

**ENTITIES THAT MANAGE AND MAINTAIN NATIVE TITLE:  
CAN THEY BE CHARITABLE TRUSTS?**

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**Abstract**

Section 50-5 item 1.1 of the *Income Tax Assessment Act, 1997*<sup>1</sup> provides that the income of charitable institutions is exempt from income tax. There is no definition of ‘charity’ in the *Income Tax Assessment Act, 1997* and the courts and the Australian Taxation Office have relied on the common law for guidance on this issue. The original conception of ‘charity’ and ‘charitable’ for the purposes of income tax exemption was established in 1891 by Lord Macnaghten in *Commissioner for Special Purposes of Income Tax v Pemsel*<sup>2</sup> (*Pemsel’s case*). 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>3</sup> This article considers the application of the common law definition of charity to entities that maintain native title on behalf of Australian indigenous people. It concludes that in order to gain charitable status entities established for the benefit of indigenous people and their rights to native title must also be of benefit to the public. The current application of the law is that an organisation cannot attain charitable status if the beneficiaries are linked through a personal relationship such as family. This may have serious consequences for holders of native title who are part of the same tribal grouping.

**1. Introduction**

The *Income Tax Assessment Act, 1997* (ITAA)<sup>4</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 the courts and the Australian Taxation Office<sup>5</sup> have relied on the common law for guidance on this issue. The original conception of ‘charity’ and ‘charitable’ for the purposes of income tax exemption was established by

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<sup>1</sup> Section 50-5 item 1.1 *Income Tax Assessment Act, 1997*. This section was formerly s23(e) of the *Income Tax Assessment Act, 1936*.

<sup>2</sup> [1891] AC 531, 583.

<sup>3</sup> *Re Compton* [1945] 1 All ER 198, 205-206 (Lord Greene MR).

<sup>4</sup> This section was formerly s23(e) of the *Income Tax Assessment Act, 1936*.

<sup>5</sup> For example, Taxation Ruling TR 2003/15 ‘Income Tax and Fringe Benefits Tax: Public Benevolent Institutions’.

the English courts over 300 years ago<sup>6</sup> 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>7</sup> This article considers the application of the common law definition of charity to entities that maintain native title on behalf of Australian indigenous people. It considers in particular how the courts have applied the test of public benefit to such entities. It concludes that the holding and maintenance of native title are considered to be of actual benefit to the public and therefore have a charitable purpose. This fulfills the first part of the public benefit test but a further analysis of the case law regarding the second part, that the object of the charity must benefit a section of the community, is more problematic. The current legal formulation of the law is that an organisation cannot attain charitable status if the beneficiaries are linked through a personal relationship such as family. This may have serious consequences for holders of native title who are part of the same family grouping.

## **2. The Income Tax Assessment Acts 1936 and 1997 and the exemption of Charities**

Section 50-5 item 1.1 of the ITAA<sup>8</sup> provides that the income of charitable institutions is exempt from income tax. There is no definition of ‘charity’ in the ITAA.

Although the words ‘charity’ and ‘charitable’ have a common or everyday meaning<sup>9</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>10</sup> This article analyses the technical legal meaning of ‘charity’ in respect of the exemption from income tax and whether or not it applies to organizations established to hold native title on behalf of Australian indigenous people.

## **3. ‘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>11</sup> This Act is referred to as the Statue of Elizabeth and its Preamble set out a list (although it was not meant to be exhaustive<sup>12</sup>) of charitable purposes at that

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<sup>6</sup> *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten).

<sup>7</sup> *Re Compton* [1945] 1 All ER 198, 205-206 (Lord Greene MR).

<sup>8</sup> This section was formerly s23(e) of the *Income Tax Assessment Act, 1936*.

<sup>9</sup> *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten).

<sup>10</sup> For example refer *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten); *Re Hilditch deceased* (1986) 39 SASR 469, 475 (O’Loughlin J); *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 139 FLR 236, 251-252 (Mildren J).

<sup>11</sup> 43 Eliz I c4.

<sup>12</sup> For a complete discussion refer H Picarda, *The Law and Practice Relating to Charities* (3<sup>rd</sup> edition, 1999) 72; F M Bradshaw, *The Law of Charitable Trusts in Australia* (1983) 2.

