

National
Native Title
Council

14th December, 2011

Manager
Philanthropy and Exemptions Unit
The Treasury
Langton Crescent
PARKES ACT 2600

To Whom It May Concern,

Re: A Definition of Charity – Consultation Paper, October 2011

Thank you for the opportunity to contribute to the process of preparing a new statutory definition of charity which will apply across all Commonwealth laws from 1 July 2013. The Minerals Council of Australia (MCA) and the National Native Title Council (NNTC) welcome the review of the definition of charity given the current definition has decreasing relevance to the operations and requirements of the contemporary Australian not for profit sector, particularly in the native title context.

It is clear that the continued reliance on the Statute of Elizabeth and over 400 years of common law for charities has failed to ensure that Australian charitable tax law keeps pace with both the range of charitable activities required to meet community needs, as well as the philosophical shift in society from welfare to a broader approach founded in community development and the intergenerational transfer of wealth. These issues are even more acute in relation to the challenges and opportunities which confront Indigenous Australians, particularly those in regional and remote Australia, who have suffered generational disadvantage due to a systemic underinvestment by Governments, at all levels, and who have limited opportunities outside of mining, to participate locally in the mainstream economy.

Accordingly, the MCA and the NNTC believe that the proposed changes are insufficient to address the identified inadequacies of the charity definition to enable native title groups to effectively manage funds received through native title and other negotiations. This paper will provide some background to the MCA and the NNTC, outline the identified inadequacies of the current charity definition, introduce the Indigenous Community Development Corporation as a preferred model for managing funds from these negotiations, discuss the weaknesses of the proposed new definition, and identify a way forward.

The Minerals Council of Australia

The MCA is the peak national industry association representing exploration, mining and minerals processing companies in Australia. MCA members account for more than 85% of annual minerals production in Australia and a slightly higher proportion of mineral exports.

Members of the MCA recognise that Industry's engagement with Indigenous peoples needs to be founded in mutual respect and in the recognition of Indigenous Australian's rights in law, interests and special connections to land and waters. This

point is made even more acute by the fact that more than 60% of minerals operations in Australia have neighbouring Indigenous communities.

The MCA's vision is a thriving minerals industry working in partnership with Indigenous communities for the present and future development of mineral resources and the establishment of vibrant, diversified and sustainable regional economies and Indigenous communities. Industry further recognises that the present and future operations of minerals companies are inextricably linked to building and enhancing our strong relationships with Indigenous communities, and to meeting the needs of this generation without compromising the ability of future generations to meet their own needs.

The industry is committed to working with Indigenous communities within a framework of mutual benefit, which respects Indigenous rights and interests, and welcomes changes that improve the efficiency and operability of the Native Title system without diminishing the rights of Indigenous Australians.

The National Native Title Council

The NNTC is the peak body of Native Title Representative Bodies and Native Title Service Providers (NTRBs/NTSPs) from around Australia being formally incorporated in November 2006. The objects of the NNTC are, amongst other things, to provide a national voice for NTRBs/NTSPs on matters of national significance affecting the native title rights of Aboriginal and Torres Strait Islander people.

NTRBs and NTSPs have played a significant role in assisting native title groups negotiate agreements with mining companies over the last decade. The relationship between companies and native title representatives has significantly improved since the commencement of the *Native Title Act 1993* with opportunities being provided to native title groups, their families and communities being a welcome shift from the initial adversarial approach by industry and others. Native title groups have utilised their resources from native title agreements for significant economic opportunities, particularly employment and training, but also through enterprise and business development for engaging in commercial ventures in the resources sector.

Not only have native title groups gained significant economic benefits from native title negotiations, they have also gained more intangible benefits such as capacity building from the experience of negotiation, stronger relationships with key stakeholders in their region and the confidence to continuously strive for the future they want for their families and communities.

The NNTC recognises the ultimate goal of Traditional Owners, their families and communities to be able to fully participate in the Australian economy and society and fully supports initiatives and programs that aim to fulfil this goal.

