic area near the lake which is regularly let out to organizations for the holding of picnics. In general, weekend activities at the camp are conducted by adult groups quite outside the Department of Education. However, all these activities are carried on so as not to interfere with the basic activities of the camp which I have described above**.
>
> (Emphasis added.)

87 In assessing whether the National Fitness Camp was a 'school' Barwick CJ (with whom McTiernan and Stephen JJ agreed) said in *Cromer Golf* (at 221-222):

> It seems to me that a "school" is **a place where people**, whether young, adolescent or

> adult, **assemble for the purpose of being instructed in some area of knowledge or of activity. Thus there are drama schools, ballet schools, technical schools, trade schools, agricultural schools and so on**.
>
> In my opinion, **the activities** of the National Fitness Camp at Narrabeen as described in the evidence **predominantly involve the instruction of young and adolescent people in the care and improvement of the body, broadly an area of knowledge and expertise generally described as physical fitness**. The form of the instruction no doubt varies and includes demonstrations and practice, but **the character of the camp as so evidenced is, in my opinion, that of a place to which young and adolescent people resort in considerable numbers for the purpose of being instructed**. That, it seems to me, **makes the camp predominantly a school** within the meaning of s. 40 (1) (c) of the *Public Works Act.*
>
> (Emphasis added.)

88 The High Court's decision in *Cromer Golf* was subsequently applied by a Full Court of this Court in *Leeuwin* in respect of a foundation that was held to conduct a school providing training programs in relation to sailing ships. In *Leeuwin*, Northrop and Finn JJ held (at 203) that the definition of 'school' given by Barwick CJ in *Cromer Golf* was intended to be the ordinary meaning of that word, and that their Honours should not dissect in an arbitrary way the types and forms of educational instruction provided by what are 'schools' in the sense in which that term is used in *Cromer Golf* and in *The Oxford English Dictionary* (2nd ed, 1989), the latter providing definitions that included a 'place or establishment for instruction', and 'an institution in which instruction of any kind is given'. Their Honours noted (at 203) that those dictionary definitions 'clearly encompassed' the activities of the foundation.

89 In his separate judgment in *Leeuwin,* Carr J had regard to specific characteristics of the activities of the foundation and applied *Cromer Golf* in assessing whether it was a school. His Honour also rejected a submission put by the Commissioner which mirrors to some extent that which is now contended (at 211E-212D):

> On behalf of the Commissioner it was submitted that:
>
> > "It is not enough that an institution educates or gives instruction for it to be identified as a school in common concepts. A school in common concepts is an institution which promotes learning through a set curriculum taught by a professional body of teachers and subject to formal assessment. The common notion also includes regular attendance over a substantial period of time so as to ensure that students are provided with adequate educational opportunities to equip them for living in today's society."
>
> The facts in *Cromer Golf Club* and *Australian Airlines Ltd* were to be distinguished, so it was put, from the facts in the present matter. In his supplementary notice of appeal the Commissioner went so far as to assert that the Tribunal should have found that the word "school" in the present context was confined to those institutions recognised by relevant Education Acts, specifically, "efficient schools" registered under the *Education Act.* In the alternative the meaning of "school" was to be confined to

institutions which satisfied all or some of the learning areas referred to in the Hobart Declaration.

This was an approach specifically rejected by Barwick CJ in the *Cromer Golf Club* case. In my view the same approach should be taken to the present matter. Whether the respondent was registered under the *Education Act* or whether it satisfied all or some of the learning areas referred to in the Hobart Declaration should not decide whether it is a "school" for the purposes of the Act, being a Commonwealth Act designed to encourage, reward or protect a particular class of activity. Having regard to the following factors:

- the fact that the first principal object, set out above, of the respondent is to promote the education of young men and women by the provision of an adventure sail training scheme using a traditional sailing ship;
- the provision of a training manual and pre-voyage preparatory material prior to each voyage;
- the selection and training of the crew and the nature of their duties as instructors;
- the giving of instruction in basic seamanship, catering, marine engineering, maritime history, meteorology, navigation, pilotage, oceanography and oceanology;
- participation in structured problem solving and learning activities; and
- the assessment of each participant for the purposes of deciding whether they should be awarded a "Certificate of Achievement".