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>13</sup> Subsequently this was confirmed in *Pemsel's case* where Lord Macnaghten stated that a charity should be a trust for one of the following:

- . the relief of poverty;
- . the advancement of education;
- . the advancement of religion; or
- . for other purposes beneficial to the community.<sup>14</sup>

The classification of charitable purpose into these four areas was seen as a milestone and has been consistently used in judicial considerations ever since.<sup>15</sup>

Subsequent Australian cases have come down very strongly in favour of the principle that for an organization 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>16</sup> The exception to this is a line of cases that indicate that charities for the relief of poverty do not require a public benefit.<sup>17</sup>

To fall within the requirement of public benefit the purpose of the charity must satisfy two aspects. Is the object an actual public benefit and furthermore, is it of benefit to the community or a sufficient section of the community?<sup>18</sup>

#### **4. What is a Public Benefit?**

In order to have a 'public benefit' there must be some tangible benefit of an entity's objectives. 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 too vague and incapable of proof to be a benefit.<sup>19</sup> This has now been amended by

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<sup>13</sup> *Morice v Bishop of Durham* (1805) 10 Ves 522; 32 ER 947.

<sup>14</sup> *Income Tax Special Purposes Commissioners v Pemsel* [1891] All ER Rep 28, 55; [1891] AC 531, 583.

<sup>15</sup> For example *Salvation Army (Victoria) Property Trust v Shire of Fern Tree Gully* (1952) 85 CLR 159, 173; *Ashfield MC v Joyce* (1976) 10 ALR 193.

<sup>16</sup> *Re Compton* [1945] 1 All ER 198, [1945] Ch 123; *Gilmour v Coats* [1949] AC 426; *Dingle v Turner and others* [1972] 1 All ER 878; Applied in Australia in *Re Hilditch deceased* (1986) 39 SASR 469.

<sup>17</sup> *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] 1 All ER 31, 33, 35 (Lord Simonds); *Dingle v Turner* [1972] 1 All ER 878, 888 (Lord Cross of Chelsea).

<sup>18</sup> H Picarda *The Law and Practice Relating to Charities* (3<sup>rd</sup> ed, 1999) 20.

<sup>19</sup> *Gilmour v Coats* [1949] All ER 848, 855 (Lord Simonds).

statute<sup>20</sup> and in fact some commentators consider that this case would not be viewed favourably by modern Australian and New Zealand courts.<sup>21</sup>

The public benefit must be real or substantial<sup>22</sup> although it can extend beyond material benefit to social, mental and spiritual benefits.<sup>23</sup> For example, in *Re Pinion (deceased); Westminster Bank Ltd v Pinion and another*<sup>24</sup> 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. The court concluded that there was no charitable trust and stated that there was no 'useful object to be served in foisting on the public this mass of junk'.<sup>25</sup>

An entity is not for the benefit of the public if its aims are contrary to public policy,<sup>26</sup> unlawful or for a lawful purpose that is to be carried out by unlawful means.<sup>27</sup> Although it might be arguable that a school for thieves or criminals advances education it would not be for the public benefit.<sup>28</sup>

## **5. Is the Holding and Management of Native Title Rights for Traditional Land Owners a Charitable Public Benefit?**

### **5.1 A Brief Background to the Meaning of Native Title**

In the *Mabo* decision of 1992 the High Court accepted the concept of native title when it said:

...the common law of Australia recognizes a form of native title which reflects the entitlements of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands.<sup>29</sup>

This concept does not spring from the common law nor is it a form of land tenure developed by the common law. Native title originates from the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. It could be said to be an intersection of the common law and customary law.<sup>30</sup>

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<sup>20</sup> 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).

<sup>21</sup> *Dal Pont Charity Law in Australia and New Zealand* (2000) 171.

<sup>22</sup> *Re Pinion (deceased); Westminster Bank Ltd v Pinion and another* [1964] 1 All ER 890.

<sup>23</sup> *Dal Pont Charity Law in Australia and New Zealand* (2000), 14-15.

<sup>24</sup> [1964] 1 All ER 890; [1965] Ch 85.

<sup>25</sup> [1965] Ch 85, 107 (Harman LJ).