Moving from a welfare to economic independence focus

The *Native Title Act* has provided a vision for Aboriginal people in shifting attitudes from welfare dependency to financial independence and the ability to make lifestyle choices. Within the native title system, opportunities for achieving economic improvement are mainly under the future acts process through negotiations with the extractive industry. This is allowing native title groups to gain some significant benefits and become more and more involved in the broader economy. Other opportunities within the broader private sector are also having an increasing and positive impact for Indigenous Australians, including where NTRBs/NTSPs are negotiating their own frameworks with organisations that include employment and economic benefits for native title groups and Indigenous communities.

The MCA and NNTC fully support the Commonwealth initiatives as outlined in the Indigenous Economic Development Strategy (IEDS). Given that the activities outlined in the IEDS represent the appropriate role for Governments, we consider that where a non-government entity engages in work which is in support of the IEDS objectives and outcomes, then it should be incumbent upon Government to demonstrate why these activities are not charitable.

Accordingly, we welcome the opportunity to explore with Government a range of policy and governance reforms to better position Indigenous Australians to capture the full extent of direct and indirect economic opportunities presented in those remote and regional communities where mining is a major economic catalyst.

The role of Agreements

A clear opportunity exists to leverage the increased economic activity associated with mineral wealth to enhance social and economic capacity whereby Indigenous people can become long term contributors to, and drivers of, regional and community development.

Specifically, the MCA and NNTC consider that provided that a broader framework of policies and social and physical infrastructure is in place to support Indigenous economic development, payments made under agreements negotiated with native title groups provide a platform for the long term investment of such monies. It is hoped that this will ensure sustainable, intergenerational benefits to Indigenous communities.

In defining the scope and nature of agreements, it is important to acknowledge that a range of different agreements are used within the minerals industry, each of which is established with different purposes and legal bases. These agreements specifically provide compensation for impacts on native title rights and cultural heritage, as well as providing for benefit sharing and investment in community development, including through education, training and development.

The mining industry interests in undertaking commercial negotiations for agreements include securing both land access and a long term social licence to operate. The interests for native title groups centre on leveraging their native title and procedural rights to grow intergenerational wealth and maximise the protection of culture and country. In most cases, payments made under exploration and mining agreements are fundamentally a cost of gaining access to land, irrespective of the different particular motivation for commencing negotiations.

Accordingly, exploration and mining agreements with Indigenous communities typically comprise a bundled and undifferentiated package of benefits, including:

1. Compensation for impairment of native title rights and interests;
2. Compensation for impacts on land owners;
3. Arrangements for heritage and environmental protection;
4. A commercial component for timely, active participation in various regulatory approval processes to facilitate land access for mining project development;
5. Compensation for impacts on nearby communities;
6. Benefit sharing; and
7. Investment in community development, including through education, training and employment.

In relation to these, it is commonly acknowledged that items 1, 2 and 3 are the exclusive domain of native title groups or traditional land owners, items 5 and 6 are directed at benefit sharing with the broader Indigenous community, and items 4 and 7 span both of these groups, who may be more or less overlapping depending on the location of the project and the nature of its host community.

The long term social licence to operate interests of mining companies creates a driver for commercial negotiations to include details on governance arrangements for the management of, and criteria for the distribution of financial benefits. The objective here is to ensure that both the current and future generations of the native title groups share in the benefits of resource development.

Charitable Trusts

Currently, charitable trusts are commonly used for holding benefits from negotiated agreements to both maximise the value of the benefits and to avoid some of the difficult definitional issues in current taxation arrangements. However, charitable trusts and funds are not a neat fit, particularly for agreements centred on the statutory entitlements of native title holders.

Charitable funds access income tax exemption through endorsement as a tax concession charity. A charitable fund is a fund established solely for purposes that the law regards as charitable. Charitable purposes are:¹

- the relief of poverty

¹ <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/62731.htm>

- the relief of the needs of the aged
- the relief of sickness or distress
- the advancement of religion
- the advancement of education
- the provision of child care services on a non-profit basis, and
- other purposes beneficial to the community

Beneficial purposes under this final point have been expanded by legislation to include a variety of activities deemed to be beneficial to the community.

