

## **PRESCRIBED BODIES CORPORATE UNDER THE *NATIVE TITLE ACT 1993* (CTh): CAN THEY BE EXEMPT FROM INCOME TAX AS CHARITABLE TRUSTS?**

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### **I INTRODUCTION**

The *Income Tax Assessment Act 1997* (Cth) ('*ITAA*')<sup>1</sup> provides that the income of charitable institutions is exempt from income tax. Such an exemption can provide significant financial advantages to an entity that is able to claim this charitable status. There is no definition of 'charity' in the *ITAA* and both the courts and the Australian Taxation Office ('ATO')<sup>2</sup> have relied on the common law for guidance on this issue. The original concept of 'charity' and 'charitable' for the purposes of income tax exemption was established by the English courts over 100 years ago<sup>3</sup> (although its inception was several hundred years earlier) and clearly at that time, the interests of Australian Indigenous people would not have been contemplated. In addition to this, the English and Australian courts have considered that for a purpose to be charitable it must be founded for the benefit of the public or a significant section of the public (with the exception of charities for the relief of poverty).<sup>4</sup>

This article considers the application of the common law definition of charity to prescribed bodies corporate that hold and manage native title rights in relation to land and water pursuant to section 223 of the *Native Title Act 1993* (Cth) ('*NTA*'). In other words it first looks at whether or not the aims of these prescribed bodies corporate ('PBCs') are charitable for the purposes of exemption from income tax. Second, it considers whether this purpose is considered beneficial in the context of the legal definition of charity. Third, it analyses the application of the public benefit requirement to PBCs or similar entities. It concludes that the holding and maintenance of native title rights are considered to have a charitable purpose and that this purpose is of actual benefit to the public. This fulfils the first two requirements for an object of an entity to

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1 *Income Tax Assessment Act 1997* (Cth) s 50-5 item 1.1. This section was formerly s 23(e) of the *Income Tax Assessment Act 1936* (Cth).

2 For example, Taxation Ruling TR 2005/21 'Income Tax and Fringe Benefits Tax: Charities' [12]; Taxation Ruling TR 2003/15 'Income Tax and Fringe Benefits Tax: Public Benevolent Institutions'.

3 *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten).

4 *Re Compton; Powell v Compton* [1945] Ch 123, 139 (Lord Greene MR).

be ‘charitable’. A further analysis of the case law requiring that the object of the charity must benefit a section of the community is, however, more problematic. The article concludes that in order to gain charitable status as a charity other than one for the relief of poverty these entities must manage the native title rights for the benefit of the public or a sufficient section of the public. The current application of the law is that this type of organisation cannot attain income tax exemption if the beneficiaries are linked through a personal relationship such as family. This may have serious consequences for entities that hold native title rights on behalf of the same family or clan.

## II INCOME TAX ASSESSMENT AND THE EXEMPTION OF CHARITIES

Although the words ‘charity’ and ‘charitable’ have a common or everyday meaning,<sup>5</sup> for the purposes of the income tax exemption they have a technical legal meaning which has been developed over many centuries by the English and Australian Courts.<sup>6</sup> This article analyses this technical legal meaning of ‘charity’ in respect of the exemption from income tax and whether or not it applies to PBCs established to hold and maintain native title rights on behalf of Australian Indigenous people.

## III ‘CHARITABLE’ AS A LEGAL CONCEPT

Some 400 hundred years ago an attempt was made in England to classify or provide guidelines for the identification of charitable purposes in the Preamble to the *Charitable Uses Act 1601*.<sup>7</sup> This Act is referred to as the Statute of Elizabeth and its Preamble set out a list (although it was not meant to be exhaustive)<sup>8</sup> of charitable purposes at that time which included relief of the aged, impotent and poor; maintenance of sick and maimed soldiers and mariners; and schools and scholars in universities. Obviously the legislature did not contemplate at this time the management and maintenance of Australian native title interests.

By 1805, the English courts had ruled that for a purpose to be ‘charitable’ it had to be within the spirit and intendment of the Preamble and also for the public benefit.<sup>9</sup> Subsequently, this was confirmed in *Commissioners for Special Purposes of Income Tax v Pemsel*<sup>10</sup> (‘Pemsel’ or ‘Pemsel’s case’) where Lord Macnaghten stated that a charity should be a trust for one of the following:

- the relief of poverty;

5 *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten).

6 For example, see *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten); *Re Hilditch (deceased)* (1985) 39 SASR 469, 475 (O’Loughlin J); *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 139 FLR 236, 251-252 (Mildren J).

7 43 Eliz I, c 4.

8 For a complete discussion refer Hubert Picarda, *The Law and Practice Relating to Charities* (3<sup>rd</sup> ed, 1999) 72; Frederick M Bradshaw, *The Law of Charitable Trusts in Australia* (1983) 2.

9 *Morice v Bishop of Durham* (1805) 10 Ves 522.

10 [1891] AC 531.

- the advancement of education;
- the advancement of religion; or
- for other purposes beneficial to the community.<sup>11</sup>

The classification of charitable purpose into these four areas was seen as a milestone and has been consistently used in judicial considerations both in England and Australia ever since.<sup>12</sup>

In 1974, the High Court of Australia confirmed the place of the Preamble to the Statute of Elizabeth in Australian law in its conclusion that in order for an institution to be charitable it must be:

- within the spirit and intendment of the Preamble to the Statute of Elizabeth; and
- for the public benefit.<sup>13</sup>

The Australian government also considers that there are two aspects to the test for an entity to be considered charitable. In Taxation Ruling TR 2005/21 'Income Tax and Fringe Benefits Tax: Charities', the ATO states that:

For a purpose to fall within the technical legal meaning of 'charitable' it must be:

- beneficial to the community, or deemed to be for the public benefit by legislation applying for that purpose; and
- within the spirit and intendment of the Statute of Elizabeth, or deemed to be charitable by legislation applying for that purpose.