<sup>26</sup> *Perpetual Trustee Co (Ltd) v Robins and others* (1967) 85 WN (Pt. 1) (NSW) 403, 411. See also *Thrupp v. Collett (No.1)* (1858) 53 ER 844; *Re MacDuff, MacDuff v MacDuff* [1895-9] All ER Rep 154, 162-3; *Re Pieper (deceased); The Trustees Executors & Agency Co. Ltd v Attorney-General (Vic.)* [1951] VLR 42.

<sup>27</sup> *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382, 395.

<sup>28</sup> *Re Pinion (deceased); Westminster Bank Ltd v Pinion and another* [1964] 1 All ER 890, 893; [1965] Ch 85, 105 (Harman LJ).

<sup>29</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 15.

<sup>30</sup> Refer *Fejo v Northern Territory of Australia* (1998) 195 CLR 96, 128.

Native title rights vary due to the diverse nature of systems of indigenous traditional laws and customs and the difficulties in gaining access to information regarding these systems. However generally speaking they include rights to assert valid proprietary claims over an area of land and to speak for and represent the land as cultural property. Other rights flow from this including e.g. the right to hunt or fish.<sup>31</sup>

The development of rights relating to native title is seen as the recognition of what are essentially group rights. These rights therefore affect a range of relationships in Australian society including relationships between members of groups of indigenous Australians and between these groups and the broader community.<sup>32</sup> Once the relationship between groups of native title holders and the broader community is examined the impact of various taxing authorities becomes an important issue.

For a number of reasons including both historical and the desire of indigenous peoples for legal recognition of their interests in the land the Australian legal system has mainly dealt with native title interests through the law of property. Australian law in this area comes about through both the common law e.g. the *Gove Land Rights Case*<sup>33</sup> and the *Mabo (No 2)* case<sup>34</sup> and legislation.<sup>35</sup> The various land rights schemes confer different legal entitlements to indigenous persons depending on the context within which the legislative framework was developed. These rights may or may not be referable to equivalent legal or social relations under the system of traditional law practiced by the relevant group of indigenous persons.<sup>36</sup>

A further difficulty is that because the various legislative schemes *translate*<sup>37</sup> indigenous relations, native title differs under the various statutory land rights schemes such as the scheme under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the ALR(NT)A). As a consequence, it is possible for the same group of indigenous people with the same indigenous relations to be granted different native title land rights and interests under different pieces of legislation.<sup>38</sup>

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<sup>31</sup> For a detailed discussion refer Peter Sutton “Native Title and the Descent of Rights” National Native Title Tribunal Perth (1998).

<sup>32</sup> Refer generally Christos Mantziaris and David Martin *Native Title Corporations: A Legal and Anthropological Analysis* (2000).

<sup>33</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

<sup>34</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>35</sup> For example *Aboriginal Land Rights Act 1983* (NSW), *Aboriginal Law Act 1991* (Qld) *Community Services (Aborigines) Act 1984* (Qld) *Community Services (Torres Strait) Act 1984* (Qld), *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)

<sup>36</sup> E.g. the right to receive ‘mining royalty equivalents’: see *ALR(NT) Pt VI (Aboriginal Benefit Trust Account)* s35.

<sup>37</sup> For a detailed analysis refer Christos Mantziaris and David Martin *Native Title Corporations: A Legal and Anthropological Analysis* (2000) 6-7.

<sup>38</sup> See for example, the discussion of the contrast between legal relations created under the ALR(NT) A 1976 (Cth) and the *Native Title Act 1993* (Cth) in *Pareroutja v Tickner* (1993) 42 FCR 32, 40, 42 (FFC) and *Hayes v Northern Territory* [1999] FCA 1248, [35]. For a detailed analysis refer to the discussion of ‘Native Title is Not Uniform’ in Christos Mantziaris and David Martin *Native Title Corporations: A Legal and Anthropological Analysis* (2000) 45-6.