If the recipient of payments under negotiated agreements is a charitable trust or other entity endorsed by the ATO as tax exempt then the characterisation of the payment itself for tax purposes is not relevant. Once endorsed by the ATO, a charitable trust is exempt from income tax and capital gains tax regardless of the source of the funds. This includes income earned on trust investments. To maintain ATO endorsements, charitable trusts must comply strictly with their charitable trust deed and operate for charitable purposes only.

The attraction of charitable trusts is that by exempting the entity into which payments flow, there is no need to determine the nature of the payments or differentiate elements of the package as compensation or some other form of benefit. For industry, there is also a demonstrable element of funds 'doing good' in the community and therefore in itself an investment in their reputation and social responsibility.

However, the use of charitable trusts for community benefit payments from resource agreements poses a number of taxation and structural difficulties, including:

- A charitable trust seeking to meet the community benefit arm of the definition must be applied for the benefit of the 'public' or an appreciable section of it. A trust restricted to a native title group or groups (particularly those identified by kinship) would ordinarily fail this test according to the ATO;
- Many Indigenous communities wish to apply their benefits to more than one tax exempt purpose (eg health, education, culture, environment) and the ATO will not currently permit registration in that case unless all purposes are charitable purposes and undertaken by multiple entities;
- There is no clear statutory definition of activities or expenditure that is charitable in purpose and there is a great deal of confusion over what purposes can be funded and how to fund them. This can place significant pressure on trustee decisions and may necessitate custodial trustees to be put in place at additional cost;
- The ATO has difficulty with the accumulation of funds within charitable trusts for future generations to enjoy. Very limited accumulation of benefits is permitted and there are no clear guidelines for doing so. Disappointingly, the ATO may seek to limit the tax concession charity status to a relatively short accumulation period (e.g. 10 years), requiring a subsequent review by the ATO to extend the Tax Concession Charities (TCC) status of the trust. This hinders the ability of Traditional Owners to provide for future generations. This is particularly important in the native title context where agreements affect intergenerational rights. It is also significant where agreements are in respect of mining and the life of the mine is commonly 20 – 30 years. In such cases it is important for the Traditional Owners to accumulate funds for a significant period of the mine's life so that the funds can be appropriately managed, taking into account current needs and intergenerational requirements;
- In circumstances where charitable trusts are constructed for a broader community purpose this can be in direct conflict with the role of Traditional Owners as native title holders. Specifically, their right to be involved in the management and administration of those benefits, against the needs of the broader community for charitable assistance;
- Individual payments are not provided under a charitable trust unless in the limited context of genuine poverty relief for the provision of goods. Some native title groups maintain that they should have a right to access and enjoy some financial comfort from the payment of benefits, particularly for their Elders. Individual payments are also an issue in administering funds for cultural business such as funerals and ceremonies;
- Restrictions on the use of funds for charitable purposes discourages and in some circumstances deprive beneficiaries of economic independence through the ability to support businesses and enterprise development or employment and training opportunities within a broad 'community development' framework; and
- There is also the possibility that agreement benefits, how they are structured and their subsequent distribution, can impact welfare entitlements.

Despite the many different types of tax exempt entities recognised in the ITAA97, there is no current class of exempt entity that specifically addresses the systemic and interrelated socio-economic challenges faced by Indigenous communities to assist them to reach individual and community economic independence, particularly in the context of maximising the benefits of resource agreements. Indigenous groups are forced to rely upon the concept of charitable trusts and institutions as the only path to exempt status.

Charity in relation to philanthropy, as it is inferred by the ATO, is difficult to reconcile for Indigenous communities seeking to take responsibility for their own well being in the absence of any extensive not-for-profit or charity sector operating in many remote and regional areas. Their community values will comprise values of altruism, poverty relief and charitable purposes but must also extend towards economic independence, self reliance, recognition of family networks, traditional law and custom and self preservation.

Despite the limited human and financial resources, a range of trusts and other entities have been created and are currently in use by Indigenous communities which must traverse (not always successfully) the "charities definition minefield", in addition to working to achieve the stated aims of the community for growth and sustainable development. The legal expression of these structures could also be seen to reinforce stereotypes, prejudice and attitudes around welfare and charity for Indigenous peoples.