The ATO also accepts the four categories established in *Pemsel's case* as a means of identifying charitable purposes.<sup>14</sup>

Subsequent Australian cases have come down very strongly in favour of the principle that for an organisation to be charitable it must not only fall within one of the four divisions discussed by Lord Macnaghten in *Pemsel's case*, but it must also be founded for the benefit of the public.<sup>15</sup> This public benefit requirement has two aspects. The purpose or object must be 'beneficial' in itself and (with the exception of trusts for the relief of poverty), it must be of benefit to the community or a sufficient section of the community.<sup>16</sup>

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11 *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583.

12 For example, the High Court decision of *The Incorporated Council of Law Reporting of the State of Queensland v The Commissioner of Taxation* (1971) 125 CLR 659, 666 (Barwick CJ); *Salvation Army (Victoria) Property Trust v Shire of Fern Tree Gully* (1952) 85 CLR 159, 173; *Ashfield Municipal Council v Joyce* [1976] 1 NSWLR 455. The ATO also accepts the authority of *Pemsel*; see Taxation Ruling TR 2005/21 'Income Tax and Fringe Benefits Tax: Charities', [13], [39].

13 *Royal National Agricultural & Industrial Association v Chester* (1974) 48 ALJR 304, 305.

14 Taxation Ruling TR 2005/21 'Income Tax and Fringe Benefits Tax: Charities' [13].

15 *Re Compton; Powell v Compton* [1945] Ch 123; *Gilmour v Coats* [1949] AC 426; *Dingle v Turner* [1972] AC 601; applied in Australia in *Re Hilditch (deceased)* (1985) 39 SASR 469. The exception to this is a line of cases that indicate that charities for the relief of poverty do not require a public benefit; see *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 308 (Lord Simonds); *Dingle v Turner* [1972] AC 601, 623 (Lord Cross).

16 Picarda, above n 8, 20.

## IV THE ELEMENTS OF ‘BENEFIT’ AND ‘PUBLIC BENEFIT’

### A The Requirement of ‘Benefit’

In order to have a ‘charitable purpose’ there must be some tangible benefit of an entity’s objectives. This is not interpreted narrowly and extends beyond material benefit to other forms of benefit including social, mental and spiritual.<sup>17</sup>

The benefit must be real or substantial,<sup>18</sup> although it is not limited to purely material considerations.<sup>19</sup> At common law the purposes of a group of cloistered and contemplative nuns was not considered charitable as the benefit of prayer and the example of pious lives was considered too vague and incapable of proof to be a benefit.<sup>20</sup> This has now been amended by statute,<sup>21</sup> and in fact some commentators consider that this case would not be viewed favourably by modern Australian and New Zealand courts.<sup>22</sup> Nevertheless, this case remains an example of where the value of the benefit itself was in question.

A further example of the difficulty in evaluating ‘benefit’ is evinced in the case of *Re Pinion (deceased); Westminster Bank Ltd v Pinion*.<sup>23</sup> In this case the testator had left various items to the National Trust which argued that they had educational value. Expert evidence however established that they in fact offered very little, if any, educational benefit to the community and the court relied on this evidence to hold that the trust was not charitable.<sup>24</sup>

In cases where the merit or value of the disposition or other matters that are of relevance to its actual benefit to the public are in dispute, the matter is resolved by the court.<sup>25</sup> As Russell J stated in *Re Hummeltenberg*:

In my opinion the question whether a gift is or may be operative for the public benefit is a question to be answered by the Court by forming an opinion upon the evidence before it.<sup>26</sup>

An entity’s purpose is not beneficial if its aims are contrary to public policy,<sup>27</sup> unlawful or for a lawful purpose that is to be carried out by unlawful means.<sup>28</sup>

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17 Gino Dal Pont, *Charity Law in Australia and New Zealand* (2000) 14-15.

18 *Re Pinion (deceased); Westminster Bank Ltd v Pinion* [1965] 1 Ch 85.

19 Dal Pont, above n 17, 14-15.

20 *Gilmour v Coats* [1949] AC 426, 446-447 (Lord Simonds).

21 This situation has been amended by legislation in Australia and is now considered charitable under s 5 of the *Extension of Charitable Purpose Act 2004* (Cth).

22 Dal Pont, above n 17, 171.

23 [1965] 1 Ch 85.

24 *Ibid* 107 (Harman LJ).

25 *Re Hummeltenberg* [1923] 1 Ch 237, 242 (Russell J); *Re Coats’ Trusts* [1948] Ch 340, 347 (Lord Greene MR).

26 *Re Hummeltenberg* [1923] 1 Ch 237, 242 (Russell J).

27 *Perpetual Trustee Co (Ltd) v Robins* (1967) 85 WN (Pt 1) (NSW) 403, 411; see also *Thrupp v Collett (No 1)* (1858) 53 ER 844; *Re MacDuff; MacDuff v MacDuff* [1895] 2 Ch 451; *Re Pieper (deceased); The Trustees Executors & Agency Co. Ltd v Attorney-General (Vic)* [1951] VLR 42.

28 *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382, 395.

## **B The Second Element: The Benefit must be for the Public or a Section of the Public**

As well as being of actual benefit to the public, the second aspect of the public benefit requirement provides that a charitable purpose must benefit the community or an appreciable section of the community, although the cases have never specifically formulated a definition of what this means.<sup>29</sup> Whilst this section of the public can be small, it should not be ‘numerically negligible’.<sup>30</sup> The test requires that the beneficiaries (ie the section of the community) are linked by some criteria other than personal relationships. Assistance to family members to complete their schooling might be a charitable thing to do, but there is no public benefit as they are not, for this purpose, a section of the community. In contrast, donating money to a particular organisation which assists disadvantaged persons in gaining an education has a public benefit. Such a gift would benefit a section of the public.