To state the actual content of native title is therefore a difficult task for at least the following three reasons:

- There are many different relations between native title group members and between different group members and their physical environment. For example, a group may have a general interest in the land and be able to speak in respect of the native title interest or may have more specific and individual hunting or fishing rights.
- The traditional law and custom of indigenous groups and the Australian law relating to this area are both developing and evolving. This means that native title rights and interests will also be changing; and
- Because of the different methods and techniques used by the Australian legal system and the various contexts in which these approaches arise when dealing with indigenous law and custom they do not always disclose the full content of the traditional laws and customs.<sup>39</sup>

Legislation has also been enacted in order to establish Land Councils and other entities charged with the protection of native title interests. For example, the ALR(NT)A states that the core functions of Land Councils are to provide legal aid to persons claiming to be traditional owners of land who wish to make a claim under the Act, to protect the interests of traditional owners in Aboriginal Land in the Land Council area, to assist in the protection of sacred sites, to provide assistance of various kinds in relation to the management of Aboriginal land and to negotiate with others in respect of the land on behalf of its traditional owners and other interested Aboriginals.<sup>40</sup> Native title may be claimed under the procedures established by the *Native Title Act 1993* (Cth) (NTA) which is underpinned by the establishment of prescribed bodies corporate in accordance with the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

These provisions are mirrored in similar legislation relating to Aboriginal land rights at the State level.<sup>41</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>42</sup> These groups may be identified through a variety of features including same language group, common ancestors, religious responsibility and participation and membership of a particular clan.<sup>43</sup> In some instances the legislation has also imposed mechanisms for determining the claimant group. For example, s190B of the NTA was enacted in 1998 to provide for stringent requirements about claimant group descriptions.

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<sup>39</sup> Christos Mantziaris and David Martin “Guide to the Design of Native Title Corporations” Commonwealth of Australia National Native Title Tribunal (1999) 5.

<sup>40</sup> s23(1) *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

<sup>41</sup> For example New South Wales: *Aboriginal Land Rights Act 1983* (NSW); Queensland: *Aboriginal Land Act 1991* (Qld).

<sup>42</sup> For a more detailed discussion refer Peter Sutton ‘Aboriginal Country Groups and the Community of Native Title Holders’ (National Native Title Tribunal Occasional Paper Series No 01, 2001); Jocelyn Grace ‘Claimant Group Descriptions: Beyond the Strictures of the Registration Test’ (Native Title

Section 190B(5) of the NTA provides that:

(5) 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

(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 suggested that this section could be satisfied by reference to biological descent or the adherence to a particular set of traditional laws and customs.<sup>44</sup>

Where a native title claimant group is therefore connected through family ties this poses some difficulty when such a group attempts to claim charitable status under the ITAA. The problem is that the requirement of benefit to a section of the community may not be met.

The issue of 'public benefit' in relation to native title holders therefore poses two questions. Firstly, whether or not maintaining native title interests for Australian indigenous people is of actual benefit to the public and secondly, whether such an object must also benefit a section of the community not connected through a personal relationship such as family.

## **5.2 The Australian Case Law on whether or not Maintaining Native Title Interests is for the Public Benefit?**

The disadvantaged position of Australian indigenous people both culturally, economically and legally has been recognised in a number of judicial decisions<sup>45</sup> and the

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Research Unit: Australian Institute of Aboriginal and Torres Strait Islander Studies, Vol 2, Issues Paper No 2, 2000).

<sup>43</sup> Peter Sutton 'Aboriginal Country Groups and the Community of Native Title Holders' (National Native Title Tribunal Occasional Paper Series No 01, 2001) 15.

<sup>44</sup> Jocelyn Grace 'Claimant Group Descriptions: Beyond the Structures of the Registration Test' (Native Title Research Unit: Australian Institute of Aboriginal and Torres Strait Islander Studies, Vol 2, Issues Paper No 2, 2000) 1.

<sup>45</sup> Refer *Re Mathew* [1951] VLR 226, 232; *Re Bryning* [1976] VR 100; *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197, 211.

furtherance of land rights for indigenous people is seen by commentators as a means of overcoming these disadvantages.<sup>46</sup> In *Toomelah Co-operative Ltd v Moree Plains Shire Council*<sup>47</sup> Stein J stated that he considered the promotion of land rights as falling within the fourth and possibly the first (relief of poverty) categories in *Pemsel's* case.

In *Dareton Local Aboriginal Council v Wentworth Council*<sup>48</sup> the applicant was a local Aboriginal Land Council constituted under the *Aboriginal Land Rights Act 1983* (NSW). The powers of the Council included acquiring, holding and disposing of land and the protection of interests of Aborigines in relation to the land.