It should also be noted that compensation payments received for the extinguishment or surrender of native title under existing taxation treatment are currently regarded as compensation for the loss of a capital asset that pre-dates the capital gains tax (CGT) regime and should therefore be CGT exempt. Native title is a pre-CGT asset and as such, CGT is unlikely to attach a large number of native title payments. The Native Title Act was enacted in 1993 and did not take into account CGT issues (which had existed since 1985), however CGT provisions in the *Income Tax Assessment Act 1936 (Cth)* were amended in 1996 (post NTA-enactment) to include within the tax regime a broader concept of 'asset' to include both contractual and statutory rights. Clearly the NTA did not envisage this amendment to CGT.

The Indigenous Community Development Corporation (ICDC) Model

The proposal for an Indigenous Community Development Corporation (ICDC) model aims to create a new category of entity for tax purposes as an alternative entity for use when considering appropriate structures for the management of payments and benefits negotiated by Indigenous communities and groups, whether these benefits come from the public or private sector including, *but not limited to*, agreements centred on the statutory entitlements of native title groups.

The MCA and NNTC consider that the development of an alternative category of entity for tax purposes would substantially enhance the effectiveness and efficiency of the existing system, including:

- shifting the language away from concepts of charity to concepts of community and economic development;
- creating greater flexibility within the taxation system for community specific approaches to managing funds for socio-economic development;
- providing a structure that encourages intergenerational and sustainable benefits;
- creating capacity to maximise the delivery of economic and social dividends with minimal administrative burden; and
- recognising the unique multifaceted challenge of Indigenous disadvantage.

The proposed Indigenous Community Development Corporation would, in summary:

- be established using a model constitution/trust deed with appropriate governance and integrity measures included;
- be approved by the Minister and placed on a register of ICDCs;
- recognise and respect the fundamental connection between native title groups and their ICDC;
- have a Future Fund for accumulation for future generations;
- attract a range of tax exemptions and concessions to incentivise investment in community and economic development; and
- still be subject to compliance with the appropriate incorporating legislation (i.e. Corporations Act, CATSI Act, or Trustees Act).

The purpose of an ICDC would be to accept benefits from agreements on a tax free basis to be applied for the following key objectives:

- **Conduct Baseline Community Activities:** Addressing the economic and social disadvantage of Indigenous Communities through activities in the areas of Law & Culture, Health and Education, Employment and Training, Poverty, Elders Aged Care, Community Projects, Environmental and Land Care. The MCA and NNTC advocates that these benefits should be determined by the group and should be used to complement the responsibilities of local, State and Federal governments in their provision of services.
- **Conduct Support Activities:** The ICDC model would allow for the provision of assistance and programs that contribute to Closing the Gap; through supporting individuals and families to participate in the mainstream economy, including; individual superannuation, and individual home ownership, subsequently assisting Indigenous economic development across communities, including through supporting Indigenous enterprise development. For example, the ability to make tax exempt payments towards individual superannuation in a manner that provides a pension stream for Elders goes some way to providing the financial security that all Australians strive for.
- **Accumulate for future delivery of above:** A requirement to accumulate a percentage of benefits to meet the needs of future generations. The amount to be accumulated should be based on the advice of professional investment managers.

The introduction of a new category of tax exempt entity represents an important step forward in providing a framework that will support and enhance opportunities for economic prosperity for Indigenous Australians. The details of the framework are critical and we outline below a number of essential features that should make up the overall package applicable to an ICDC.