Clearly, not all charities are for the benefit of the entire community and the very fact that they are charities often necessitates that they are trying to assist a section of the community that has special needs or disadvantages.<sup>31</sup>

The unsuccessful cases have generally failed because the class or groups of members of the public are linked by a relationship to someone or something.<sup>32</sup> This is not considered to be in the public benefit as the quality which distinguishes them from other members of the public depends on their relationship to another person or entity. For example, a religious college failed the test of being a charitable institution as it was only open to the descendents of particular persons.<sup>33</sup> An institution for the benefit of employees of a particular company is not charitable,<sup>34</sup> neither will a school for the children of freemasons,<sup>35</sup> or a mutual benefit society such as a friendly society or a trade union.<sup>36</sup> In these cases the benefits were intended for people in their capacity as employees, relatives or members rather than as a segment of the public. An institution for the benefit of persons in a particular geographic location would, on the other hand, be for the public benefit, as here the quality which links the group is not their personal relationship but their physical location.<sup>37</sup> The rationale is that anyone can theoretically move to a particular location, and therefore the benefit is still open to the public.

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29 *Verge v Somerville* [1924] AC 496, 499; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 305-306 (Lord Simonds).

30 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 306 (Lord Simonds); *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197, 209 (Nader J).

31 For a detailed discussion of the role of charities, see Dal Pont, above n 17.

32 For example, *Re Compton*; *Powell v Compton* [1945] Ch 123; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Thompson v Federal Commissioner of Taxation* (1959) 102 CLR 315.

33 *Beatrice Alexandra Victoria Davies v Perpetual Trustee Co (Ltd)* (1959) 59 SR (NSW) 112.

34 *Re Compton*; *Powell v Compton* [1945] Ch 123; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

35 *Thompson v Federal Commissioner of Taxation* (1959) 102 CLR 315.

36 *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] Ch 194.

37 *Re Compton*; *Powell v Compton* [1945] Ch 123, 129-130; *Verge v Somerville* [1924] AC 496, 499.

Lord Greene MR expressed this principle in *Re Compton; Powell v Compton*:<sup>38</sup>

they do not enjoy the benefit when they receive it by virtue of their character as individuals but by virtue of their membership of their specified class. In such a case the common quality which unites the potential beneficiaries into a class is essentially an impersonal one. It is definable by reference to what each has in common with the others and that is something into which their status as individuals does not enter. Persons claiming to belong to the class do so not because they are AB, CD, and EF but because they are poor inhabitants of the parish. If in asserting their claim it were necessary for them to establish the fact that they were individuals AB, CD, and EF, I cannot help thinking that on principle the gift ought not to be held to be a charitable gift since the introduction into their qualification of a purely personal element would deprive the gift of its necessary public character.<sup>39</sup>

If benefits are restricted to family members or friends, the courts have considered that there is no public benefit.<sup>40</sup> As Farwell J said in *Re Delaney*,<sup>41</sup> ‘[t]here is, in truth, no “charity” in attempting to improve one’s own mind or save one’s own soul. Charity is necessarily altruistic and involves the idea of aid or benefit to others...’.<sup>42</sup>

### C Public Benefit Test not a Requirement where the Charitable Purpose is the Relief of Poverty

One important exception to the rule that a charity must be for the benefit of the public or a section of the public is a charity that is for the relief of poverty. This was confirmed by Lord Greene MR in *Re Compton; Powell v Compton*. This approach has been upheld in subsequent cases.<sup>43</sup>

There are two main reasons usually given for this exception.<sup>44</sup> In *Re Compton; Powell v Compton*, Lord Greene MR considered that because the exception had been in existence for many generations and that many trusts had been founded with the exception in mind it was too late for the principle to be overturned.<sup>45</sup> Secondly, Lord Greene stated that there may be some special quality in gifts for the relief of poverty that put them in a class by themselves. He felt that the relief of poverty may be of such benefit to the community that this outweighs the fact that the relief is confined to family members.<sup>46</sup>

This exception was confirmed in the 1997 decision of *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation*.<sup>47</sup> In this case the Northern Territory Court of Appeal held that the corporation’s aim of assisting needy

38 [1945] Ch 123.

39 Ibid 129-130.

40 *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381; *Ip Cheung-Kwok v Sin Hua Bank Trustee Ltd* [1990] 2 HKLR 499.

41 [1902] 2 Ch 642.

42 Ibid 648-649.

43 For example, *Dingle v Turner* [1972] AC 601, 623 (Lord Cross); *Re Hobourn Aero Components Limited’s Air Raid Distress Fund* [1946] Ch 194, 203-207 (Lord Greene MR); *Re Scarisbrick* [1951] Ch 622, 649-652 (Jenkins LJ).

44 For a detailed discussion refer Dal Pont, above n 17, 121.

45 *Re Compton; Powell v Compton* [1945] Ch 123, 139.

46 Ibid.

47 (1997) 139 FLR 236.

Aboriginal people fell within a trust for the relief of poverty and that therefore there was no public benefit requirement.<sup>48</sup>

This does not, however, mean that a trust for a very restricted group of poor beneficiaries will be charitable. In *Re Scarisbrick*<sup>49</sup> Jenkins LJ stated that a gift to a narrow class of near relations in need would not be a gift for the relief of poverty in the charitable sense.<sup>50</sup> Some commentators have stated that whilst a benefit to the public or a section of the public is still required for charities established to relieve poverty, distinct groups of persons may be considered as sections of the public in cases dealing with poverty where they might not be considered as such in other circumstances.<sup>51</sup> For example, a trust for the relief of poor relations or poor employees has been held to be charitable<sup>52</sup> although a trust for the education of relations or employees has not been.<sup>53</sup> A distinction must therefore be drawn between gifts for the relief of poverty amongst a class of persons (which will be charitable) and mere gifts to private individuals which have as their object the relief of poverty amongst those specific people (which will not be charitable).<sup>54</sup> A gift can be determined as charitable where there is evidence that the object or purpose was to create a trust in which no-one has a personal right, or otherwise shows a purpose that goes beyond merely benefiting the statutory next of kin or a narrow class of near relatives of the donor or persons defined in some other personal manner.<sup>55</sup> For example, in *Re Scarisbrick*<sup>56</sup> a trust for 'such relations' of the children of the testatrix 'as in the opinion of the survivor of [them] shall be in needy circumstances' was upheld as a trust for the purpose of relieving poverty.<sup>57</sup>