The Court stated that a trust for the advancement of Australian indigenous people was charitable within the fourth heading of *Pemsel's* case<sup>49</sup> and approved the statement in *Aboriginal Hostels Ltd v Darwin City Council*:

The 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>50</sup>

The Court considered that the powers relating to holding, managing and disposing of land were charitable as being for the advancement of Australian indigenous people although finding that the Council was not a charity for other reasons.<sup>51</sup>

Subsequently, in *Northern Land Council v Commissioner of Taxes*<sup>52</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 'charitable'.<sup>53</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>54</sup>

The Court held that the Land Council was a PBI and stated:

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<sup>46</sup> For example, refer Report of the Aboriginal Land Rights Commission [769].

<sup>47</sup> (1996) 90 LGERA 48, 59.

<sup>48</sup> (1995) LGERA 120.

<sup>49</sup> (1995) LGERA 120, 125 (Bignold J).

<sup>50</sup> 75 FLR 197, 211 (Nader J) approved by Bignold J in *Dareton Local Aboriginal Land Council v Wentworth Council* (1995) LGERA 120, 125.

<sup>51</sup> The Court decided that one of the powers conferred on the Council was not charitable in itself or incidental to the overarching charitable purpose of advancing the interests of Aboriginal people and that therefore the Council was not a charity (1995) LGERA 120, 126 (Bignold J).

<sup>52</sup> *Northern Land Council v Commissioner of Taxes* [2002] NTCA 11.

<sup>53</sup> Taxation Ruling TR 2003/15 'Income Tax and Fringe Benefits Tax: Public Benevolent Institutions' states that "For the purposes of Division 50 of the ITAA 1997, a public benevolent institution which is an entity is a charitable institution" [24]. In fact the definition of PBI is more restrictive as 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' *Charity Law in Australia and New Zealand* (2000) 37.

<sup>54</sup> [2002] NTCA 11 [28].

...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>55</sup>

These cases have therefore established 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 that such a purpose falls under either the first, 'relief of poverty', or fourth, 'other purposes beneficial to the community', categories of charitable purposes established by *Pemsel's* case.

## **6. The Second Element in the Public Benefit Test: 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.<sup>56</sup> Whilst this section of the public can be small it should not be 'numerically negligible'.<sup>57</sup> The test requires that the beneficiaries 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, whereas donating money to a particular organisation which assists disadvantaged persons in gaining an education has a public benefit.

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>58</sup>

The problem is that the unsuccessful cases have generally failed because the class or group of members of the public, are linked by a relationship to someone or something.<sup>59</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>60</sup> An institution for the benefit of employees of a particular company is not be charitable,<sup>61</sup> neither will a school for the

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<sup>55</sup> *Northern Land Council v Commissioner of Taxes* [2002] NTCA 11 [75] (Thomas J).

<sup>56</sup> *Verge v Somerville* [1924] AC 496, 499; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 305; [1951] 1 All ER 31, 33 (Lord Simonds).

<sup>57</sup> *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).

<sup>58</sup> For a detailed discussion of the role of charities refer Gino Dal Pont *Charity Law in Australia and New Zealand* (2000).

<sup>59</sup> For example, *Re Compton; Powell v Compton* [1945] 1 All ER 198; *Oppenheim v Tobacco Securities Trust Co Ltd* (1951) 1 All ER 31, [1951] AC 297; *Thompson v Federal Commissioner of Taxation* (1959) 102 CLR 315.

<sup>60</sup> *Beatrice Alexandra Victoria Davies v Perpetual Trustee Co (Ltd) and others* (1959) 59 SR(NSW) 112.

<sup>61</sup> *Re Compton; Powell v Compton* [1945] 1 All ER 198; *Oppenheim v Tobacco Securities Trust Co Ltd* (1951) 1 All ER 31, [1951] AC 297.

children of freemasons,<sup>62</sup> or a mutual benefit society such as a friendly society or a trade union.<sup>63</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>64</sup> As theoretically anyone can move to a particular location the section of the public benefited is not restricted by something outside its control such as a family or employment relationship.

