

AN INDIGENOUS ECONOMIC DEVELOPMENT CORPORATION: HOW DOES THIS COMPARE TO A CHARITY?

by Fiona Martin

INTRODUCTION

Indigenous groups, particularly those in receipt of mining payments in remote communities, regularly use a charitable institution or trust structure in order, amongst other things, to gain income tax exemption in respect of mining payments and other income that they receive.¹ In these cases the majority of this income is reinvested into the Indigenous community through community development activities and infrastructure.² There are, however, problems that have been identified in the literature with the use of this legal structure.³ This article identifies three main problem areas and then compares charities with the proposed income tax entity known as the Indigenous Economic and Community Development Corporation ('IED Corporation'). It is noted that the Federal Government has recently announced that native title payments will become exempt from income tax.⁴ However, there is no draft legislation and no further details available as to the scope of this exemption. The discussion in this paper is still, therefore, highly relevant particularly as the investment income from native title payments will not be exempt and charities will therefore be a necessary structure to ensure maximum return on investment by Indigenous communities.

CHARITIES AND THE FAMILY LIMITATION

A significant legal barrier to the use of charities is that although otherwise charitable, an entity that benefits a group of persons defined through their family or blood connection cannot be a charity.⁵ The only exception is where the charity is solely for the relief of poverty.⁶ This restriction is because an entity aimed at benefitting family members is not considered to be of benefit to a section of the public.⁷

The family limitation in the context of native title holders under the *Native Title Act 1993* (Cth) ('NTA') has been identified as an issue in the literature⁸ and in several submissions to the Treasury Consultation on the *Definition of Charity*.⁹ The joint submission of the Minerals Council of Australia and the National Native Title Council states:

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.¹⁰

Similar views were expressed to the 2000/01 *National Inquiry into the Definition of Charity*¹¹ and the 2010 Treasury Consultation, *Native Title, Indigenous Economic Development and Tax*.¹² This legal barrier to charities for Indigenous peoples has also been identified in New Zealand.¹³

THE LIMITATIONS OF CHARITABLE PURPOSES

A significant limitation to the effective use of charities by Indigenous groups is the restriction of their purposes to those that the common law has decided are charitable. A major area is the restriction on charities engaging in business activities. In the 2011 Federal Budget the Government announced that there would be reforms to the charities and Not-for-Profit ('NFP') sector to ensure that any income tax exemption did not apply to unrelated business income.¹⁴ This is in part to overcome the decision of the High Court in *Commissioner of Taxation v Word Investments Ltd*,¹⁵ which held that an entity that carried on a commercially operated funeral business was still charitable as its purposes were charitable and all of its funds were used for these purposes. The Government stated that it would ensure that the income tax exemption was targeted only at those activities that directly further an NFP's altruistic purposes. Under this measure, the NFP income tax concessions will only apply to profits generated by unrelated commercial activities that are directed back to an NFP entity to carry out its altruistic work. This means NFP entities will pay income tax on profits from their unrelated commercial activities that are not directed back to their altruistic purpose (that is, the earnings they retain in their commercial undertaking).

Commercial activities that further an NFP entity's altruistic purposes, and small-scale and low risk unrelated commercial activities, will not be affected by the reforms. The Government has also announced that it will extend the start date for these new arrangements from 1 July, 2011, to 1 July, 2012, and they will initially affect only new unrelated commercial activities that commence after

10 May, 2011.¹⁶ Draft legislation is planned for release in May, 2012, however at the time of writing this article no draft had been produced.¹⁷

An unrelated business income tax will pose serious difficulties for many charities for Indigenous Australians. This is because these charities often wish to maximise the financial outcomes of mining payments and other income and in order to do this may need to carry on businesses.¹⁸ These businesses are also important aspects of the communities that they operate in. They bring in funds which are then used for charitable and community purposes, they provide services which are needed in remote communities, e.g. engineering and construction of roads and housing, they provide training opportunities for community members and through tourism and cultural activities may enhance and develop cultural strength.