A further example is *Re Hilditch (deceased)*,<sup>58</sup> where the gift was to provide 'a home for poor and distressed Freemasons' who were also members of a particular Masonic Lodge. It was held to be charitable as the trust was not limited in time and also was to take effect only on the death of a class of persons most of whom were younger than the testator and therefore likely to outlive him.<sup>59</sup>

In the context of trusts for the relief of poverty, the main contentious issue will usually be in ensuring that the ultimate beneficiaries satisfy the judicial criterion of 'poverty'.<sup>60</sup> For the application of the common law concept of charity,

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48 Ibid 252.

49 [1951] Ch 622.

50 Ibid 650-651.

51 See, eg, P S Atiyah 'Public Benefit in Charities' (1958) 21 *Modern Law Review* 138, 148.

52 *Gibson v South American Stores* [1950] Ch 177.

53 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Re Compton; Powell v Compton* [1945] Ch 123, 139.

54 Dal Pont, above n 17, 122.

55 *Re Scarisbrick* [1951] Ch 622, 655 (Jenkins LJ); *Re Segelman (deceased)* [1996] Ch 171, 183 (Chadwick J).

56 [1951] Ch 622.

57 Ibid.

58 (1985) 39 SASR 469.

59 Ibid 473 (King CJ).

60 For the legal meaning of 'poverty' in this context refer Dal Pont, above n 17, 112-113.

‘poverty’ is not the equivalent of ‘destitution’<sup>61</sup> and is aimed at a situation where a person is unable to sustain a modest standard of living.<sup>62</sup>

## **V IS THE HOLDING AND MANAGEMENT OF NATIVE TITLE RIGHTS BY PRESCRIBED BODIES CORPORATE UNDER THE *NATIVE TITLE ACT 1993* (CTH) A CHARITABLE PURPOSE?**

### **A A Brief Background to the Meaning of Native Title and the Role of Prescribed Bodies Corporate under the *Native Title Act 1993* (Cth)**

In *Mabo v Queensland (No 2)*,<sup>63</sup> the High Court accepted the concept of native title when it said: ‘the common law of this country recognises a form of native title which ... reflects the entitlement of the Indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.’<sup>64</sup>

This begs the question of what is meant by native title. Christos Mantziaris and David Martin have commented:

*Native title* is a conclusion of law produced by the Australian legal system, in given circumstances, for the purpose of granting recognition, within that system, to a selected range of relations between indigenous people and their physical environment, and to relations between indigenous people. These relations are, in the first instance, defined and ordered by indigenous systems of traditional law and custom. Both the system of traditional law and custom, and the relations ordered by it, are ascertained by the Australian legal system as matters of fact rather than law.<sup>65</sup>

The *NTA* defines native title in section 223(1) as:

the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

Such rights and interests include hunting, gathering and fishing.<sup>66</sup>

Once a court makes a determination that native title exists, the native title holders are required by the *NTA* to establish a body corporate to represent them

61 *Trustees of Mary Clark Home v Anderson* [1904] 2 KB 645, 655 (Channell J); *Flynn v Mamarika* (1996) 130 FLR 218, 223 (Martin CJ).

62 *Ballarat Trustees Executors and Agency Co v Federal Commissioner of Taxation* (1950) 80 CLR 350, 385 (Kitto J).

63 (1992) 175 CLR 1.

64 *Ibid* 15.

65 Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (2000) 12.

66 *NTA* s 223(2).



as a group and manage their native titles rights and interests.<sup>67</sup> The *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) ('*PBC Regulations*') provide that all members of the PBC must be native title holders.<sup>68</sup> At the time of a native title determination, the native title holders must also indicate whether the PBC will hold their native title on trust ('trust PBC'), or whether the native title will be held by the native title holders. If it is the latter, the PBC will act as the agent of the native title holders and operate on their instructions ('agent PBC'). The choice between a trust PBC and an agent PBC results in different legal relationships between the PBC and the broader native title holding group. For example, in the case of an agent PBC, the broader native title holding group is liable for any debts that may exist if the PBC becomes insolvent.

The primary roles of PBCs are to protect and manage native title interests in accordance with the wishes of the broader title holding group, and to ensure certainty for government and other parties with an interest in accessing or regulating native title lands and waters, by providing a legal entity through which to conduct business with native title holders.

The *NTA* and the *PBC Regulations* set out the functions to be carried out by a PBC in managing and holding native title. A PBC's functions, established under the *NTA*, include:

- receiving 'future act notices', and possibly advising native title holders about such notices;<sup>69</sup>
- exercising procedural rights afforded to native title holders under the *NTA*, including commenting on, objecting to and negotiating about proposed future acts;<sup>70</sup>
- preparing submissions to the National Native Title Tribunal or other arbitral bodies about the right to negotiate matters, including whether negotiations have occurred in good faith and objecting to the application of the expedited procedure;<sup>71</sup>
- being a party to indigenous land use agreements;<sup>72</sup>

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67 *NTA* ss 55, 56, 57. Once the details of a prescribed body corporate ('PBC') are entered on the National Native Title Register, the PBC then has the status of a 'Registered Native Title Body Corporate' which is recognised under s 203AD of the *NTA*. For ease of reference, this article uses the term PBC to cover both prescribed bodies corporate and Registered Native Title Bodies Corporate.

