

Comments on the Definition of Charity relevant to Native Title Groups

1 Issues facing Native Title Groups

1.1 Overview of issues

There are a number of issues facing native title groups relevant to the Definition of Charity. These are:

- (a) The restrictions on obtaining charitable status.
- (b) Lack of clarity on the meaning of charity. How to identify charitable purposes or entities.
- (c) Lack of charitable organisations in rural areas.

Further detailed information and background on these issues has been received by Treasury in connection with the “Native Title, Indigenous Economic Development and Tax” consultation paper released in May 2010 which included specific questions on the difficulties with charitable trusts.

1.2 Restrictions on obtaining charitable status

Consultation question 4: Are changes to the Charities Bill 2003 necessary to ensure beneficiaries with family ties (such as native title holders) can receive benefits from charities?

Due to the operation of the *Native Title Act 1993 (Cth)*, the common law in relation to native title and the rules of traditional ownership, native title groups or native title claimants are often familial groups able to trace their connection to a single ancestor. As a result of this, prescribed bodies corporate (PBCs), required under the *Native Title Act*, and trusts established to receive native title payments and for the benefit of a particular native title group, are generally unable to be recognised as charitable, even where the purposes are exclusively charitable and the not for profit requirement is satisfied.

Further detailed information and background on this issues has been received by Treasury in connection with the “Native Title, Indigenous Economic Development and Tax” consultation paper released in May 2010.

It appears there is confusion and inconsistency as to the structures and types of income tax endorsement received by structures created to receive native title payments.

A significant number of PBCs or trusts adopt the wording required for a public benevolent institution as a result of the wording approved in the *Northern Land Council v Commissioner of Taxes (NT) 2002 ATC 5117* where a court held a corporation negotiating land rights in the Northern Territory was a PBI, largely due to the state of disadvantage experienced by the Aboriginal groups in the relevant region.

Some traditional owner groups have been advised or led to understand that this wording is necessary in order to receive charitable status.

We understand the ATO endorses these entities as public benevolent institutions on the basis that they are for the relief of poverty and therefore can be restricted to a family grouping.

However restricting native title groups to PBI status and not enabling general charitable purposes:

- (a) restrains the application of the money preventing a number of activities such as education, health and well being, economic development, environmental and cultural activities;
- (b) may not always be applicable or appropriate if not all the native title members fall within the PBI definition of needing benevolent relief; and
- (c) if public benefit is to be required for relief of poverty, not even this opportunity will be available to native title groups.

Native title groups are therefore caught between the operation of two sets of laws – one relating to native title which by its interpretation and application often results in the groups being a familial group, and the other denying any entity established for the receipt of native title payments relevant tax concessions because the benefits are restricted to a familial group, even where the entity is not for profit and for otherwise charitable purposes.

In order to provide clarity, simplicity and recognition of the difficult position of native title groups, we recommend that an entity is accepted as a charity where it is established for the benefit of a native title group which is a familial group, and:

- where it must be (or it is desirable that it is) restricted to that native title group in order to receive the native title benefits or to properly apply the native title benefits; and
- in all other respects meets the requirements of being a charity.

We note that this would also enable the indigenous community fund proposed in the Treasury's consultation paper in May 2010 to be charitable and enable existing charitable entities established by native title groups to transition to an indigenous community fund.

1.3 Sufficient section of the public

Consultation question 3: Are any changes required to the Charities Bill 2003 to clarify the meaning of "public" or "a sufficient section of the general community"?

There should be further clarification of a 'sufficient section of the public' to a section which is not numerically negligible compared with the size of that part of the community to whom the purpose would be relevant. To ensure that charities in geographically isolated or other small rural communities continue to meet the public benefit requirement.

1.4 Clarity as to meaning of charity

There is considerable confusion and misinformation in native title groups and indigenous communities as to the meaning of 'charitable' and little access to expert advice. In most cases it is limited to welfare type funding or educational scholarships whereas there is a great need to use this available funding in community and economic development. A selection of examples of the types of activities are outlined in section 1.7 below.

In order to maximise the potential and capacity of native title groups it is essential that there is clarity readily available as to the range of activities and the projects that can be funded while operating within an entity's charitable status.

There is also considerable confusion and misinformation regarding the ability of charitable entities to accumulate funds for future generations which is a material characteristic to native title rights.

For these reason, it is essential for effective and proper use of native title payments paid into charitable trusts for a full list of charitable purposes and confirmation of the ability to accumulate for future generations to be provided in the proposed legislation.

Consultation question 16: Is the list of charitable purposes in the Charities Bill 2003 and the extension of Charitable Purposes Act 2004 an appropriate list of charitable purposes?

Consultation question 17: If not, what other charitable purposes have strong public recognition that is charitable which would improve clarity if listed?