- **Opt In Arrangement:** It is critical that any new framework is made available as an opt-in arrangement for use where the circumstances deem it appropriate. A simple tax-free rollover to permit existing structures to migrate to the ICDC model at any time would be advantageous. The MCA and NNTC consider that such arrangements should not have a 'sunset clause' arrangement as existing funds may wish to only opt-in in future years if a future event warrants it.
- **Traditional Owners:** The ICDC framework will recognise the Traditional Owners from whose traditional lands the benefits have accrued, will respect their traditional and native title rights, and will further value and respect Traditional Owners' role in decision making processes.
- **Objects and Purpose:** An ICDC must be capable of operating for multiple objects to avoid a proliferation of entities. An agreed list of objects would be developed which would include all existing charitable purposes. Collaboration between an ICDC and the public and private sectors including other ICDCs should be encouraged and rewarded. Activities must be aimed at finding a balance between individual, local and regional benefit and a balance between projects for community and projects for individuals.
- **Organisational Governance:** It is proposed that Traditional owners will comprise over 50% of the body which makes decisions about the application of benefits (with the potential for one or more independent persons being appointed to that body). Other integrity measures including compliance with core competencies described in the Corporations Act, audits and review processes should be undertaken by an independent entity, and, funds accumulation to be managed by a professional.
- **Model Constitution:** There must be a model constitution, trust deed or rule book containing the fundamental requirements necessary to ensure a robust, transparent and flexible corporate structure covering the following areas:
 - Decision Making Processes
 - Integrity Measures including external auditing
 - Capacity Measures
 - Investment Plan / Distribution Plan
 - Professional Investment Managers
 - Prudential governance for sound financial decision making

- Consideration of the appointment of Independent experienced Board Directors
- Public disclosure
- **Register of ICDCs:** Having a register of ICDCs enables a way of providing the model constitution, maintaining standards, capturing information regarding activities and the success of ICDCs, sharing information between ICDCs and delivering governance training and other support. This provides a level of oversight not currently applicable to charitable trusts and represents a positive step forward.
- **Built In Accumulation:** The concept of accumulation is well recognised within the philanthropic community as a means by which a benefactor can accumulate a large capital amount to be preserved, with the income generated from that preserved amount available for the trustees to use to further the specified trust purpose.

The ICDC should have an obligation to accumulate funds towards a future fund to support ICDC's activity for future generations where the average annual revenue stream from the agreement is above an identified threshold based on the needs of the group and the advice of an investment professional. For amounts generated below the identified threshold, accumulation is at the discretion of the trust administrators. Further, the future fund would:

- have Accumulation Guidelines providing indicative minimum and maximum level requirement;
- be held by a qualified professional institution on behalf of the ICDC for asset protection purposes; and
- have an approved customised Accumulation Plan, designed to take account of the particular facts, circumstances, and predicted income flows etc.
- **Activities:** The ICDC will include a list of approved community activities and a list of approved associated activities acceptable to the ATO. These will further provide inspiration and support for the ICDC and its members to achieve their goals.
- **Sub-Fund Capacity:** An ICDC should be in a position to accommodate and hold funds for smaller groups and individuals and be the recipient of multiple funding sources. This offers an opportunity to maximise the governance framework and administrative structures and to avoid duplication. Further, the concept of 'sub funds' or regional trust models also enables groups to pool wealth and to gain economies of scale in administration and expertise.
- **Individual Benefit:** The ICDC should have the ability to make limited distributions to beneficiaries based on areas of need, for example health equipment, aged care requirements, household necessities or housing support. Such benefits would be provided with the dual aims of addressing Indigenous disadvantage, as outlined in the Government's 'Closing the Gap' Strategy and ensuring that distributions provide immediate benefits to those Traditional owners who, because of age, are not in a position to share in the longer term benefits of the agreement. While the benefits are provided to the individual, it is also clear that for Indigenous communities there is an indirect benefit which is also provided to the broader community due to the communal nature of assets. In many cases, benefits received by individual native title claimants are unlikely to exceed or contribute to exceeding the minimum tax free threshold for an individual's income and as such, a large number of native title claimants would not be liable to pay income tax on such payments received by them.
- **Economic Development:** An ICDC should be encouraged to assist and support, but not necessarily participate directly in economic development activities. The very nature of business and commerce is that it carries risk and requires decision making against a set of parameters that do not always sit comfortably with community purposes. Indigenous economic development is critical and ICDCs should play an active role in the support, development and encouragement of such activities. The nature of this support may include the provision of capital assistance grants, education and training and capacity building.
The MCA and NNTC consider that the role of an ICDC does not extend to the actual conduct of commercial activity. Community organisations are well placed to support the growth and development of commercial activities but the actual conduct of those commercial activities can often complicate and frustrate the ability of the community organisation and its governing body to fulfil its goals and visions for the entire community.