90 In conclusion, his Honour held that:

> I consider that **the evidence establishes that *STS Leeuwin* was a ship where people, whether young, adolescent or adult, assembled for the purpose of being instructed in areas of knowledge** which included in particular seamanship and the like, and personal development in general. A sailing ship is a logical place in which to give instruction in such maritime and other studies. **Over 70 per cent of the time is devoted to supervised training.**
>
> …
>
> **In my view, the activities conducted by the respondent are strongly analogous to the activities conducted at the National Fitness Camp as described in *Cromer Golf Club Ltd v Downs* [1971] 1 NSWLR 963 at 966-968 by Hope J at first instance and referred to by Barwick CJ on appeal.**
>
> (Emphasis added.)

91 The ordinary definition of 'school', namely, a place where people come together for the purpose of being instructed in an area of knowledge or of activity, applied in both *Cromer Golf* and *Leeuwin*, was again applied by a Full Court in *Australian Airlines* per Lockhart J (at 454) and Sundberg and Merkel JJ (at 463). In that case, the respondent operated a flight training centre which supported its commercial operations by allowing pilots to receive training in compliance with regulatory standards imposed by the Civil Aviation Safety Authority. The

only basis upon which the training centre's character as a 'school' was contested was that its purposes were specifically directed to, and were a necessary incident of the respondent's commercial operations. The second issue the Full Court considered was the additional requirement in the relevant statutory scheme that the school (or the organisation operating it) not be 'carried on for the profit of an individual'. The respondent airline in the case was a company whose sole shareholder was the Commonwealth. This case is not concerned with either of these issues.

92 In a brief analysis which the Commissioner draws on heavily in the relevant parts of TR2013/2, Sundberg and Merkel JJ said (at 463):

> In any event, whatever may be the position with Item 22, Item 63A looks, in our view, to what the educational institution in fact does, and not to the purpose for which it was brought into existence. **On the evidence before the primary judge, the centre was plainly a school in the sense described in the dictionary, in *Cromer* and in *Leeuwin.* It had defined syllabuses for each course of instruction provided. It had defined programs of instruction and qualified instructors. There was external certification by the Civil Aviation Authority of the syllabuses, the training exercises, the instructors and the equipment. The centre had a physically identifiable location, its own administration, and was established for the sole purpose of instruction. Qualifications obtained at the conclusion of training were portable** – within Australia, a pilot could, without further qualification, work with any domestic airline operating aircraft of the type in respect of which the qualification was obtained. The flight training centre conducted by the respondent was therefore a school within Item 63A.
>
> (Emphasis added.)

93 Finally, in *NIDA* White J made the following observations about the meaning of 'school or college', having first considered the three decisions discussed above (at [37]-[39]):

> 37 ***Cromer Golf Club*, *Leeuwin* and *Australian Airlines* provide a consistent body of authority attributing a wide meaning to the word "school"** to which the Parliamentary draftsman might be expected to have had regard in the drafting of the relevant provisions of the *Payroll Tax Act*.
>
> 38 NIDA submitted that cl 4 of Sch 1 uses the words "school or college" in the traditional sense, rejected by the Full Court in Leeuwin, of an educational institution that promotes learning through a set curriculum taught by a professional body of teachers and subject to a formal assessment, and encompassing the notion of regular attendance over a substantial period of time…
>
> …
>
> 39 **In my view the word "school" in cl 12(1)(c) is to be given the wide sense that the word has been given in the Australian cases referred to above as being a place or institution where people, whether young, adolescent or adult, receive instruction in some area of knowledge or of activity… I do not accept that in cl 12(1)(c) the words "school or college" refer only to an**

> **educational institution that promotes learning through a set curriculum taught by a professional body of teachers and subject to a formal assessment encompassing the notion of regular attendance over a substantial period of time. The National Fitness Camp in *Cromer Golf Club* and the training ship in *Leeuwin* would not be a school (or college) on that more limited definition.**
>
> (Emphasis added.)

