



ATNS SUBMISSION

SUBMISSION TO THE TREASURY, EXPOSURE DRAFT, CHARITIES BILL 2013

1 May 2013

This submission is made by Professor Miranda Stewart on behalf of the Chief Investigators for the Agreements, Treaties and Negotiated Settlements (ATNS) Project.

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ABOUT THE ATNS

This submission is made by the Chief Investigators on the ATNS Project and does not necessarily represent the views of the industry research partners on the project.

The Agreements, Treaties and Negotiated Settlements (ATNS) project is a University of Melbourne based research project consisting of a series of ARC Linkage grants and a team of inter-disciplinary researchers from Melbourne, Griffith and the Australian National Universities. The ATNS database (www.atns.net.au) is an integral part of the project. The project began in 2002 with an ARC Linkage grant examining treaty and agreement-making with indigenous Australians and the nature of the cultural, social and legal rights encompassed by past, present and potential agreements and treaties. In 2005 the research team secured a second grant to build on the project. The second phase examined the process of implementation and the wider factors that promote long term sustainability of agreement outcomes.

The current project, 'Poverty in the Midst of Plenty: Economic Empowerment, Wealth Creation and Institutional Reform for Sustainable Indigenous and Local Communities', started in 2010. It aims to study the institutional, legal and policy reforms required to reduce indigenous people's poverty and to promote economic development for sustainable indigenous communities. The interdisciplinary research draws on anthropology, geography, demography, law and public policy and uses comparative case studies. The project analyses the impacts of large-scale resources projects, and government policy and services, on local communities. The object is to identify solutions for realising sustainable social and economic development for indigenous people based on social, policy, fiscal, procedural and legal models.

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- Rio Tinto Ltd
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SUBMISSION

We are grateful for the opportunity to comment on the Exposure Draft Charities Bill (**ED Bill**) and Charities (Consequential Amendments and Transitional Provisions) Bill 2013 and the accompanying Explanatory Material (**EM**).

This submission focuses on two specific aspects of the Bill.

1. The rule intended to address concerns about charities to benefit certain native title groups (section 8).
2. The definition of charitable purposes, and in particular whether community economic development, which is a key goal of Indigenous communities and of the government, will qualify as a charitable purpose.

1. NATIVE TITLE AND INDIGENOUS GROUPS (S 8)

We welcome the Government's willingness to provide certainty that a charity established for the benefit of a native title group will not breach the 'public benefit' aspect of the definition of charity.

There have been two aspects of uncertainty in respect of the 'public benefit' test. First, whether the position at common law that relationship by family or kinship, causes difficulty for native title and traditional owner groups. In general, at common law, relationship by family or blood has been found to indicate that the purposes are not sufficiently for the 'public benefit'.¹ There has been some flexibility in the common law as regards how these tests apply to indigenous groups, in particular for charities that with the primary purpose of the relief of poverty.² The second aspect is that native title groups may sometimes be numerically small, so there may be concern that they fail to meet the public benefit requirement for this reason.

The issue of relationship by kin is of particular concern to native title claimants and holders, as these groups are commonly defined as an anthropological and legal matter, in the legal process of determining native title, with reference to common descent from an apical ancestor.³ Some Prescribed Bodies Corporate (PBCs) that hold native title have succeeded in obtaining charitable status, and there are numerous charitable trusts that receive native title benefits that are directed to charitable purposes for the benefit of the native title holders. However, there has also been ongoing uncertainty about how far this flexibility will allow for charities to benefit native title groups.⁴

¹ *Dingle v Turner* [1972] AC 601.

² Charities for the relief of poverty are excluded from the requirement of separately establishing public benefit at common law: applied in Australia: *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 139 FLR 236.

³ See, for example, the discussion of definition of native title claim groups by reference to apical ancestor in the recent case of *Weribone on behalf of the Mandananji People v State of Queensland* [2013] FCA 255.

⁴ Australian Government, *Native Title Payments Working Group Report*, 2008, 9; Fiona Martin, 'Prescribed Bodies Corporate under the Native Title Act 1993 (Cth); Can they be Exempt from Income Tax as Charitable Trusts?' (2007) 30 *University of New South Wales Law Journal* 713–30; *ATNS Submission: Native Title, Indigenous Economic Development and Tax Paper* (2010).

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Drafting of section 8

Section 8 is intended to confirm that the rules set out in section 6 concerning benefit to ‘related individuals’ will not disqualify charities for the benefit of native title holders. However, as drafted, we submit that the provision will not achieve the intended purpose and it is both unnecessarily limited and unduly complex. As the government is no doubt aware, the drafting also depends on the passage of amendments relating to taxation of native title agreements that have not yet passed the Parliament.⁵ However, our primary submission is that the purpose can be achieved without reference to those reforms.

The Explanatory Memorandum states that the reform “turns off the ‘related individuals’ element of the public benefit test”.⁶ There is a risk that a charity for purpose of benefiting a native title group may also fail on the basis of s 6(3)(a) or s 6(4). It is in accordance with the policy of the reform that such a charity should be deemed to be of public benefit in all these respects.