68 *PBC Regulations*, regs 4(2)(a), 4(2)(c).

69 The *NTA* establishes a procedural framework, known as the future act regime, within which future activity impacting on native title may be undertaken. This regime seeks to ensure that native title rights are taken into account by laying down procedures, which must be complied with before acts affecting native title occur: *NTA* pt 2, div 3. See also *NTA* s 29.

70 *NTA* ss 30, 31.

71 Under the *NTA*, native title holders have the right to negotiate about the doing of certain acts. The *NTA* also allows for an expedited procedure to apply in relation to acts, which would otherwise be subject to the right to negotiate, if those acts are unlikely to interfere directly with the activities of, or sites or areas of significance to, the native title holders. Native title parties have four months to object to the application of the expedited procedure: see generally *NTA* s 32. See also *NTA* s 75.

72 *NTA* s 24CD.

- considering compensation matters and bringing native title compensation applications in the Federal Court;<sup>73</sup> and
- bringing revised or further native title determination applications cases in the Federal Court.<sup>74</sup>

A PBC's functions, established under the *PBC Regulations*, include:

- managing the native title holders' native title rights and interests;<sup>75</sup>
- holding money (including payments received as compensation or otherwise related to the native title rights and interests) in trust;<sup>76</sup>
- investing or otherwise applying money held in trust as directed by the native title holders;<sup>77</sup>
- consulting with the native title holders about decisions that would affect native title and preparing and maintaining documentation as evidence of consultation and consent;<sup>78</sup>
- consulting and considering the views of the relevant Native Title Representative Body for an area about a proposed native title decision;<sup>79</sup> and
- performing any other function relating to the native title rights and interests as directed by the native title holders.<sup>80</sup>

The groups that make native title claims vary depending on many factors including the extent of the claim and the region in which it is made.<sup>81</sup> These groups may be identified through a variety of features including by belonging to the same language group; by having common ancestors; by carrying the same religious responsibility; and by participating and being a member of a particular clan.<sup>82</sup> Section 190B(5) of the *NTA* imposes mechanisms for determining the claimant group:

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area; and

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73 *NTA* s 61(1).

74 *NTA* s 61(1).

75 *PBC Regulations*, regs 6(1)(a), 7(1)(b).

76 *PBC Regulations*, regs 6(1)(b), 7(1)(c).

77 *PBC Regulations*, regs 6(1)(c), 7(1)(d).

78 *PBC Regulations*, regs 6(1)(d), 7(1)(e).

79 *PBC Regulations*, reg 8(2).

80 *PBC Regulations*, regs 6(1)(e), 7(1)(f).

81 For a more detailed discussion see Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (2003); Peter Sutton, 'Aboriginal Country Groups and the Community of Native Title Holders' (Occasional Paper Series No 01, National Native Title Tribunal, 2001); Jocelyn Grace 'Claimant Group Descriptions: Beyond the Strictures of the Registration Test' (Vol 2, Issues Paper No 2, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2000).

82 Sutton, above n 81, 15.

- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests; and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Guidelines produced by the National Native Title Tribunal suggest that this section could be satisfied by reference to biological descent or the adherence to a particular set of traditional laws and customs.<sup>83</sup>

This discussion of native title rights and interests under the *NTA* raises several questions for determining whether a PBC may be classified as ‘charitable’ for the purposes of the *ITAA*. Are the objects or purposes of PBCs ‘charitable’? In other words, do they fall within one of the four classifications established in *Pemsel*? Intrinsic to this issue is whether or not such a purpose is of actual benefit. If it is established that the purposes are ‘charitable’ and of benefit, the issue is whether or not such purposes must also benefit a section of the community not connected through a personal relationship such as family.

### **B Australian Case Law on Whether Holding and Maintaining Native Title Interests by a Prescribed Body Corporate under the *Native Title Act 1993 (Cth)* is a Charitable Purpose**

The preamble to the *NTA* provides that Australian Indigenous people have been progressively dispossessed of their lands and that this dispossession has occurred largely without compensation. It recognises that as a consequence, Australia’s Indigenous peoples have become the most disadvantaged group in Australian society.

The preamble also notes: ‘[t]he Australian Government has acted to protect the rights of all of its citizens, and in particular its indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms’.

The disadvantaged position of Australian Indigenous people culturally, economically and legally has been recognised in a number of judicial decisions.<sup>84</sup> The furtherance of land rights for Indigenous people is seen, by commentators, as a means of overcoming these disadvantages.<sup>85</sup> The question that arises for the purposes of this article is whether attempting to overcome past injustices by restoring native title rights is a charitable objective. There has not been any Australian case on this particular issue; however, there have been a number of decisions relating to entities established for the advancement of Australian Indigenous people in other contexts.

In *Dareton Local Aboriginal Council v Wentworth Council* (‘*Dareton*’),<sup>86</sup> the applicant was a local Aboriginal Land Council constituted under the *Aboriginal*

83 Grace, above n 81, 1.

84 See *Re Mathew* [1951] VLR 226, 232; *Re Bryning (deceased)* [1976] VR 100; *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197, 211.

85 See, eg, Commonwealth of Australia, *First Report of the Aboriginal Land Rights Commission*, Parliamentary Paper No 138 (1973) [769].

86 (1995) 89 LGERA 120.