94 Two important observations are readily apparent from the survey of the authorities above. *Cromer Golf* and the cases which have followed it have adopted the ordinary usage of the term 'school' and have avoided any gloss on the dictionary definition. They have avoided superimposing additional requirements such as appear in TR 2013/2. They have simply applied this very broad 'ordinary meaning' to a diverse range of facts and circumstances. Barwick CJ's statement that a school is 'a place where people, whether young, adolescent or adult, assemble for the purpose of being instructed in some area of knowledge or of activity' has not been doubted. That statement, in my view, aligns comfortably with the various dictionary definitions cited in the authorities above. Particularly, a school is 'an institution in which instruction of any kind is given'.

95 The second is that none of the cases referred to above employed the phrase 'regular, ongoing and systematic instruction' in considering whether an entity was operating a 'school'. Thus, the Commissioner faces the difficult task of convincing the Court that such words now form part of the 'ordinary meaning' of 'school' by necessary implication from the reasoning in the previous cases, despite the absence of the express words.

96 In my view, this central contention cannot be accepted. There is no warrant to read any of the authorities as establishing this additional requirement that goes to the nature of the instruction that is provided at a school. Nor can it be said that this description of the type of instruction arises by necessary implication from the *Cromer Golf* and dictionary definitions or their application in the subsequent cases. While it may be the case that many schools *do* provide 'regular, ongoing and systematic instruction', those words simply do not form part of the 'ordinary meaning' of 'school' and are therefore not a necessary quality that every school must possess. To the extent that the Commissioner imposed this requirement in the Objection Decision, I consider that he proceeded on a misunderstanding of the law.

97 Similarly, I consider that the adoption by the Commissioner of the 'factors' identified by Sundberg and Merkell JJ in *Australian Airlines* and those expressed at [18] of TR2013/2, as prerequisites of any school is, with respect, misplaced. It is clear from both judgments that the

Full Court applied the ordinary meaning of 'school' by reference to the *Cromer Golf* and dictionary definition. The *ratio* of the case is to be found in this consistent application of the ordinary meaning test. The identification of factors or *indicia* such as a 'defined syllabus', 'qualified instructors' and portable qualifications (at 463C) should not be understood as anything more than the application of the ordinary meaning test to the facts of that particular case; the Court's reasons do not suggest any broader general application of the factors. Indeed, it was not at all contentious in that case that the flight training centre was in fact a school, due to the presence of those rather obvious factors; the real issues in the case concerned whether the centre was operated 'for the profit of an individual'.

98 Thus, while it is appropriate for the Commissioner to have regard to the factors as identified by Sundberg and Merkel JJ when *applying* the ordinary meaning test, those factors should not be taken to form part of the test themselves, and must not supplant a proper and fulsome consideration of *Cromer Golf* and the dictionary definition. Those factors may be indicators that a building is a school, but their absence cannot be conclusive of the converse result. I consider, therefore, that the Commissioner erred at [50] of the Objection Decision when he said:

> **None of the Dhammaloka Buddhist Centre's activities**, apart from perhaps the Childrens' Dhamma Class, **is a school or college according to the factors put forward by Sundberg and Merkell JJ in *Australian Airlines***. Neither do the centre's activities **satisfy the majority of the factors for a school listed in paragraph 18 in TR 2013/2…**

Neither the factors set down in *Australian Airlines*, nor those expressed at [18] in TR 2013/2 form part of the ordinary meaning of 'school'. Those factors are the result of an application of the ordinary meaning test to particular factual circumstances and should not be elevated to the level of prerequisites or inherent requirements forming part of the ordinary meaning test in all cases.

99 The ordinary meaning of 'school' also does not require the course of education to be vocational as opposed to recreational. The Commissioner says that a school is to be contrasted with places that offer recreational courses of instruction which the Commissioner says is a conclusion reached by application of *Cromer Golf*. I disagree. The sorts of schools identified by the Chief Justice expressly included schools which were quite clearly recreational education, such as ballet or drama. There may be some who ultimately pursue the vocation, but many will not. Indeed, in my view, except in the most obvious of cases such as the flight training centre in *Australian Airlines,* a consideration of whether a course of instruction is recreational or

vocational misdirects attention to the intention and subjective state of mind of the student who is receiving the instruction. The focus must remain steadfastly on the activities carried out at the purported school, to reach a view as to whether instruction is given in an area of knowledge.

