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20 June 2025

Dear Sir/Madam,

Mutual transactions of associations (including clubs and societies) REF: ED0265

Thank you for the opportunity to comment on the consultation on Exposure Draft ED0265 **Mutual transactions of associations (including clubs and societies)**.

CPA Australia represents the diverse interests of more than 175,000 members, including over 3,300 members in New Zealand, working in over a 100 countries and regions supported by 19 offices around the world. We make this submission on behalf of our members and in the broader public interest.

CPA Australia submits this response to Inland Revenue's Exposure Draft Operational Statement OS 25/xx (ED), published in 2025.[1] We make the following comments for your consideration:

- We strongly oppose the proposed shift in the Commissioner's approach to abandon the common law principle of mutuality for not-for-profit (NFP) associations, particularly the taxation of membership subscriptions, fees, and levies for associations prohibited from distributing funds to members, as it is not in New Zealand's best interest.
- This submission outlines our concerns, drawing on the Australian Federal Government's legislative response to to *Coleambally Irrigation Mutual Co-operative Ltd v Federal Commissioner of Taxation*[2], relevant New Zealand case law, and the broader implications for the Not for Profit (NFP) sector.

Please refer to the Appendix for our response to the questions raised in the consultation paper. If you have any queries about this submission, please contact me on jenny.wong@cpaaustralia.com.au or Bill Leung, Tax Technical Advisor on bill.leung@cpaaustralia.com.au.

Yours sincerely,

Jenny Wong
Tax Policy Lead
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Mr Rick Jones
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[1] Inland Revenue, *Exposure Draft Operational Statement OS 25/xx: Mutual Transactions of Associations* (ED0265, 2025) 1.
[2] *Coleambally Irrigation Mutual Co-operative Ltd v Federal Commissioner of Taxation* (2004) ATC 4,126 (FCA).

Acknowledgements

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- Mr Angus Ogilvie FCPA (Aust.), Chair of Tax Committee – New Zealand
- Mr Jeffrey Owens FCPA (Aust.), Tax Committee – New Zealand
- Mr Darshana Elwela – Tax Committee – New Zealand
- Mr Richard Ashby CPA (Aust.), Tax Committee – New Zealand
- Mr Jamil Eldar, CPA (Aust.), Tax Committee – New Zealand
- Professor Adrian Sawyer, FCPA (Aust.), Tax Committee – New Zealand
- Mr Peter Loerscher, CPA (Aust.), Tax Committee – New Zealand

Appendix

Detailed discussion

Introduction

Inland Revenue's proposed operational statement seeks to override the common law principle of mutuality, which holds that income derived from mutual transactions within an association's membership is not taxable, as members are effectively transacting with themselves.[3] The statement, referencing the Australian *Coleambally* case, asserts that subscriptions, fees, and levies paid to associations with non-distribution clauses are not mutual and are thus taxable under ordinary income provisions (e.g. ss CA 1(2) and CB 1(1) of the *Income Tax Act 2007*).[4]

CPA Australia submits that this approach is misguided, as it misapplies the *Coleambally* decision, omits and disregards the subsequent Australian Federal Government's corrective legislative response[5],[OBJ] and overlooks New Zealand case law that supports the mutuality principle. Furthermore, the proposal risks imposing undue compliance burdens on small NFPs, undermining their community contributions and it is not in New Zealand's best interest.

The Australian *Coleambally* Case and Legislative Response

Background of the *Coleambally* Case

In *Coleambally Irrigation Mutual Co-operative Ltd v Federal Commissioner of Taxation* [2004] FCAFC 250*,* [6] the full Federal Court of Australia ruled that the mutuality principle did not apply to a cooperative whose constitution prohibited the distribution of surplus funds to members upon winding up.[7] The Court held that for mutuality to apply, any surplus must remain the property of the contributing members, either through rebates during operations or distribution upon dissolution.[8] The non-distribution clause meant that member contributions (e.g. levies) were not mutual in nature and were therefore taxable as income under ordinary concepts.[9]

This decision disrupted the long-standing tax treatment of mutual associations in Australia, raising concerns for approximately 200,000 to 300,000 not-for-profit organisations, including Returned and Services League of Australia (RSL) clubs, social clubs, and community groups.[10]