Lord Greene MR expressed it in *Re Compton; Powell v Compton*:

[T]hey 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>65</sup>

If benefits are restricted to family members or friends the courts have considered that there is no public benefit.<sup>66</sup> As Farwell J said in 1902:

There 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>67</sup>

### **6.1 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. Lord Greene MR confirmed in *Re Compton; Powell v Compton*<sup>68</sup> that there is no requirement of public

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<sup>62</sup> *Thompson v Federal Commissioner of Taxation* (1959) 102 CLR 315.

<sup>63</sup> *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] Ch 194.

<sup>64</sup> *Re Compton; Powell v Compton* [1945] 1 All ER 198, 201; *Verge v Somerville* [1924] AC 496, 499.

<sup>65</sup> [1945] 1 All ER 198, 201.

<sup>66</sup> *Yeap Cheah Neo and others v Ong Cheng Neo* (1875) LR 6 PC 381; *Ip Cheung-Kwok v Sin Hua Bank Trustee Ltd and others* [1990] 2 HKLR 499.

<sup>67</sup> *Re Delaney; Conoley v Quick* [1902] 2 Ch 642, 648-649.

<sup>68</sup> [1945] 1 All ER 198.

benefit where the charitable object is for the relief of poverty.<sup>69</sup> This approach has been upheld in subsequent cases<sup>70</sup>

There are two main reasons usually given for this exception.<sup>71</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>72</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>73</sup>

This exception was confirmed in the 1997 decision of *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation*.<sup>74</sup> In this case the Northern Territory Court of Appeal held that the aim of the corporation of assisting needy Aboriginal people fell within a trust for the relief of poverty and that therefore there was no public benefit requirement.<sup>75</sup>

This does not however mean that a trust for a very restricted group of poor beneficiaries will be charitable. In *Re Scarisbrick*<sup>76</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>77</sup> Some commentators have stated that whilst a benefit to the public or a section of the public is still required for charities for the relief of poverty, a group of persons may be considered as a section of the public in the poverty cases which would not be considered so in other cases.<sup>78</sup> For example, a trust for the relief of poor relations or poor employees has been held to be charitable<sup>79</sup> although a trust for the education of relations or employees would not have been.<sup>80</sup> A distinction must therefore be drawn between a gift for the relief of poverty amongst a class of persons which will be charitable, or merely a gift to private individuals which has relief of poverty amongst those people as the motive for the gift, which will not be charitable.<sup>81</sup> A gift can therefore be determined as charitable where there is evidence that the intention was to create a perpetual fund in which no one has a personal right, or otherwise shows an intention that goes beyond merely benefiting the statutory next of kin or a narrow class of near relatives of the donor

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<sup>69</sup> *Re Compton* [1945] 1 All ER 198, 205-206.

<sup>70</sup> For example, *Dingle v Turner* [1972] AC 601, 622-625 (Lord Cross); *Re Hobourn Aero Components Limited's Air Raid Distress Fund* [1946] 1 Ch 194, 203-207 (Lord Greene MR); *Re Scarisbrick* [1951] 1 Ch 622, 649-652 (Jenkins LJ).

<sup>71</sup> For a detailed discussion refer Gino Dal Pont *Charity Law in Australia and New Zealand* (2000) 121.

<sup>72</sup> *Re Compton; Powell v Compton* [1945] 1 All ER 198, 206.

<sup>73</sup> *Re Compton; Powell v Compton* [1945] 1 All ER 198, 206.

<sup>74</sup> (1997) 139 FLR 236.

<sup>75</sup> (1997) 139 FLR 236, 252.

<sup>76</sup> [1951] 1 Ch 622.

<sup>77</sup> [1951] 1 Ch 622, 650-651.

<sup>78</sup> Refer for example PS Atiyah "Public Benefit in Charities" (1958) 21 *Modern Law Review* 138, 148.

<sup>79</sup> *Gibson v South American Stores* [1950] Ch 177.

<sup>80</sup> *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Re Compton* [1945] 1 Ch 123, 131.

<sup>81</sup> Gino Dal Pont *Charity Law in Australia and New Zealand* (2000) 122.

or persons defined in some other personal manner.<sup>82</sup> For example, in *Re Scarisbrick*<sup>83</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.