An example of a native title group that is pre determination but which engages in significant construction work and also training of Indigenous people is the Myuma Group of corporations. Myuma Pty Ltd, a member of the Myuma Group, is a not-for-profit company that considers it should be eligible for charitable status as its aims are to relieve the poverty of its Indigenous community and advance members vocational education. Myuma Pty Ltd runs a construction company which not only engages in construction activity that is of benefit to its remote community in north-west Queensland (near the Northern Territory border) but also trains Indigenous members in the skills necessary for employment in construction and mining.¹⁹ Together with the Queensland Government and private sector partners, Myuma Pty Ltd constructed large segments of the Barkly Highway which joins Mt Isa to Camooweal where the community is based.²⁰ It provides apprenticeships and training programs for Indigenous people in the area.²¹

Another example, although not in the mining context is the Lhere Artepe Aboriginal Corporation ('Lhere Artepe') which represents the native title holders in respect of a determination of native title in and around Alice Springs. Lhere Artepe is a charity.²² The Lhere Artepe group own, through a subsidiary corporation, the largest shopping centre in Alice Springs and several other commercial outlets.²³

Apart from undertaking commercial activities, many Indigenous communities wish to engage in a range of economic and community development activities. This includes use of funds to encourage Indigenous businesses and being able to lend money and grant initial funding to

small Indigenous businesses. These activities do not always fall within current charitable purposes as it is considered that the private benefits outweigh those to the public.²⁴ Sport and recreational and cultural purposes are other areas that do not fall within charitable purposes but which are important to Indigenous communities. Under the common law, sport and recreational activities, unless otherwise attached to a recognised charitable object (e.g. advancement of education) are not charitable purposes.²⁵

ACCUMULATION OF INCOME

The third limitation to the use of charities is the difficulty of accumulating income for significant periods of time. The Australian Taxation Office ('ATO') requires that charities distribute all funds within reasonable time frames and can only accumulate investment income for a few years.²⁶ This is a significant problem for Indigenous groups that want to invest income in order to build their capital and provide intergenerational benefits.²⁷

PROPOSED IED CORPORATION

In 2010, Treasury issued a Consultation Paper, *Native Title, Indigenous Economic Development and Tax*, which invited submissions on a number of issues including the establishment of a new income tax exempt vehicle termed an Indigenous Community Fund into which native title payments and benefits could be paid.²⁸ As part of this and subsequent discussions the Minerals Council of Australia and the National Native Title Council have proposed that the Federal Government establish a new form of income tax exempt entity, the IED Corporation, which is intended to overcome the problems identified above with charities and which will also have other advantages for Indigenous groups.²⁹

IED CORPORATION AND BENEFITTING INDIGENOUS FAMILY GROUPS

The first advantage of the IED Corporation is that it would be able to benefit traditional land holding groups defined through their family connection. Traditional land holding is often established through the proof of descent from a particular ancestor who practised traditional laws and customs on the land. For example, section 3 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) defines a traditional Aboriginal owner as a member of a local 'descent group'. Traditional land holding groups may have some similarities with European families however they also have significant differences which have been identified in the literature³⁰ and case law.³¹ It is outside the scope of this article to discuss these differences, however the proposed IED Corporation would have the advantage over charities of being able to benefit a group of Indigenous

land holders who are defined through descent from a common ancestor or by some other family connection.

PURPOSES OF THE IED CORPORATION

The purposes of the IED Corporation will include all those that are currently charitable but also other purposes that are uniquely important to Indigenous communities, particularly those in remote areas of Australia. The IED Corporation would be able to carry on businesses that benefit their community. It would also be able to encourage Indigenous businesses in a practical manner such as providing initial funding and making low or no interest loans to small Indigenous businesses. At the moment, although the encouragement of industry generally is a charitable purpose, where such encouragement also enables private gain for the benefit of individuals the purpose is not charitable.³²

The second important area is the encouragement of sport. Engagement in sport is an important and positive aspect of many Indigenous communities³³ and can be used to advance the education and health of Indigenous children.³⁴ It is arguably an area wherein Indigenous peoples and western society can interact in a positive way.³⁵ Engagement in sport can also be a significant contributor to community development and health.³⁶