Australian Federal Government's Response

Recognising the unintended consequences of the *Coleambally* decision, the Australian Federal Government, under Treasurer Peter Costello and Assistant Treasurer Mal Brough, acted swiftly to restore the mutuality principle through legislative amendments.[11] On 30 May 2005, shortly after the High Court's refusal to grant leave to appeal on 27 May 2005, the Government announced amendments to the *Income Tax Assessment Act 1997*.[12] These were enacted via the *Tax Laws Amendment (2005 Measures No. 6) Act 2006* with the following key objectives:

- **Override Common Law Restrictions:** To ensure that NFPs were not disadvantaged by the *Coleambally* decision, the Australian Federal Government enacted section 59-35 of the *Income Tax Assessment Act*

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[3] Inland Revenue, above note 1, at [17].
[4] Income Tax Act 2007, ss CA 1(2), CB 1(1).
[5] Tax Laws Amendment (2005 Measures No. 6) Act 2006 (Cth) s 59-35 *Income tax Assessment Act 1997*, ss CB 33 and DV 19 *Income Tax Act 2007*.
[6] *Coleambally*, above n 2, at 4,126.
[7] Id., at [27].
[8] Id., at [50]
[9] Nathalie Love, 'The Mutuality Principle and Australian Tax Law' (2005) 12(3) *Tax Review Journal* 45, 47.
[10] Ibid.
[11] Peter Costello and Mal Brough, 'Government to Amend Tax Laws to Protect Not-for-Profits' (Press Release, 30 May 2005) Australian Treasury.
[12] Ibid.

1997, applicable to income years that commence from 1 July 2000. Under s 59-35, ordinary income is treated as non-assessable non-exempt income if it would have been a mutual receipt but for the entity's constituent document preventing the entity from making any distribution to its members, and it would have been assessable only because of section 6-5 (income according to ordinary concepts). The enactment of section 59-35 in response to the *Coleambally* decision is not intended to change the law. It simply reinstates the accepted treatment prior to *Coleambally* that income received by NFPs, such as from membership subscriptions, would be treated as mutual receipts and not as assessable income.

The proposed amendments to s CB 33 ensured that amounts derived from mutual transactions, which would otherwise be income under the Act, remained taxable despite the mutuality principle.[13] However, they preserved the principle's application for non-taxable member contributions, such as subscriptions where no specific goods or services were provided in return.[14]

- **Protect Not-for-Profit Entities:** As discussed above, the Australian legislative response was explicitly designed to protect NFPs by ensuring that member subscriptions and levies remained non-taxable where they were contributions to a common fund for mutual benefit, not payments for specific services.[15]

Legal commentary, such as that by Nathalie Love, emphasised the Government's commitment to supporting the NFP sector's role in providing charitable, sporting, and social services.[16]

Relevance to New Zealand

Inland Revenue's reliance on *Coleambally* in the ED to justify taxing subscriptions and levies for associations with non-distribution clauses omits and ignores the Australian Government's corrective action.[17] The *Coleambally* decision was a narrow interpretation that prompted immediate legislative intervention.[18] Adopting the pre-legislative amendment of the *Coleambally* position in New Zealand risks replicating an error that Australia rectified nearly two decades ago.[19] We submit the omission or absence of any discussion on the response and legislative correction by the Australian Federal Government misrepresents the legal position in Australia is not only confounding and incomplete, but also dangerous. Furthermore, the approach recommended by Inland Revenue in the Exposure Draft would move New Zealand away from the current Australian legislative position of recognising and restoring the non-taxability of mutual receipts for NFPs.