*Land Rights Act 1983* (NSW). The powers of the Council included acquiring, holding and disposing of land vested in or acquired by the Council, and the protection of interests of Aborigines in relation to this land. The Land and Environment Court of New South Wales stated that, generally speaking, a trust for the advancement of Australian Indigenous people was charitable within the fourth heading in *Pemsel* because it was beneficial to the community.<sup>87</sup> The Court approved the statement in *Aboriginal Hostels Ltd v Darwin City Council*<sup>88</sup> that '[t]he fact that the purposes of accommodation are in respect of Aboriginal persons gives a special character to these purposes which renders an otherwise neutral purpose charitable'.<sup>89</sup>

In particular, the Court stated that the particular functions of the Council 'to make claims for Crown Land', in section 12(f) of the *Aboriginal Land Rights Act 1983* (NSW), and 'to protect the interest of Aborigines in [the land council's] area in relation to the acquisition, management, use, control and disposal of its land', in section 12(h), were arguably charitable.<sup>90</sup> The Court, however, considered that there were functions and objects of the Council that were not charitable. In particular, 'such other functions as are conferred or imposed on [the Council] by or under [the *Aboriginal Land Rights Act 1983* (NSW)] or any other Act' was not a charitable purpose and was not ancillary or incidental to the other charitable purposes.<sup>91</sup> In view of this, the objects of the Council were held not to be charitable.

In *Toomelah Co-operative Ltd v Moree Plains Shire Council* ('*Toomelah Co-operative*'),<sup>92</sup> the applicant was a community advancement society established under the *Co-operation Act 1923* (NSW).<sup>93</sup> Justice Stein considered the promotion of land rights as falling within the fourth and possibly the first (relief of poverty) categories of charitable purposes in *Pemsel*.<sup>94</sup>

*Toomelah Co-operative* was decided shortly after *Dareton*. In *Toomelah*, the Land and Environment Court held that it would not rely on the *Dareton* decision in view of the factual differences.<sup>95</sup> It should be noted that the objects of *Toomelah Co-operative Ltd* did not include a general provision, and, therefore, the reasoning which resulted in the failure of the charitable purpose test in the *Dareton* decision was not applicable.

Subsequently, in *Northern Land Council v Commissioner of Taxes*,<sup>96</sup> the Northern Territory Court of Appeal was required to consider whether or not the Northern Land Council was a public benevolent institution ('PBI'). This question raises issues similar to those addressed when considering whether an entity is

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87 Ibid 125.

88 (1985) 75 FLR 197.

89 Ibid 211, approved in *Dareton* (1995) 89 LGERA 120, 125.

90 *Dareton* (1995) 89 LGERA 120, 125-6.

91 Ibid 126.

92 (1996) 90 LGERA 48, 59 ('*Toomelah Co-operative*').

93 One of the objects of the society was '[t]o promote Land Rights and other legal and cultural rights of the Aboriginal community': ibid 50.

94 Ibid 59.

95 Ibid 60.

96 (2002) 12 NTLR 86.

‘charitable’.<sup>97</sup> The Court noted that the Northern Land Council’s primary purpose was to provide a convenient administrative structure for traditional owners to acquire and hold Indigenous land and for the management of this land.<sup>98</sup> The Northern Land Council also had functions conferred on it as a representative Aboriginal Torres Strait Island body, under Part 10 of the *NTA*. Under section 203BB of the *NTA*, the Council had power to facilitate and assist in the recognition of native title for Indigenous persons.<sup>99</sup>

The Court held that the Land Council was a PBI:

the restoration and management of traditional Aboriginal land for the benefit of Aboriginal people addresses the disadvantaged position of Aboriginal people arising from dispossession and homelessness ... The restoration of land, and with it the promotion of cultural and spiritual integrity, have been recognised as benevolent purposes.<sup>100</sup>

In my opinion, these cases establish that the holding and management of native title interests on behalf of Australian Indigenous people is considered to be of benefit to the public, and such a purpose falls under either the first (‘relief of poverty’) or fourth (‘other purposes beneficial to the community’) categories of charitable purposes established in *Pemsel*.

### **C Does the Holding of Native Title Interests by Prescribed Bodies Corporate Fall within the First *Pemsel* Category of Being for the Relief of Poverty?**

With regard to trusts for the aid of Australian Indigenous people generally, the courts have stated in several cases that ‘Australian Aborigines are notoriously in this community a class which, generally speaking, is in need of protection and assistance’.<sup>101</sup> In *Alice Springs Town Council v Mpweteyere Aboriginal Corporation*,<sup>102</sup> the Court accepted that a purpose of providing land, housing and other community facilities to needy Aboriginal people was for the relief of poverty. In *Northern Land Council v Commissioner of Taxes*,<sup>103</sup> Thomas J stated: ‘Aboriginal persons are disadvantaged by being dispossessed of their land which has placed them in a position of destitution, helplessness and distress’.<sup>104</sup> He also stated that the restoration and management of traditional Aboriginal land for the

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97 *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, Taxation Ruling TR 2003/5 states: ‘[f]or the purposes of Division 50 of the *ITAA 1997*, a public benevolent institution [(‘PBI’)] which is an entity is a charitable institution’: at [24]. In fact, the definition of PBI is more restrictive because whilst every entity that is a PBI is a charity, not all charities are PBIs. As Gino Dal Pont states: ‘a “public benevolent” institution is *not* synonymous with a “charitable institution”, but can properly be seen as a subset of charitable institutions’: above n 17, 37.

98 *Northern Land Council v Commissioner of Taxes* (2002) 12 NTLR 86, 98.

99 *Ibid* 108.

100 *Ibid* 118 (footnotes omitted).

101 *Re Mathew* [1951] VLR 226, 232; *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197, 211; *Tangentyere Council Inc v Commissioner of Taxes* (1990) 99 FLR 363,369; *Macleay Shire Council v Nungera Co-operative Society Ltd* (1994) 84 LGERA 139, 144.

102 (1997) 139 FLR 236, 252.

103 (2002) 12 NTLR 86.