100 The Society contends, and I accept, that the assertions in TR 2013/2 that a school must satisfy non-recreational or vocational requirements are inconsistent with Australian law, in that a school may provide both recreational and non-vocational instruction. I also accept its submission that 'regular, ongoing and systematic' instruction is far less appropriate as a yardstick for assessing recreational forms of education as opposed to vocational education. This is another reason why the Commissioner's contention as to the ordinary meaning of 'school' cannot be accepted. It does not accord with the legislative purpose in Item 2.1.10 of providing DGR Status for building funds that are established 'otherwise than for the purposes of profit or gain to the individuals members of the society or association' because not-for-profit organisations are for more likely to provide non-vocational types of instruction.

101 What the authorities establish is that a school must be providing education. It is not a requirement under *Cromer Golf* that the person receiving the education must receive a certificate or some other recognition for completion of a course. That element of the qualification prescribed by the Commissioner in TR 2013/2 is not based on any statement of principle in the authorities. It may have been a feature of some of the other facilities examined in the authorities but it is not a prerequisite having regard to *Cromer Golf* and the plain meaning of school. There is no requirement for a formal examination and or test to qualify to be a school.

102 The Commissioner's view that the Dhammaloka Centre does not provide regular, ongoing and systematic instruction has proceeded on a misunderstanding of the law. That is not the test required under the ordinary meaning test set down in *Cromer Golf* and the cases which have followed that decision. It may be that schools often have those qualities but it is not a requirement for identification as a school that such a prerequisite exist. A school must be a place where people assemble for the purpose of being instructed in some area of knowledge or activity.

103 As to whether the Dhammaloka Centre was 'used, or to be used, as a school' the Commissioner concluded that 'less than 5% of the total hours of the operation of the Dhammaloka Buddhist Centre are dedicated to activities that resemble teaching or instructing.' The Commissioner contends that, as a matter of principle, a building that is 'used as a school' must be 'substantially' used as a school. Again, although this statement appears in TR 2013/2 (at [31])

and is relied upon by the Commissioner in the Objection Decision (at [59]) it is not a proposition that is explicitly reflected in any of *Cromer*, *Leeuwin* or *Australian Airlines.* Barwick CJ used the relatively similar phrase 'predominantly' in *Cromer*, and the Full Court in *Leeuwin* found that 70 per cent of the operational use of the sailing ship was devoted to school activities. However, in neither case was the question of whether *enough* of the activities carried out were school-related activities squarely in issue.

104 In my view, consideration of whether a building is 'used, or to be used as a school' cannot proceed simply by comparing the total number of hours that the building is put to both school and non-school activities and ascribing a percentage value (of total operational time) to the school activities. Regard must also be had to the overall purpose (or purposes) for which the building has been established and maintained, and the *importance* of each of the activities carried out to that purpose. Further, it will also be necessary to consider any connection that the non-school activities may have to the school activities carried out, and the extent to which both pursuits contribute to the furtherance of that purpose. Considering the present case, the presence of non-school administrative activities that are clearly connected to the school activities carried out at the Dhammaloka Centre and other school sites operated by the Society, is to be distinguished from a situation where the bulk of a building's activities are administrative in nature with no relevant connection to the school activities carried out and where the importance of the school activities to the overall purpose is limited.

Unreasonableness

105 It is strictly unnecessary to consider the Society's contention that the Objection Decision was legally unreasonable, and indeed neither party addressed it in oral submissions. However, for completeness, it is addressed and rejected. In *Minister for Immigration and Citizenship v* ***Li*** [2013] HCA 18; (2013) 249 CLR 332 (at [72]), Hayne, Kiefel and Bell JJ held that the more specific errors in decision making, including those referred to in s 5(2) of the ADJR Act, may be seen as encompassed by unreasonableness. Their Honours then referred to *Minister for Aboriginal Affairs v* ***Peko-Wallsend*** *Ltd* [1986] HCA 40; (1986) 162 CLR 24 (at 41-42), in which Mason J, with whom Gibbs CJ and Dawson J agreed (at 30 and 71), considered that the preferred ground for setting aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to an irrelevant factor of no importance, is that the decision is 'manifestly unreasonable'. In *Peko-Wallsend*, Mason J (at 41), with whom Gibbs CJ and Dawson J agreed, referred to the consideration given

to this ground of review by Lord Greene MR in *Associate Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (at 230 and 233-234) in which his Lordship held that the ground would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it.