New Zealand Case Law Supporting the Mutuality Principle

New Zealand courts have consistently upheld the mutuality principle, recognising its importance for NFPs:

- ***Case C27* (1978) 3 NZTC 60,261**: This involved a body corporate under the *Unit Titles Act 1972* charging levies to unit owners. The TRA held that these levies were not taxable, as they were contributions to a common fund for mutual benefit.[20]
- ***Grieve v CIR* (1984) 6 NZTC 61,682 (CA)**: This case considered whether an entity's activity constituted a business for tax purposes. The court emphasised that the absence of a profit-making motive precludes classification as business income.[21]

These cases confirm New Zealand's longstanding legal stance in favour of the mutuality principle, directly contradicting Inland Revenue's assertion that subscriptions are taxable due to non-distribution clauses.[22]

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[13] s CB 33, above n 5.
[14] Ibid.
[15] Costello and Brough, above n 11.
[16] Love, above n 9, at 46–47.
[17] Inland Revenue, above n 1, at [50].
[18] Ibid.
[19] Tax Laws Amendment (2005 Measures No. 6) Act 2006 (Cth).
[20] *Case C27* (1978) 3 NZTC 60,261, 60,263.
[21] *Grieve v Commissioner of Inland Revenue* (1984) 6 NZTC 61,682 (CA) 61,686–61,687.
[22] Ibid, at [1].

Policy and Practical Concerns

Impact on Small Not-for-Profit Entities

The Exposure Draft acknowledges that taxing subscriptions and levies will increase compliance costs for NFPs, particularly smaller organisations.[23] Many clubs and societies rely on these to fund core operations, not to generate profit.[24] Taxing these funds would:

- **Increase Compliance Burdens**: Small NFPs may lack resources to manage new obligations, such as filing returns for subscription income.[25]
- **Reduce Community Benefits**: NFPs would need to divert resources from social impact initiatives.[26]
- **Disadvantage Non-Commercial Entities**: Associations with non-distribution clauses—often incorporated societies—are penalised under the proposal.[27]

Misapplication of *Coleambally*

Inland Revenue's reliance on *Coleambally* is flawed:

- The decision was quickly overturned by legislative amendments.[28]
- It involved a cooperative with distinct commercial characteristics not representative of the wider New Zealand NFP landscape.[29]
- It contradicts *Case C27*, where mutuality applied despite non-distribution clauses.[30]

Inconsistency with Inland Revenue's Prior Guidance

The Exposure Draft withdraws longstanding guidance (e.g. *Taxation of Clubs, Societies, etc.*)[31] without adequate transitional protection.[32]

Recommendations

CPA Australia recommends:

- **Retain the Mutuality Principle**: Align with *Case C27* and *Grieve*; preserve the non-taxable treatment of member contributions.[33]
- **Exempt Small NFPs**: Expand s DV 8 to fully cover subscriptions for entities earning under $10,000 annually.[34]
- **Clarify Taxable Transactions**: Limit s CB 33's scope to transactions for specific services or goods, not general contributions.[35]
- **Further Consultation**: Engage with NFPs before implementing changes and conduct a cost-benefit analysis.[36]

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[23] Ibid, at [1].
[24] Ibid, at [69].
[25] Inland Revenue, *Taxation and the Not-for-Profit Sector* (Issues Paper, 2025) 4.
[26] Inland Revenue, above n 1, at [15].
[27] *Incorporated Societies Act 2022*.
[28] *Tax Laws Amendment (2005 Measures No. 6) Act 2006* (Cth).
[29] *Coleambally*, above n 2.
[30] *Case C27*, above n 21.
[31] Inland Revenue, *Taxation of Clubs, Societies, etc* (1993) 4(8) *Tax Information Bulletin*, (April) 7.
[32] Inland Revenue, above n 1, at [1], [16].
[33] *Case C27* and *Grieve*, above nn 21 and 22.
[34] *Income Tax Act 2007* (NZ), s DV 8.
[35] Ibid, s HE 2(1).
[36] Inland Revenue, above n 26.

- **Transitional Support**: Provide a grace period until at least 31 March 2028 and educational materials to aid compliance.[37]

Conclusion

CPA Australia strongly opposes Inland Revenue's proposed abandonment of the mutuality principle. The proposal misapplies *Coleambally*, fails to recognise the Australian federal government's statutory reversal of the case decision, contradicts established New Zealand jurisprudence, and risks undermining the vital work of NFPs and it is not in the best interest for New Zealand.[38] Inland Revenue should retain the mutuality principle, adopt Australian-style legislative clarity, and protect small NFPs from undue tax burdens.[39]

[37] Inland Revenue, above n 1, at [73].
[38] Ibid, at [70].
[39] Ibid, at [1].