A further example is *Re Hilditch (deceased)*,<sup>84</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.<sup>85</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 legal criterion of ‘poverty’.<sup>86</sup> For the purposes of charity law ‘poverty’ is not the equivalent of ‘destitution’,<sup>87</sup> and is aimed at a situation where a person is unable to sustain a modest standard of living.<sup>88</sup>

### **7. Can Trusts Holding Native Title Interests Fall within the First *Pemsel* Category as 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>89</sup> In *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation*<sup>90</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,<sup>91</sup> and in *Northern Land Council v Commissioner of Taxes* Thomas J stated that ‘Aboriginal persons are disadvantaged by being dispossessed of their land which has placed them in a position of destitution, helplessness and distress.’<sup>92</sup> His Honour went on to say that the restoration and management of traditional Aboriginal land for the benefit of Aboriginal people addressed the disadvantaged position of these people and was a benevolent purpose.<sup>93</sup>

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<sup>82</sup> *Re Scarisbrick* [1951] 1 Ch 622, 655 (Jenkins LJ); *Re Segelman (deceased)* [1995] 3 All ER 676, 687-688 (Chadwick J);

<sup>83</sup> [1951] 1 Ch 622.

<sup>84</sup> (1985) 39 SASR 469.

<sup>85</sup> (1985) 39 SASR 469, 473 (King CJ).

<sup>86</sup> For the legal meaning of ‘poverty’ in this context refer Gino Dal Pont *Charity Law in Australia and New Zealand* (2000) 112-113.

<sup>87</sup> *Trustees of Mary Clark Home v Anderson* [1904] 2 KB 645, 655 (Channell J); *Flynn v Mamarika* (1996) 130 FLR 218, 223 (Martin CJ).

<sup>88</sup> *Ballarat Trustees Executors and Agency Co v Federal Commissioner of Taxation* (1950) 80 CLR 350, 385 (Kitto J).

<sup>89</sup> *Re Mathew* [1951] VLR 226, 232; *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197, 211; Approved in *Tangentyre Council Inc v Commissioner of Taxes* 90 ATC 4352, 4357 (Angel J); A similar statement was made in *Macleay Shire Council v Nungera Co-operative Society Ltd* (1994) 84 LGERA 139, 144 (Handley JA).

<sup>90</sup> 139 FLR 236.

<sup>91</sup> 139 FLR 236, 252 (Mildren J).

<sup>92</sup> [2002] NTCA 11, [84].

<sup>93</sup> [2002] NTCA 11, [75].

With regard to land rights specifically Stein J stated in *Toomelah Co-Operative Ltd v Moree Plains Shire Council*<sup>94</sup> that the Co-Operative's purpose of promoting "Land Rights and other legal and cultural rights of the Aboriginal community" fell within the fourth and possibly first category established in *Pemsel's* case.<sup>95</sup>

Although no case is directly on point the comments discussed above indicate a strong argument that as Australian indigenous people are generally recognised as being in need, a trust for the assistance of these people will be for the relief of poverty and consequently have no additional strict 'public benefit' requirement.

## **8. Entities that Hold Native Title Interests: Other Purposes Beneficial to the Community**

The cases discussed earlier in this article indicate that trusts established to hold and manage native title interests on behalf of Australian indigenous people may fall within the fourth category under *Pemsel's* case, as trusts for 'other purposes beneficial to the community'. Such trusts are also required to be for the public benefit and this requirement has been applied in cases where the entity is established for the benefit of Australian indigenous people. In *Toomelah Co-Operative Ltd v Moree Plains Shire Council*<sup>96</sup> the applicant was a community advancement society under the *Co-operation Act 1923* (NSW) which 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 and the court specifically stated that this was a charitable purpose under either the first or fourth category in *Pemsel's* case.<sup>97</sup> The court further held that a description of beneficiaries of the Co-Operative as 'members of the Aboriginal community of Toomelah and Boggabilla' was sufficient to fulfill the public benefit requirement.<sup>98</sup>

In *Aboriginal Hostels Ltd v Darwin City Council*<sup>99</sup> the company was established in order to provide hostel accommodation to transient Aboriginal people. The court held that the purpose of the appellant in providing this accommodation was charitable and in doing so approved the statement in *Re Matthew*<sup>100</sup> that "Australian Aborigines are notoriously in this community a class which, generally speaking, is in need of protection and assistance".<sup>101</sup> Mr 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

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<sup>94</sup> 90 LGERA 48.