A third important purpose that does not always fit into the common law interpretation of charitable purpose is cultural activities. Engagement in festivals and cultural activities are a way of keeping Indigenous cultures alive and are essential when the culture is at risk of domination by more pervasive non-Indigenous cultures.³⁷ Indigenous festivals are important to communities as they contribute to wellbeing, resilience and capacity. They also increase individual and community self-esteem and leadership capabilities.³⁸ Indigenous funerals are often much more complex and time consuming than European funerals and are another significant aspect of community life.³⁹ The IED Corporation would be able to engage in running Indigenous cultural practices and festivals and also be able to fund them.

ACCUMULATION OF FUNDS

The importance of the ability to accumulate funds so that intergenerational benefits can be provided is essential for communities that hold traditional lands. These lands are held for the benefit of current and future generations and it is considered that the income generated from these lands should also flow across generations.⁴⁰ Many Indigenous entities also need to accumulate funds to increase working capital. As stated earlier the ATO requires that charities

distribute all funds within reasonable time frames and can only accumulate investment income for a few years. This restriction on accumulation is a deterrent to community development and is unrealistic when the time frame for mining activities is frequently in excess of 20 years. The IED Corporation would be able to accumulate its income until its board of directors considered it appropriate to use the funds for community purposes.

PROVISION FOR FUTURE GENERATIONS

Charities are able to be created so that they last indefinitely.⁴¹ This is a significant advantage over non-charitable trusts which are subject to the rule against perpetuities and therefore must have a vesting date. In most Australian states and territories this date is 80 years from settlement.⁴² Lands that are subject to traditional claims and benefits flowing from this land belong not only to the current generation but to future generations.⁴³ The ability to provide for intergenerational members is therefore essential and an important advantage of the use of a charitable entity. It is proposed that the IED Corporations have this same feature as charities.

ECONOMIC AND COMMUNITY DEVELOPMENT AS OPPOSED TO CHARITY

A further positive aspect of an IED Corporation is that its establishment would recognise the important place of Indigenous economic and community development in modern Australian society. The use of the word 'charity' can have negative connotations whereas the phrase 'economic and community development' emphasises advancement and self motivation. The different nomenclature would remove encouragement of Indigenous development out of the charitable sphere, with its stigma of welfare recipients, and recognise it as a significant part of the Australian economy.

CONCLUSION

Entities that represent groups of Indigenous Australians defined through their family relationship are currently unable to gain charitable status unless they are solely for the relief of poverty. There are also difficulties where Indigenous charities wish to maximise financial gain and contribute to community development, employment and training in a commercial manner. The IED Corporation is an alternative income tax exempt organisation that has the potential to overcome these difficulties. Furthermore, the identification of a specific income tax exempt entity for Indigenous economic development would remove Indigenous development from the stigma of the charity space and recognise it as a significant part of the Australian mainstream economy.