Do not limit provision to “Indigenous holding entities”

Section 8(1) applies only to an “Indigenous holding entity” as defined in law. We submit that this limitation to a specific form of entity is not consistent with either the common law or the proposed ED Bill definition of charity, which is not limited by entity form but by not-for-profit status, charitable purposes and public benefit.

To ascertain the definition of an “Indigenous holding entity” it will be necessary to refer to both the Income Tax Assessment Act 1997 (ITAA 1997) and to the Income Tax Assessment Act 1936 (ITAA 1936).⁷ An “Indigenous holding entity” is proposed to be defined in s 59-50(6) as:

- (a) a *distributing body; or
- (b) a trust, if the beneficiaries of the trust can only be Indigenous persons or distributing bodies.

A distributing body is currently defined in s 128U of the ITAA 1936 (the mining withholding tax rules) to mean:

- (a) an Aboriginal Land Council established by or under the *Aboriginal Land Rights (Northern Territory) Act 1976*;
- (b) a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*; or [para (c) has been repealed]
- (d) any other incorporated body that: (i) is established by or under provisions of a law of the Commonwealth or of a State or Territory that relates to Indigenous persons;⁸ and (ii) is empowered or required (whether under that law or otherwise) to pay moneys received by the body to Indigenous persons or to apply such moneys for the benefit of Indigenous persons, either directly or indirectly.

⁵ Taxation Laws Amendment (2012 Measures No 6) Bill 2012, Schedule 1. The Bill has passed the House of Representatives but has not yet passed the Senate at the time of writing.

⁶ EM para [1.73].

⁷ Assuming the above-mentioned amendments are passed, see above n. 5.

⁸ This currently states “Aboriginals” but is proposed to be amended by the Taxation Laws Amendment (2012 Measures No 6) Bill 2012, Schedule 1 cl 16, as are the remaining references to Aboriginals in the provision.

We are concerned that any charity established for the benefit of a native title claim group or native title holders that is not in one of these entity forms will not benefit from s 8(1). However, there seems no reason to restrict charities for native title groups in this way.

Specifically, we are concerned that a charitable trust for the benefit of a native title claim group will not be able to benefit from s 8(1). A charitable trust will not satisfy the definition of a 'distributing body' as defined above. We submit further that a charitable trust will also most likely not satisfy paragraph (b) of the definition as a charitable trust will not have "beneficiaries" but is a trust for purposes.⁹ This seems contrary to the intention of the reform. There are many existing charitable trusts for native title holders and claim groups, as well as other entity forms such as incorporated associations.

Receipt of native title benefits

Section 8(1)(a) requires the entity to be one that "receives native title benefits". This wording is unduly restrictive and also requires cross-referencing to multiple other statutes, including the proposed definition of native title benefit in s 59-50(5) of the ITAA 1997 and concepts regarding native title agreements in the Native Title Act 1993 (as set out in s 8(2)). On its face, it requires native title benefits to be received currently and fails to account for situations where they may have been received historically, or potentially in the future (or, possibly, not at all).

More generally, we submit that it is important to ensure that native title claim groups should be included in s 8(1) even where native title is not made out and a charity for these groups may not be in receipt of "native title benefits" as defined.

Deem public benefit for charities to benefit native title groups

We submit that the Government's purpose can be achieved by disregarding the 'public benefit' test for an entity established for one or more charitable purposes directed to the benefit of native title holders or native title claim groups.

This amendment could be done in a positive way, deeming such entities to be for the public benefit, as is expressed in section 9 with respect to certain self-help groups and closed religious orders.

One possible drafting approach which we would support is as follows:¹⁰

s 8 Deem the purpose of an entity to be for the public benefit, if the entity is established and maintained for charitable purposes directed to the benefit of one or more:

- (a) **native title claim groups**; or
- (b) persons who hold **native title**.

native title has the meaning given by the *Native Title Act 1993 (Cth)*. [see s223]

⁹ The Laws of Australia, TLA [15.13.105] – "a charitable trust is an express trust, the objects of which are purposes not persons" (Legalonline); *Attorney General (NSW) v Perpetual Trustee Co Ltd* (1940) 63 CLR 209, Dixon and Evatt JJ at 222.

¹⁰ We acknowledge the contribution of Alice Macdougall, of counsel, Herbert Smith Freehills, in respect of this suggested definition.
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native title claim group has the meaning given by the *Native Title Act 1993 (Cth)*. [see s190; s253 – essentially the group as defined in their “Form 1” or initial application for native title as amended.]

Recommendation 1: Section 8 should be redrafted to ensure that entities of all forms with charitable purposes directed to the benefit of native title holders or native title claim groups are deemed to be of ‘public benefit’.

Extend the benefit of s 8 to other traditional owner groups defined by common ancestry

We understand that the focus of the Government’s reform is on native title groups.

However, we are concerned that this policy is unduly limited and will potentially disadvantage other Indigenous charities. The EM states that section 8 ‘takes into account the nature of Indigenous community structures and familial links with particular geographical areas and turns off the ‘related individuals’ element of the public benefit test so that an entity may provide benefits within a particular community’.¹¹ The section as drafted, tied to native title, does not reflect this policy goal.