104 *Ibid* 120.

benefit of Aboriginal people addressed the disadvantaged position of these people and was a benevolent purpose.<sup>105</sup>

With regard to land rights specifically, Stein J stated in *Toomelah Co-operative* that the Co-operative's purpose of promoting 'Land Rights and other legal and cultural rights of the Aboriginal community'<sup>106</sup> fell within the fourth, and possibly first, category established in *Pemsel*.<sup>107</sup>

In relation to trusts for the benefit of Australian Indigenous people falling within the relief of poverty category, it is not necessary to establish that the beneficiaries are impoverished as the case law has recognised that, as a class, Australia's Indigenous people are in need.<sup>108</sup> The problem is that a trust for the relief of poverty would be limited to providing cash payments to beneficiaries and/or accommodation,<sup>109</sup> legal or medical aid.<sup>110</sup> If, however, the objectives of the trust were intended to cover other areas, such as education or vocational training or cultural enhancement, the trust would no longer be for the relief of poverty and the public benefit requirement would be introduced.

#### D Other Purposes Beneficial to the Community

The cases discussed earlier in this article clearly establish that trusts established for the advancement of Australian Indigenous people fall within the fourth category in *Pemsel*, as trusts for 'other purposes beneficial to the community'. Such trusts are also required to be for the public benefit. This requirement has been applied in cases where the entity is established for the benefit of Australian Indigenous people. In *Toomelah Co-operative*, the applicant was a community advancement society under the *Co-operation Act 1923* (NSW). The applicant owned various houses which it rented to needy Aboriginal families. One of its objects was the promotion of land rights and other legal and cultural rights of the Aboriginal community. The Court specifically stated that this was a charitable purpose under either the first or fourth category in *Pemsel*.<sup>111</sup> The Court further held that a description of the beneficiaries of the Co-operative as 'member[s] of the Aboriginal community of Toomelah and Boggabilla' was sufficient to fulfil the public benefit requirement.<sup>112</sup>

In *Aboriginal Hostels Ltd v Darwin City Council*,<sup>113</sup> Aboriginal Hostels Ltd was established to provide hostel accommodation to transient Aboriginal people. The Court held that the purpose of the appellant in providing this accommodation was charitable. In doing so, the Court approved the statement in *Re Mathew*

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105 Ibid 118.

106 *Toomelah Co-operative* (1996) 90 LGERA 48, 59.

107 Ibid 59.

108 See, eg, *Re Mathew (deceased)* [1951] VLR 226, 232; *Re Byrning* [1976] VR 100; *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197, 211; *Tangentyere Council Inc v Commissioner of Taxes* (1990) 99 FLR 363, 369.

109 *Re Niyazi's Will Trusts* [1978] 3 All ER 785.

110 *Income Tax and Fringe Benefits Tax: Charities*, Taxation Ruling TR 2005/21, [197].

111 *Toomelah Co-operative* (1996) 90 LGERA 59.

112 Ibid 55.

113 (1985) 75 FLR 197.

(deceased)<sup>114</sup> that ‘Australian Aborigines are notoriously in this community a class which, generally speaking, is in need of protection and assistance’.<sup>115</sup> Justice Nader reasoned that:

It is clear that an object of providing accommodation to all transients whatever race would not be charitable: after all, the most expensive hotels do just that. What I regard as determinative in this case is that the transient person is Aboriginal. The fact that the purposes of accommodation are in respect of Aboriginal persons gives a special character to those purposes which renders an otherwise neutral purpose, charitable.<sup>116</sup>

As the company had relied on the fourth category in *Pemsel*, the Court also confirmed that the purpose had to be for the benefit of the public,<sup>117</sup> and that the class of beneficiaries, being Aboriginal people, was a sufficient section of the community to satisfy this requirement.<sup>118</sup>

In *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation*,<sup>119</sup> Mildren J held that the public benefit requirement was fulfilled in respect of any of the Corporation’s purposes that were not for the relief of poverty, as the potential beneficiaries included all needy Aboriginal people in central Australia.<sup>120</sup>

The case of *Northern Land Council v Commissioner of Taxes*<sup>121</sup> raised the question of whether or not the Northern Land Council was a PBI for the purposes of the *Pay-roll Tax Act 1978* (NT). In reaching its conclusion that the Northern Land Council was a PBI, the Court canvassed the cases on the meaning of charity and considered that PBIs are charities although they fall in a narrower category.<sup>122</sup> The comments in the case are, therefore, relevant to this discussion; although, they are not exactly on point. The Court further stated that the functions of the Council in providing legal aid to persons claiming to be traditional owners of land, and wishing to claim land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), and granting them assistance in managing that land were benevolent purposes (and therefore analogous to charitable purposes).<sup>123</sup> As Thomas J stated:

I agree with the submission made by counsel for the appellant that the restoration and management of traditional Aboriginal land for the benefit of Aboriginal people addresses the disadvantaged position of Aboriginal people arising from dispossession and homelessness (*Gerhardy v Brown* (1985) 159 CLR 70 at 143). The restoration of land, and with it the promotion of cultural and spiritual integrity, have been recognised as benevolent purposes (*Toomelah Co-op v Moree Plains Shire Council* (1996) 90 LGERA 48 at 59).<sup>124</sup>

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114 [1951] VLR 226.

115 *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197, 211.

116 *Ibid* 211.

117 *Ibid* 209-10.

118 *Ibid* 212.

119 (1997) 139 FLR 236.

120 *Ibid* 253.

121 (2002) 12 NTLR 86.

122 *Ibid* 92-3, 95.

123 *Ibid* 95.

124 *Ibid* 118.

This conclusion is supported by the earlier statement of Handley JA on behalf of the Full Court of the Supreme Court of New South Wales, in *Maclean Shire Council v Nungera Co-operative Society Ltd*,<sup>125</sup> when he stated: ‘[i]n my opinion the current disadvantaged position in Australia of Aboriginals is such that any valid charitable trust for their benefit must also be for public benevolent purposes.’<sup>126</sup>

With regard to the ‘public benefit’ requirement of a PBI, the parties in *Northern Land Council v Commissioner of Taxes* agreed that the activities of the Northern Land Council were for the benefit of Aboriginal people in the Northern Territory and that these people were an appreciable section of the community.<sup>127</sup> It is important to note that the beneficiaries of the Council were defined by geographical location rather than a personal relationship so that the benefit was considered to be available to a section of the public.