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- 1 Minerals Council of Australia and National Native Title Council, Joint Submission to Treasury, *Native Title, Indigenous Economic Development and Tax: Consultation Paper*, 30 November 2010, 10-11; Native Title Services Victoria Ltd, Submission to Treasury, *Native Title, Indigenous Economic Development and Tax: Consultation Paper*, 30 November 2010, 4.
- 2 See Gundjeihmi Aboriginal Corporation, *Financial Report*, 2011; Gundjeihmi represents the traditional owners of the Kakadu area in the Northern Territory.
- 3 See Fiona Martin, 'The Income Tax Exempt Charitable Structure as a Vehicle for holding Australian Native Title interests: Some lessons from New Zealand' in M Langton and J Longbottom (eds), *Community Futures, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom*, (Oxford and New York, Routledge, 2012) 195.
- 4 Nicola Roxon, Federal Attorney-General, 'Keynote Address' (Paper presented at AIATSIS National Native Title Conference, Townsville, Australia, 4-6 June 2012).
- 5 *Verge v Somerville* [1924] AC 496; *Re Compton* [1945] Ch 123; *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR PC 381; *Ip Cheung-Kwok v Sin Hua Bank Trustee Ltd* [1990] 2 HKLR 499; *Davies v Perpetual Trustee Co Ltd* (1959) 59 SR (NSW) 112.
- 6 *Re Compton* [1945] Ch 123.
- 7 See Fiona Martin, 'Prescribed Bodies Corporate under the Native Title Act 1993 (Cth); Can they be Exempt from Income Tax as Charitable Trusts?' (2007) 30(3) *University of New South Wales Law Journal* 713.
- 8 *Ibid.*
- 9 See University of Melbourne Law School, Not-for-Profit Project, Submission to Treasury, *A Definition of Charity: Consultation Paper*, October 2011, 7 December 2011, 6; Australian Council of Social Service, Submission to Treasury, *A Definition of Charity: Consultation Paper*, December 2011, 7; Pilchconnect, Submission to Treasury, *A Definition of Charity: Consultation Paper*, 9 December 2011, 6.
- 10 Minerals Council, above n 1.
- 11 See Australian Institute of Aboriginal and Torres Strait Islander Studies, Submission to Treasury, *National Inquiry into the Definition of Charities and Related Organisations*, 2001, 5 <http://www.taxboard.gov.au/content/charity_subs/Australian_Institute_of_Aboriginal_and_Torres_Strait_Islander_Studies.pdf>.
- 12 Native Title Services, above n 1; Minerals Council, above n 1; Law Council of Australia, Submission to Treasury, *Native Title, Indigenous Economic Development and Tax: Consultation Paper*, 30 November 2010, 4.
- 13 New Zealand Inland Revenue Department, Policy Advice Division, *Taxation of Maori Organisations, A Government Discussion Document* (August 2001); this review led to the amendment of the taxation legislation to allow charities for the benefit of those related by blood provided that they still have charitable purposes and are of benefit to the public.
- 14 Australian Government, Budget 2011-2012, *Not-for-Profit Sector Reforms* <http://www.finance.gov.au/publications/commonwealth-budget/2011-12/2011-12/content/bp2/html/bp2_revenue-07.htm>.
- 15 *Taxation v Word Investments Ltd* [2008] HCA 52.
- 16 David Bradbury, Assistant Treasurer, and Mark Butler, Minister for Social Inclusion, 'Extended Start Date for 2011-2012 Budget Measure to Better Target Not-For-Profit Tax Concessions' (Joint Media Release, 30 March 2012) <<http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/009.htm&pageID=003&min=djba&Year=&DocType=>>.
- 17 University of Melbourne, Australian Research Council Project, 'Defining, Taxing and Regulating the Not-for-Profit Sector in Australia: Law and Policy for the 21st Century' <http://tax.law.unimelb.edu.au/files/ACLA_seminar_state_of_reform.pdf>.
- 18 Minerals Council, above n 1, 4.
- 19 Paul Memmott, *The Myuma Group, Georgina River Basin: Aboriginal Enterprise, Training and Cultural Heritage* (Desert Knowledge CRC, Report Number 63, University of Queensland, 2007); Paul Memmott, 'Demand-Responsive Services and Culturally Sustainable Enterprise in Remote Aboriginal Settings: A Case Study of the Myuma Group' (Paper presented at Indigenous Participation in Australian Economies Conference, Australian National University, Canberra, 9-10 November 2009).
- 20 *Ibid.*
- 21 Julie Collins, Government of Australia, '68 Indigenous Jobs in Mining and Construction at Myuma and Dugalunji' (Media Statement, 3 January 2012) <<http://ministers.deewr.gov.au/juliecollins/68-indigenous-jobs-mining-and-construction-myuma-and-dugalunji>>.
- 22 Lhere Artepe Aboriginal Corporation, *Financial Report*, 2011.
- 23 Australian Government, Department of Finance and Deregulation, Office of Evaluation and Audit (Indigenous Programs), 'Performance Audit of Centrecorp Aboriginal Investment Corporation Pty Ltd' (November 2008) 18; Lhere Artepe, above n 22.
- 24 *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) 69 TC 231.
- 25 *Strathalbyn Show Jumping Club Inc v Mayes* [2001] SASC 73 following *Re Nottage*; *Jones v Palmer* [1895] 2 Ch 649.
- 26 Australian Taxation Office, *Income Tax and Fringe Benefits Tax: Charities* TR 2011/4, 12 October 2011 [39]-[40]; the number of years is not specified in the ruling however the author is advised that in practice it is 10 years.
- 27 Minerals Council, above n 1, 5-6.
- 28 Australian Government, Treasury, *Native Title, Indigenous Economic Development and Tax: Consultation Paper*, October 2010, 8-13.
- 29 Minerals Council, above n 1, 5-6.
- 30 See Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (Cambridge University Press, 2003).
- 31 See *Latimer v Commissioner of Inland Revenue* [2001] NZCA 121 [38] for a discussion of this in the context of Maori.
- 32 *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) 69 TC 231.
- 33 Helen Alexiou, 'Alternative Models for Engaging and Developing Skills, Experience and Knowledge in Indigenous Youth: Pre-fieldwork Presentation for a PhD Thesis' (Paper presented at the Centre for Aboriginal and Economic Policy Research Seminar, Canberra, October 2010); Amos Aikman, 'For Tiwis, Life's Goals Come from Sherrin', *The Australian*, 19 March 2012; AFL (webpage), 'AFL and the Indigenous Community' <<http://www.afl.com.au/indigenous%20community/tabid/14282/default.aspx>> at 26 June 2011; states that AFL players make up 11 per cent of the list players and there are 90,000 indigenous Australians in AFL programs.
- 34 Australian Government, Department of Education, Employment and Workplace Relations, *Aboriginal and Torres Strait Islander Education Action Plan 2010-2014*, 'School-based Sports Academies'; J Taylor and N Westbury, 'Aboriginal Nutrition and the Nyirranggulgung Health Strategy in Jawoyn Country'