The Proposed Changes to the Definition of Charity

With respect to the concerns identified with the current definition of charity it is acknowledged that the review discusses the following:

- Requiring the charity to have an **exclusive** charitable (not for profit) purposes rather than having charitable purposes as their dominant activities.
- Recognising trusts or entities established to receive and manage payments made to native title owners and traditional owners that would otherwise be charitable (apart from the strict public benefit test) as charitable. The New Zealand definition is provided as an example of how the rule can be modified to take into account family ties. (It is anticipated that the soon to be released Blood Ties Report will provide detail about this proposal.)
 - Entities that qualify as charities will not be excluded from the associated exemption from income tax simply because they benefit people connected by blood ties; and,
 - Marae on Maori reservations whose funds are solely applied to the administration and maintenance of the marae will qualify for a 'charitable' income tax exemption.
- Extending the term 'for the public benefit' to not only incorporate practical utilities but other benefits such as social, mental or spiritual benefits. This changed focus would see benefits needing to be related to aims and balanced against any harm, with private benefits being seen as incidental.
- Including of 'prevention' in the purposes. (still lacks economic development)
- Identifying 'disqualifying purposes' including conferring private benefits, against public policy and sporting, recreational or social activities or listing more purposes in order to provide more clarification of the ins rather than focusing on the outs.
- Harmonising the definition across Governments.

MCA and NNTC responses to the proposed changes

Omissions

It is the opinion of the MCA and NNTC that the discussion paper has omitted to discuss a number of critical issues in addressing the identified inadequacies of the current charity provisions with respect to being able to manage native title payments effectively:

- The continued use of the term Charity which is aligned to a welfare rather than a development approach.
- The limitations on organisations with DGR status being focussed on a single charitable purpose.
- Accumulation of funds (including superannuation) has not been specifically discussed or identified as an allowable activity.
- The current ATO practice of limiting the number of years the tax concession can be applied for the purpose of holding funds.
- Economic development for Indigenous Australians has not been specifically discussed or identified as an allowable activity.

Activities allowable under the proposed charity definition

The proposal to require entities to have an exclusive charitable purpose, rather than a dominant charitable purpose would suggest that the ICDC model is out of scope of the proposed charity definition. The proposed ICDC model includes a range of community development initiatives (which would be in scope) as well as economic development and accumulation, (that continue to be out of scope).

It is therefore the view of the MCA and the NNTC that the range of purposes eligible under the charity definition should be expanded to allow the following:

1. Indigenous Economic development as outlined in the IEDS:
 - Funding social enterprises to undertake economic activities in communities that deliver employment and training opportunities for Indigenous people. These funds can be used to subsidise business activity to achieve broader community benefits (e.g. a community store), and to enable and support Indigenous people to participate. If profits are generated, they will be returned to the entity for reinvestment into other social enterprise activities. The activities funded will be aligned with community strategic plans. It is proposed that funding could be made by way of grants as well as loans, provided the purpose of a grant (or loan) is to provide a public benefit in the form of the advancement of economic development for Indigenous Australians rather than an individual benefit (recognising that, as with many forms of charitable distributions, a particular individual may benefit from the grant).

- Provide a start up loan fund to individuals wanting to establish private businesses. Individuals receiving the loan will not be tax exempt; however the capacity for the entity to provide a start up loan fund should be tax exempt. Again, the purpose of a loan must be to provide a public benefit, being the advancement of economic development for Indigenous Australians.

2. Accumulation:

- It is understood that current ATO practice provides an effective limit on accumulation given the view that charitable needs may not exist in perpetuity (described by many that after 10 years only 20% of funds accumulated receive tax exemption), which does not provide for intergenerational equity. The MCA and NNTC consider it is preferable that tax exemptions apply to accumulations over an unlimited timeframe and that the practice of accumulation be incentivised rather than discouraged, as this is consistent with the proposed ICDC.
- The MCA and NNTC support a requirement for charities to lodge an accumulation plan. Such a plan may be consistent with the current distribution requirements for PAF's where they are required to distribute 5% or \$11,000 annually, depending on the size of their fund. The MCA and NNTC also consider that any requirements re: distribution should provide entities with the flexibility to accrue an initial corpus prior to making defined distributions.
- The capacity to accumulate funds for the benefit of future generations is included in the IEDS, and we believe that an ICDC should be able to accumulate funds in a way which is commensurate with factors such as the size and likely length of time during which payments will be made under an Agreement.