We recommend that the Government give consideration to a provision to ensure that entities with charitable purposes directed to the benefit of Indigenous persons, that otherwise meet the public benefit test, are not disqualified from having charitable status only because they benefit people connected by blood ties. For example, a charitable trust to advance the education of ‘traditional Aboriginal owners’ as defined in the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* defines the class in part with reference to common descent.¹²

A similar issue may arise with respect to Indigenous traditional owners as defined under various State laws.

Recommendation 2: Section 8 should be extended to ensure that entities of all forms with charitable purposes directed to the benefit of traditional owners defined in part by common ancestry or blood ties are not disqualified from being a charity.

Specific inclusion of prescribed bodies corporate that hold native title as agents or trustees for native title groups as charities

We have previously submitted that PBCs which are specifically established as required by law under the Native Title Act to hold native title as agents or trustee for native title groups, be accorded charitable status.

We reiterate this submission.

Recommendation 3: The Government consider legislating specifically to ensure that PBCs that hold native title for the benefit of native title groups (as agents or trustees) are charities.

¹¹ Explanatory Material, [1.73].

¹² *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* s 3(1): ‘traditional Aboriginal owners’, in relation to land, means a local descent group of Aboriginals who: (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and (b) are entitled by Aboriginal tradition to forage as of right over that land.

2. CHARITABLE PURPOSES (S 11)

We focus in this submission on two aspects of the definition of charitable purposes in section 11 as expanded by section 13.

Relief of poverty

First, we note that the relief or prevention of poverty is not specifically included as a charitable purpose and indeed, some of the discussion in the EM seems to indicate that today, relief of poverty may in itself be appropriate as a charitable purpose. This seems contrary to the usual meaning of charity; more specifically, the relief and prevention of poverty is a primary purpose of many charities for indigenous people.¹³ We consider that this is an important head of charity that should be explicitly maintained for the benefit of indigenous people.

Recommendation 4: The purpose of relief or prevention of poverty be explicitly included as a charitable purpose under s 11 or s 13

Community or economic development

A purpose of community or economic development is not explicitly listed as a charitable purpose. Paragraph 11(1)(k) extends the definition of charitable purpose to include ‘any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of’ any of the charitable purposes listed in subsection 11(1).

The EM states that ‘the list is not intended to exclude other charitable purposes that the courts have found to be beneficial to the general public that do not readily lend themselves to grouping’.¹⁴ The EM also states that paragraph 11(1)(k) ‘encompasses other purposes which the courts have found to be charitable, including for scientific and scholarly research, promoting industry, commerce and agriculture in certain circumstances ... and to a locality or neighbourhood, such as the beautification of a township.’¹⁵

It has been accepted in the common law that in an area of regional disadvantage in particular, the promotion of commercial or business ends is charitable.¹⁶ However, the EM notes that “community and economic development, and the advancement of industry, commerce or agriculture can be charitable purposes but particular care is needed where carrying out such purposes allows an entity to provide benefits to individual entities or members that cannot be considered incidental to the public benefit.”¹⁷ The general position in the cited common law cases

¹³ As in the *Alice Springs* case, above n 2.

¹⁴ EM, [1.82].

¹⁵ EM, [1.106].

¹⁶ *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] FCA 439, para 38: “An institution the objects of which are to promote a particular form of industry or commerce, either generally or within a particular locality, may be charitable within the fourth Pemsel category: *Commissioners of Inland Revenue v Yorkshire Agricultural Society* [1928] 1 KB 611; *In re Pleasants* (1923) 39 TLR 675; *Royal Agricultural Society of England v Wilson* (1924) 9 Tax Cas. 62; *Re Tennant* [1996] 2 NZLR 633, as may be the promotion of industry and commerce in general: *Crystal Palace Trustees v Minister of Town and Country Planning* [1950] 2 Ch D 857 at 859 per Danckwerts J.”

¹⁷ EM, para [1.60]

has not been explicitly stated as being continued in the statute. These purposes may well fit into the head of advancement of social or public welfare, but this is not made clear.

Many indigenous charities have a significant purpose of advancing community or economic development; while this may frequently be ancillary or incidental to the purpose of relieving poverty and disadvantage in general in the indigenous community, it may be desirable as a matter of public policy that this can be an independent purpose. If it is the government's position that an independent purpose of advancing economic, commercial or business development for indigenous people may not be a charitable purpose, then such a purpose would disqualify an indigenous entity from being a charity.

This indicates the need for a separate tax-exempt indigenous community or economic development entity to enable indigenous Australians, in particular remote and regional native title and traditional owner communities, to close the gap for future generations. We refer to our previous submission in support of such a tax-exempt "Indigenous Community Development Corporation" or similar entity.¹⁸

Recommendation 5: The government should make clear that advancing community or economic development may be charitable under the head of advancing public or social welfare; in any event, the government should pursue the development of a specific indigenous community and economic development tax-exempt entity as a component of its policy of Closing the Gap

¹⁸ ATNS Submission: Native Title, Indigenous Economic Development and Tax Paper (2010).
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