- (Research Monograph No 19, CAEPR, 2000) 1, 3.
- 35 John Bale and Mike Cronin, 'Sport and Post Colonialism' in John Bale and Mike Cronin (eds), *Sport and Post Colonialism* (Berg, 2003) 8-9; although there are significant issues of racism both personal and systemic.
- 36 Oxfam Australia, 'Rugby League Helps Close the Gap', <<https://www.oxfam.org.au/explore/indigenous-australia/close-the-gap/rugby-league-helps-close-the-gap/>>; See Emma E Campbell and Christopher C Sonn, 'Transitioning into the AFL: Indigenous Football Player's Perspectives' (2009) 11(3) *Athletic Insight The Online Journal of Sport Psychology*; AFL and the Indigenous Community, above n 33; Amos Aikman above n 33.
- 37 Peter Phipps and Lisa Slater, 'Indigenous Cultural Festivals: Evaluating Impact on Community Health and Wellbeing' (Report to the Telstra Foundation on Research on Indigenous Festivals 2007-2010, 2010) 9.
- 38 Ibid 86.
- 39 Katie Glaskin et al (eds), *Mortality, Mourning and Mortuary Practices in Indigenous Australia* (Ashgate Publishing, 2008).
- 40 Minerals Council, above n 1.
- 41 *Pemsel* [1891] AC 531, 581; Gino Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [6.9].
- 42 For example in the ACT and NSW the perpetuity period is 80 years from the date of settlement; *Perpetuities and Accumulations Act 1985* (ACT) s 8; *Perpetuities Act 1984* (NSW) s 7; In Queensland, Tasmania, Victoria and Western Australia a settlor may adopt a period not exceeding 80 years instead of the common law rule; *Property Law Act 1974* (Qld) s 209; *Perpetuities and Accumulations Act 1992* (Tas) s 6; *Perpetuities and Accumulation Act 1968* (Vic) s 5; *Property Law Act 1969* (WA) s 101.
- 43 See *Native Title Act 1993* (Cth), Preamble.

Loondooroo
(crocodile in my
Kungarakan language)
Wayne 'Liwingu' McGinness

1700mm (h)