3. Individual Benefits:

- It is proposed by the MCA and the NNTC that there should be provision for the entity to assist its beneficiaries to cover the incidental costs that relate to their individual well being e.g. medical services and equipment; funeral costs; measures to ensure access to health foods, including refrigeration; transport costs to attend work or school; mobility aids associated with age and immobility. These benefits would be provided on a non cash and non cash convertible basis. It is acknowledged that these benefits could be largely incorporated into existing allowable activities (i.e. education and training, health, poverty, community development). However there may be situations where the benefits do not 'fit neatly' under existing allowable activities which could suggest the need for both broadening of the definitions and the ability to access multiple benefit streams both concurrently and consecutively.
- The MCA and the NNTC consider that Indigenous Australians should not be required to individually demonstrate the 'necessitous circumstances' in recognition of Indigenous disadvantage as outlined by Government in the Closing the Gap Strategy. The types of benefits and precise circumstances in which they could be provided need to be considered and where they fit will need to be negotiated in more detail with stakeholders and with Government. The best way to ensure the above flexibility and a developmental "hand up not hand out" approach is to ensure that the normal tax and social security provisions apply, giving them a broader range of options while requiring an engagement with the real economy.

4. Environment and Land Management:

Not all environmental and land management purposes are currently allowable under the charity definition. It is proposed that these purposes be allowable under the charity definition to enable environment and land management issues to be managed by the same entity. For Indigenous Australians, culture and land management/country are inseparable therefore this is also consistent with existing charitable purposes re: art and culture.

5. Culture

The inclusion of culture as an allowable purpose is highly commended by the MCA and the NNTC. The following activities should be permitted in pursuit of this purpose: ceremonies (including welcome to country rituals, funerals, initiations, protection of cultural and significant sites); cultural festivals; contemporary expressions of tradition according to the wishes of native title holders; protection of cultural sites and places and significant survey protection enclosures; recording of cultural history, genealogies, and family histories; Indigenous language maintenance; dances, performances and other endangered traditions (e.g. possum cloak making); traditional education of youth; alternative dispute resolution and alternative legal mechanisms for customary law (e.g. Aboriginal community courts); Community initiations, cross culture events and activities (e.g. Welcome baby ceremonies, flag flying at pre schools); and making of traditional material culture. Where profits are generated from the activities they should be returned to the entity.

6. Housing:

It is noted that a number of housing activities are currently tax exempt including the provision of emergency housing under the relief of poverty purpose. The MCA and the NNTC believe facilitating the provision of housing and home ownership in towns (to facilitate employment and training opportunities, and access to services) and remote communities utilising provisions such as the ALRA, long term leases and PBC ILUA's with individuals should also be eligible for tax exemption. This will need to be distinguished from direct benefits to individuals or to beneficiaries.

It is proposed that the entity would be responsible for providing loans and grants to achieve these outcomes. The MCA and NNTC support the purpose to the extent that it is directed at community wide benefits through, for example, facilitating better employment and economic development outcomes on communal lands, and, through provision of more and improved housing, address health and other closing the gap outcomes.

7. Capacity building for effective governance:

MCA and the NNTC propose that funds required to ensure appropriate governance should be tax exempt. This would involve investment in capacity building activities to develop the ability, skills and confidence of a community in such a way that enables participation in and provides benefit to the community, and improves the effectiveness and level of participation in community organisation. It will include Director's training courses and audit and asset management to support the *furtherance of an entity's charitable purposes*.

