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# The Advantages and Disadvantages of Using a Charity by Indigenous Australians

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# Charities for Indigenous Australians

Overview of the research:

- Importance of charity law in a taxation law context
- Common law – definition of charitable purposes
- Charities Act – some new charitable purposes
- Common Law concept of public benefit/impact on traditional owners
- Charities Act – public benefit – removal of barrier for charities that benefit indigenous kinship groups
- Advantages of charities eg NFP, able to access philanthropic grants, intergenerational longevity
- Disadvantages eg limitations of charitable purposes, carrying on business can be an issue, accumulation

# Charities and taxation law

- Exempt from income tax
- Other tax concessions eg GST - higher registration threshold than for-profits, council rate exemption where land used for charitable purposes (depending on state legislation)
- if PBI then FBT concessions
- if a DGR donors are granted a tax deduction



# Charitable purposes and requirements at common law

- Charity must be NFP
- *Pemsel* charitable purposes— relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community; and
- Public benefit



# *Charities Act*

- Charities Act – 1 January 2014
- Charities Act ss 5, 6, 11 and 12
  - Charity must be NFP
  - All its purposes are charitable and for the public benefit (ancillary)
  - No purposes are disqualifying
  - Entity is not an individual, political party or government entity

# Charities Act and common law charitable purposes

- Charities Act - continues common law charitable purposes – s 12(1)(k)
- *Charities (Consequential Amendments and Transitional Provisions) Act 2013*  
– item 7 sch 2



# Charitable purposes

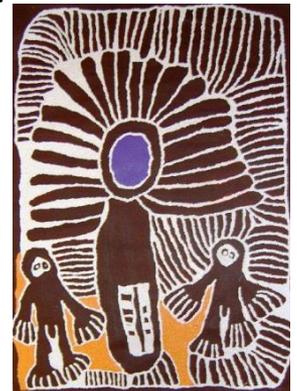
- Also Charities Act expands on and amplifies – via s s12, 15, 16 and 17
- Advancing health
- Education (Pemsel)
- Social or public welfare – expands relief of poverty (Pemsel)
- Religion (Pemsel)
- Culture
- Reconciliation, mutual respect etc between groups of individuals in Australia
- Human rights
- The security or safety of Australia
- Preventing or relieving the suffering of animals
- Advancing the natural environment
- Any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes above
- Promoting or opposing a change to any law, policy or practice - proviso – must relate to one of the above purposes

# Common law Public Benefit Limitation

- *Re Compton* [1945] – UK Case
- English Court of Appeal refused to find a public benefit in a trust to educate the descendants of three named persons because the beneficiaries were defined by reference to a purely personal relationship to those persons.
- *Davies v Perpetual Trustee* [1959] Australian Case – accepted the rationale
- Very limited exception relief of poverty – *Dingle v Turner*

## Family limitation – Indigenous Australians

- *Aboriginal Hostels Ltd v Darwin City Council* (1975)
- Nader J of the Supreme Court of the Northern Territory confirmed that in order to be a charity the Aboriginal Hostels Ltd had to benefit a section of the community that was not defined through family relationships.



# Legal Barriers and Limitations to the use of charities by Native Title Groups

- Family limitation and public benefit
- Minerals Council of Australia and National Native Title Council:

‘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.’

# Charities Act – s 9

(1) This section applies to a **purpose** that an entity has if:

(a) the purpose is directed to the **benefit of Indigenous individuals only**;  
and

(b) the purpose is not for the public benefit under this Division (disregarding this section) only because of the relationships between the Indigenous individuals to whose benefit the purpose is directed.

(2) The purpose is treated as being for the public benefit if the entity **receives, holds or manages an amount, or non-cash benefit (within the meaning of the *Income Tax Assessment Act 1997* ), that relates to:**

(a) **native title (within the meaning of the *Native Title Act 1993* ); or**

(b) **traditional Indigenous rights of ownership, occupation, use or enjoyment of land.**

# Limitations of s 9

- NFP must have a purpose that is directed to the benefit of individual Indigenous Australians
- Eg can't be for the protection of the environment



# Traditional land

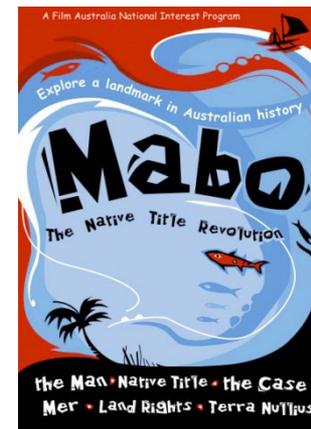
- There must be payments in respect of either:
  - Native title within the *Native Title Act 1993* (Cth);  
or
  - Traditional Indigenous rights of ownership, occupation, use or enjoyment of land



# Native Title

2 possible limitations:

- In some instances under the NTA, native title is either extinguished or never proven eg Comalco ILUA
- Does the provision still apply if the payments are made to a 3<sup>rd</sup> party ie how broadly will 'relates to' be interpreted.



# Advantages of being a charity

- Tax concessions
- Longevity – but so has a company
- NFP – so any excess funds must go back into the charitable purposes
- Can carry on a business – but....

**NGO: From *Charity* to  
*Social Enterprise***

# Charities Carrying on Business

- *Word Investments Case* – 2008
- High Court held a charity could carry on a commercially run funeral business
- Sanitarium is owned by the Seventh Day Adventist Church
- Charity and income tax exempt



# Disadvantages

- Purposes must be charitable purposes
- Issue of whether or not charitable purposes includes community development?
- Sport not a separate charitable purpose
- Accumulation limits



# PBCs as at December 2013 – Not Charities

State/ Territory	Small – no assets/ income	Small – some assets/ income /staff	Medium	Large	Total
NSW	2	0	1	0	3
NT	12	2	0	0	14
Qld	17	10	2	0	29
Qld (Torres Strait Islands)	16	2	1	0	19
SA	3	3	4	0	10
Vic	0	1	1	0	2
WA	9	6	2	1	18
Total	59	24	11	1	95

# Australian Charities and NFP Commission

- To be a charity must register with ACNC
- Commissioner Interpretation Statement on Indigenous Charities
- [http://www.acnc.gov.au/ACNC/Publications/Interp\\_IndigenousCharities.aspx](http://www.acnc.gov.au/ACNC/Publications/Interp_IndigenousCharities.aspx)

# Conclusion

- Charities have significant advantages – not just tax concessions, longevity, access to grants, philanthropic purposes
- Barrier to PBCs representing Native Title Groups related by blood has been removed *to a limited extent*
- But Native Title Groups need to be aware of charity limitations