<sup>95</sup> 90 LGERA 48, 59.

<sup>96</sup> 90 LGERA 48.

<sup>97</sup> 90 LGERA 48, 59.

<sup>98</sup> 90 LGERA 48, 55.

<sup>99</sup> 75 FLR 197.

<sup>100</sup> [1951] VLR 226.

<sup>101</sup> [1951] VLR 226 approved at 75 FLR 197, 211 (Nader J).

purposes of accommodation are in respect of Aboriginal persons give a special character to those purposes which renders an otherwise neutral purpose, charitable.<sup>102</sup>

As the company had relied on the fourth category in *Pemsel's* case the court also confirmed that the purpose had to be for the benefit of the public<sup>103</sup> and that the class of beneficiaries, being Aboriginal people, was a sufficient section of the community to satisfy this requirement.<sup>104</sup>

In *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation*<sup>105</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>106</sup>

The case of *Northern Land Council v Commissioner of Taxes*<sup>107</sup> raised the question of whether or not the Northern Land Council was a public benevolent institution(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>108</sup> The comments in the case are therefore relevant to this discussion although 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 wishing to claim land under the ALR(NT)A and granting them assistance in managing that land were benevolent purposes (and therefore analogous to charitable purposes<sup>109</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>110</sup>

This is supported by the earlier statement of Handley JA on behalf of the Full Court of the Supreme Court of New South Wales in *Macleay Shire Council v Nungera Co-operative Society Ltd*<sup>111</sup> when he stated: "In my opinion the current disadvantaged

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<sup>102</sup> 75 FLR 197, 211 (Nader J).

<sup>103</sup> 75 FLR 197, 209-210 (Nader J).

<sup>104</sup> 75 FLR 197, 212 (Nader J).

<sup>105</sup> 139 FLR 236.

<sup>106</sup> 139 FLR 236, 253.

<sup>107</sup> [2002] NTCA 11.

<sup>108</sup> [2002] NTCA 11, [15]. Also [21] (Mildren J).

<sup>109</sup> [2002] NTCA 11, [21].

<sup>110</sup> [2002] NTCA 11, [75].

<sup>111</sup> 84 LGERA 139.

position in Australia of Aboriginals is such that any valid charitable trust for their benefit must also be for public benevolent purposes.”<sup>112</sup>

With regard to the ‘public benefit’ requirement of a PBI the parties in the *Northern Land Council* case 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>113</sup>

A final example is *Flynn v Mamarika*<sup>114</sup> where 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 fulfill this requirement for charitable purposes.<sup>115</sup>

It seems clear from the discussion of the above cases 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. Entities must therefore be careful to ensure that they are aimed at benefiting a group of indigenous people who are not defined by their family relationships if the wish to gain charitable status. An 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.

## 9. Conclusion

There have been a number of cases that deal with entities established for the purpose of attaining and managing native title interests on behalf of Australian indigenous people and whether or not these entities can gain the income tax benefits of being considered charitable or benevolent. The cases have clearly stated that an organization aimed at establishing and/or maintaining land rights for Australia’s indigenous population is charitable as either for the relief of poverty or for other purposes beneficial to the community. It has not always been clear from the cases however which category the entity has fallen into.

If the organization is considered to be a charity for the relief of poverty it is strongly arguable that its objects could be restricted to members of only one family or beneficiaries who are related by blood ties and that this 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

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<sup>112</sup> 84 LGERA 139, 144.

<sup>113</sup> [2002] NTCA 11, [26]. Also confirmed at [78] (Thomas J).

<sup>114</sup> (1996) 130 FLR 218.

<sup>115</sup> (1996) 130 FLR 218, 223 (Martin CJ).

the relief of poverty amongst a class of persons, although very narrowly defined.<sup>116</sup> If on the other hand, the entity is considered charitable under the fourth category it must also fulfill 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 their 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 that is defined by blood ties or descent from common ancestors as for example, is required by the NTA .

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<sup>116</sup> Gino Dal Pont *Charity Law in Australia and New Zealand* (2000) 122.