A final example is *Flynn v Mamarika*,<sup>128</sup> in which the Court held that a trust for the benefit of all Aboriginal persons permanently resident on Groote Eylandt or Bickerton Island, and who were members of any 12 of the clans identified in the trust deed, was a sufficient section of the public to fulfil this requirement for charitable purposes.<sup>129</sup> These clans comprised 88 family groups<sup>130</sup> and approximately 1 200 people.<sup>131</sup> Clans were defined as ‘a grouping of people of common descent and who share spiritual affiliation to a particular area of land (including seas) and have responsibility for the land and sites with special significance on it’.<sup>132</sup> The beneficiaries in this case were not confined to one family or clan and could, therefore, be considered a section of the public.

It seems clear from the discussion that if a trust falls within the charitable category ‘other purposes beneficial to the community’ it must be of benefit to a section of the community. A description of Australian Indigenous people who are resident in a certain area meets this requirement; however, a trust for the benefit of members of an Indigenous family or group limited by blood relations would not meet this requirement.<sup>133</sup>

This requirement could cause problems for smaller land councils, Native Title Representative Bodies and PBCs.<sup>134</sup> Entities must, therefore, be careful to ensure that they are focused on benefiting a group of Indigenous people who are not defined by their family relationships if they wish to gain charitable status. An

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125 (1994) 84 LGERA 139.

126 *Ibid* 144.

127 *Northern Land Council v Commissioner of Taxes* (2002) 12 NTLR 86, 97, 118-19.

128 (1996) 130 FLR 218.

129 *Ibid* 223.

130 *Ibid* 226.

131 *Ibid* 220.

132 *Ibid* 219.

133 This approach has been confirmed in discussions with Julie Martin, Australian Taxation Office representative, held at the seminar entitled ‘Not-for-Profit and Charitable Organisations – Practical Tax Issues’ (Taxation Institute of Australia Seminar, Sydney, 15 November 2006).

134 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Submission to the Consultation on the Definition of a Charity from the Australian Institute of Aboriginal and Torres Strait Islander Studies* (2001) 5 <[http://www.taxboard.gov.au/content/charity\\_subs/Australian\\_Institute\\_of\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_Studies.pdf](http://www.taxboard.gov.au/content/charity_subs/Australian_Institute_of_Aboriginal_and_Torres_Strait_Islander_Studies.pdf)> at 11 October 2007.



example would be defining beneficiaries as those Indigenous persons living in a certain area or practising the traditional culture and law of a certain group.

## VI CONCLUSION

There have been a number of cases that deal with entities established for the purpose of advancing the interests of Australian Indigenous people and whether or not these entities can gain the income tax benefits of being considered charitable or benevolent. The objects of some of the entities considered have been to obtain and maintain native title interests. The cases clearly support the view that an organisation aimed at establishing and/or maintaining land rights for Australia's Indigenous population is charitable, provided its role is for the relief of poverty or for other purposes beneficial to the community. It has not always been clear from the cases, however, into which category an entity falls.

If the organisation is considered to be a charity for the relief of poverty, its objects could be restricted to members of only one family or beneficiaries who are related by blood ties. This type of restriction would not disqualify it from being a charity for income tax purposes. The entity would, however, need to be careful to establish that the gift was not intended to be for private individuals but was actually for the relief of poverty amongst a class of persons, although very narrowly defined.<sup>135</sup> This type of organisation would also be restricted in the type of distributions it could make.

If on the other hand, the entity is considered charitable under the fourth category it must also fulfil the public benefit requirement. A description of beneficiaries as those Aboriginal people living in a certain area would suffice, but not a description that limits them by means of strict family ties. This could create difficulties in situations where land rights belong to a group of Indigenous people by virtue of their membership of a family or clan which is defined by blood ties or descent from common ancestors as, for example, is required by the *NTA*.

Indigenous Australia is seeking new approaches to community development issues.<sup>136</sup> Many Indigenous organisations suggest that establishing Indigenous controlled charities and philanthropic bodies is an important aspect of this new approach.<sup>137</sup> In view of this, it is essential that these bodies know clearly whether or not they fall within the legal concept of 'charitable' for income tax purposes. In light of the above discussion, it is therefore submitted that the ATO end all

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135 Dal Pont, above n 17, 122.

136 See, eg, Anthony Smith, *Indigenous Development – Without Community, Without Commerce* (2006) Australian Review of Public Affairs <<http://www.australianreview.net/digest/2006/09/smith.html>> at 11 October 2007; Lumbu Indigenous Community Foundation, *Submission to the Inquiry into Definitional Issues Relating to Charitable, Religious and Community Service Not-for-Profit Organisations* (2001) 5 <<http://www.cdi.gov.au/submissions/223-LumbuIndigenousCommunityFoundation.doc>> at 11 October 2007.

137 See, eg, Lumbu Indigenous Community Foundation, above n 136, 5; Northern Land Council, *Inquiry into Definitional Issues Relating to Charitable, Religious and Community Service Not-for-Profit Organisations – Northern Land Council Submission* (2001) <<http://www.cdi.gov.au/submissions/236-NorthernLandCouncil.doc>> at 11 October 2007.

unnecessary confusion and publicly state that PBCs under the *NTA* are ‘charitable’ and entitled to exemption from income tax. Furthermore, clarification needs to be given as to whether or not PBCs on behalf of native title holders who are defined by their blood ties are either included or excluded from this charitable status. If the ATO considers that they are excluded, it may well be in the interests of Indigenous entities to obtain a barrister’s opinion as to whether they should commence a test case to determine the correctness of this interpretation.