The following could be included in the full list with particular relevance to indigenous communities:

- (a) Community capacity building - including developing the ability, skills and confidence of members of a community in such a way that enables participation in and benefit to the community, and improves the effectiveness and level of participation in community organisations;
- (b) Community and economic development and support – this should include for indigenous communities:
 - (1) training, finding employment, providing work experience, skills development, business incubation in disadvantaged areas or for people who have or are likely to experience difficulty in obtaining and maintaining employment;
 - (2) preserving, promoting and enabling culture, language, customs, traditions and heritage, including Aboriginal Cultural Heritage;
 - (3) preservation or restoration of the natural and built environment;
 - (4) providing health and community information and services;
 - (5) improving community facilities and access, including housing and community transport;
 - (6) carrying out the functions of a Prescribed Body Corporate under the *Native Title Act*;
 - (7) managing land rights, environmental planning and protection, Aboriginal Cultural Heritage, access to natural resources, employment and training, commercial activities, education, health, housing and welfare for the benefit of the native title group;
 - (8) providing facilities for meeting and holding events in relation to the above activities, including transport.

A full list including all the areas which have been accepted as charitable are needed for understanding.

1.5 Inclusion of sport

In indigenous communities sport can make a significant difference in providing a healthy focus and activity for the whole community. Sporting activities can be the centre of the community. In indigenous communities sport provides much more than sport for sport's sake, in terms of community building, reducing social isolation, providing a meeting point, relieving feelings of hopelessness, building self confidence and health and well being. In addition the facilities attached to sport can often be available to the rest of the community for other community building activities.

Charitable entities not being able to support and fund sporting groups in indigenous communities is often confusing and frustrating and seen as being unfair given the often vital role sport could play in these communities.

In many of these communities sport will be a charitable activity provided along the lines listed above but the confusion around this area results in sport being excluded. It would add clarity as well as reflecting community opinion to list sport as a charitable purpose.

The sporting purpose can be restricted to sports which promote health and wellbeing by involving physical or mental skill or exertion and are open to all, regardless of ability.

Consistent with this would be the provision and support of recreational facilities similar to overseas and some State jurisdictions.

1.6 Restrictions in the event of a disaster

Consultation question 19: What are the current problems and limitations with ADRFs?

Reacting to natural disasters is a real and on-going concern of all rural and isolated areas. In the context of the proposed legislation regarding the definition of charity it would be of assistance to communities in rural and regional areas recovering from a disaster for many of the issues listed in the December 2009 legislation as a consequences of the Victorian bushfires can be specifically deemed as charitable.

This is particularly applicable as many (if not all in the majority of rural areas) of the community assets and infrastructure (such as community halls, community centres, sports and recreational centres, theatre halls, playgrounds) will normally be owned by the local government or owned and operated by sporting or other recreational clubs. In most respects these will not come within the definition of charitable. Additionally funding may be required by the local state schools or health centres for counsellors or other goods and services.

The inability to use donated funds for these major community issues severely hamper the access to funding and also severely limit the ability of communities to recover and foundations to support disaster recovery.

We recommend a special listing of charitable purposes is provided in the event of the disaster, in line with the community needs and expectations.

1.7 Some examples

We list some examples of possible activities a PBC or charitable trust receiving native title payments may wish to fund or pursue – these should be included as charitable purposes:

- 1 *Vegetable garden and store:* The community leaders want to set up not-for-profit store to sell mainly food goods and operate a vegetable garden for selling. The store and garden will be operated to provide employment and training opportunities for mainly young people. Eventually the leaders hope to run cooking and healthy eating courses for all members of the community from the store.
- 2 *Festival:* The community of YYY want to run a community festival highlighting the arts and culture of indigenous people from the area. The festival will attract tourists to the area and provide many local artists opportunities to show and sell their art and young people with opportunities to gain skills in organising an arts event and other associated activities. The festival will be educational and also bring the region together as a community. It will encourage racial acceptance and diversity.
- 3 *Enterprise Programs:* Some of the women in the community are keen to establish small businesses based on skills they have such as soap making, food production, reed weaving and so on. There are also a number of men trained in land management who could expand the services and train youth in these skills. There are a large number of long term unemployed women and youth in the community. The PBC wishes to establish a business incubator to encourage those in the community with possible business ideas. It wants to fund a program of small grants, revolving loans, and expert mentors to support the development of businesses in the community to reduce the levels of unemployment. A Centre where this program could be promoted and where the small business could be located (a business incubator) could also be established.

- 4 *Cultural Centre*: The PBC wants to develop cultural centre where the local culture, customs, language, songs, history, art and craft can be displayed and taught to both the members of the community and visitors. The centre will also be the offices for the PBC and have a number of meeting rooms and office facilities for hire.

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(based on material prepared by Alice Macdougall)