106 In *Li* (at [72]), Hayne, Kiefel and Bell JJ held that where the decision-maker is regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense. Further, in *Li* (at [76]), Hayne, Kiefel and Bell JJ held that even if some reasons for making a decision have been provided, it may nevertheless not be possible for a court to comprehend how the decision was arrived at, and that unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.

107 The Society contends the errors of law referred to above resulted in the Objection Decision being unreasonable, and therefore an improper exercise of power under s 5(1)(e) of the ADJR Act construed with s 5(2).

108 I do not consider that the Society has established that the Objection Decision was legally unreasonable in the sense explained by the authorities. The Commissioner approached the analysis by reference to what was perceived to be the appropriate legal test. In my view, that perception was mistaken such that there was an error of law. That error falls well short of legal unreasonableness.

ESTOPPEL

109 The Society also raised an estoppel claim against the Commissioner, however it was not made clear whether the estoppel claim was pressed in both the Appeal and the Review or only one of the two. Again, as the Society has succeeded on its primary grounds in the Review, I consider this point unnecessary to decide, though in my view, it is not a claim that can be properly considered in the Review, which is concerned strictly with the identification of legal error in the Objection Decision, and is not concerned with the earlier conduct of the Commissioner in making the underlying Revocation decision.

THE APPROPRIATE RELIEF

110 For the reasons given, I consider that the Commissioner has applied the wrong definition of 'school'. This constitutes an error of law sufficient to ground relief under s 16 of the ADJR Act.

111 As noted, the Society contends for the following relief in the Review:

(a) the Objection Decision be quashed, pursuant to s 16(1)(a) of the ADJR Act;

(b) the Commissioner be directed to revoke, with effect from 4 October 2019, the Revocation, pursuant to s 16(1)(d) of the ADJR Act; and

(c) the endorsement of the Society as a DGR Status Holder for the operation of the Fund is reinstated, with effect from 4 October 2019, pursuant to s 16(1)(d) of the ADJR Act.

112 The Commissioner opposes any order that the Revocation be revoked or that the Society's DGR Status be reinstated. The Commissioner says that in making such orders, the Court would, in effect, be substituting its own decision for the Commissioner's and that such a result would not do justice between the parties as required by s 16(1)(d). This is said to be because the Commissioner made the Objection Decision in the face of the Society's refusal to provide further information as requested, such that it should follow that the Revocation was also made on incomplete and limited information. It is also contended that, for the same reasons that the Appeal had to be dismissed for want of evidence, the Court has no evidence before it on which it could base any decision to revoke the Revocation or reinstate the Society's DGR Status.

113 These submissions are, with respect, correct. It would be inappropriate for the Court to direct, under s 16(1)(d) of the ADJR Act, the Commissioner to revoke the Revocation and reinstate the Society's DGR Status. That is principally because the Review was concerned strictly with the identification of legal error in the Objection Decision. There is no basis upon which the Court could go beyond the correction of the legal errors identified in the Objection Decision in the relief that it grants.

CONCLUSION

114 The Society has succeeded in demonstrating legal error in the Objection Decision under the Review but has failed in its Appeal.

115 Orders will be made setting aside the Objection Decision and the matter will be referred back to the Commissioner for further consideration and determination in light of these reasons and according to law. An order will also be made dismissing the Appeal.

116 Should the Society seek its costs, it should file written submissions within 5 days, with the Commissioner to have a further 5 days to respond, and the question to be determined on the papers.

I certify that the preceding one hundred and sixteen (116) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice McKerracher.

Associate:

Dated: 4 November 2021