Public Benefits Test

The efforts to ensure that charities that benefit people connected by blood ties are not excluded from tax exemption are welcomed. It is noted that the New Zealand model is being looked at very closely. In this model the beneficiary group relates back to the original 'Iwi' people arriving in New Zealand approximately 600 years ago. Such a model would be broadly applicable in Australia; however Aboriginal people have lived in Australia for over 60,000 years, making establishing proof of lineage to original inhabitants particularly complex.

In a similar fashion to the approach in New Zealand, the MCA and NNTC consider that the public benefit test should not be failed simply because the class of beneficiaries have family ties. However the approach will require adjustment for Australian circumstances. In particular this test should not be applied so as to automatically include a native title claimant group within the public benefit. Other factors would still need to be relevant. However the application of the test as to whether or not the group is numerically negligible (some native title claimant groups only number approximately 40 to 60 adults and it is also possible for individual native title holdings to be recognised) may need to be reviewed in view of the nature of agreements, where many agreements relate only to Polygon Claims, as well as the impacts of the historical relocation of Aboriginal communities associated with the 'Stolen Generation'.

Welcomed inclusions

MCA and NNTC welcome proposals that:

- Allow prevention activities
- Allow initiatives that utilise sport/recreational/social activities to achieve development outcomes
- Address limitations to the Australian Disaster Relief Funds
- Review the limitations regarding public policy advocacy.

Conclusion

The MCA and the NNTC welcome the Government's initiative to review the charity definition as the current definition does not enable the effective utilisation of funds received by native title groups from agreement negotiations with mining companies. The funding provided through mining agreements has the potential to be very significant. It is important that an appropriate administrative mechanism be established to ensure that the funds are managed and regulated effectively and in accordance with the needs and aspirations of native title groups

The MCA and the NNTC have developed the ICDC model as a vehicle to manage native title agreement funding. The purpose of the ICDC, its operational requirements and the proposed activities are not acceptable to the current charity definition. It is our assessment that the review to date has not sufficiently canvassed and addressed the issues that prevent the ICDC being treated as a charity. These issues include the use of the 'charity' terminology; one purpose restrictions; limited number of years for tax compensation eligibility; lack of clarity as to whether economic development, superannuation, home loans and joint ventures are 'in'; and, lack of focus on governance requirements.

Should the Government be in a position to expand charities to meet the aspects outlined above, the MCA and the NNTC would welcome the opportunity to engage with Government on the opportunity to progress the ICDC as an alternative tax structure. The ICDC would be an overarching entity which is the holder of two tax entities, namely a charitable trust (the Indigenous Community Fund) and a discretionary trust which would focus on individual payments and other economic development initiatives outside of charitable purposes.

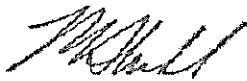
To develop an appropriate entity it is essential that more consultation occur with Aboriginal groups and the extractives industry, which in our view, could be undertaken through a reconstituted Native Title Payments Working Group.

The MCA and the NNTC look forward to the release of the Blood Lines report and providing comment. We are very interested in continuing to work with the Government to establish the ICDC model to drive enhanced economic development outcomes from the economic benefits provided for in mining agreements utilising the most appropriate legal framework.

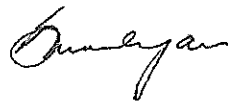
The MCA and NNTC consider that the current growth in resource development across Australia presents a 'once in a generation' opportunity for Indigenous Australians to share in the economic development outcomes that are possible from native title related agreements. For this reason, it is critical that Government provides both a comprehensive and timely response to this opportunity, and is not limited to seeking to make minor amendments which sit within the scope of a broader policy agenda for the not-for-profit sector.

Further, the MCA and NNTC consider that the Government's commitments to Closing the Gap, and its recognition of the UN Declaration of the Right of Indigenous Peoples create a strong platform upon which to utilise the 'special measures' provisions of the Racial Discrimination Act and to create a 'fit for purpose' vehicle to ensure enduring benefits from Indigenous Australians from mining related agreements.

Thank you for providing the opportunity for MCA and the NNTC to contribute to comment on the charity definition consultation paper. Should you wish to discuss the matters raised in this letter, please do not hesitate to Therese Postma (02 6233 0631) or Brian Wyatt (0417 970 413).



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