A DEFINITION OF CHARITY

SUBMISSION ON CONSULTATION PAPER

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1. This submission deals only with the comments made at [67]-[70] of the Consultation Paper under the title "Familial Ties."

2. Whether or not a statutory definition of charity is adopted, there is merit in clarifying the requirement of public benefit in connection with trusts for Aboriginal peoples. By use of a mechanism like that employed in the *Extension of Charitable Purposes Act 2004* (Cth), provision could be made (along the lines of that in New Zealand) that an entity is not outside the scope of charity only because the persons its objects benefit may be linked by common descent.

3. The issue is most likely to arise in cases involving trusts or ventures that seek to promote the interests of Aboriginal peoples with traditional associations to land. In this respect, indigenous traditional laws and customs that support rights to land will be passed down from generation to generation. A common aspect is for members of the group to inherit and transmit right to country through principles of descent, although other group membership criteria will often by involved.

4. It is submitted that while the presence of familial ties of that kind does not deny a trust for the purposes of promoting the interests of indigenous land holders the requisite public element, the issue is one appropriate for legislative clarification.

5. Generally, the cases treat a trust for the benefit of a group of Aboriginal peoples as falling within the fourth head of charity in *Pemsel's Case* as purposes beneficial to the community.[1] Some cases, however, treat such a trust as within the first head as being directed to the relief of poverty.[2]

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1 The cases on the point are collected in Dal Pont, *Law of Charity* (2010) at [11.11] and the accompanying footnotes.

2 *Radmanovich v Nedeljkovic* (2001) 52 NSWLR 641 at 665 [136]; *Trustees for Indigenous Barristers' Trust v Federal Commissioner of Taxation* (2002) 127 FCR 63 at 79 [22]-[23].

6. The basic proposition recognised in the case law is that Aboriginal peoples, including traditional Aboriginal owners of land, constitute a disadvantaged section of the community such that measures designed to further their interests may be seen as directed towards the relief of that disadvantage.[3] On that footing, a disposition expressed in general terms for the benefit of Aboriginals,[4] or a group of Aboriginals,[5] is considered to be a disposition for charitable purposes.

7. The general rule is that a trust, in order to be charitable in a legal sense, must be for the benefit of the public or some section of the public. Where relief is directed to a group of Aboriginals linked (in part) by common descent there is an argument that the requisite public element with which charitable trusts, other than a trust for the relief of poverty, are concerned is lacking.[6] The argument derives from what is known as the *Comptom-Oppenheim* test that, putting aside trusts for the relief of poverty, the public element needed for a valid charitable trust is lacking if the quality or characteristic which joins a class of persons benefited by a disposition depends upon a personal relationship.[7]

8. In the case of trusts for the relief of poverty, it is no objection that those who may benefit are related – the "poor relations" cases have always provided exceptions to the general rule.[8] Also, there are recognised charities within the fourth head involving purposes beneficial to the community where criteria of personal ties have presented no difficulty – trusts for the repatriation of returned service men and women involving application of trust funds for their benefit, and for the benefit of their children, have been recognised as valid public charitable trusts tending to benefit the community as a whole.[9]

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3 *Northern Land Council v Commissioner of Taxes (NT)* (2002) 171 FLR 255 at 261-2 [23]-[28], 264 [34].

4 *Re Mathew* [1951] VLR 226 – gift to be used at direction of trustee for the benefit of Australian Aborigines.

5 *Re Bryning* [1976] VR 100 – gift to be applied for the benefit of Aboriginal women in Victoria – *Flynn v Mamarika* (1996) 130 FLR 218 – trust for Aboriginals resident on two islands belonging to 12 clans.

6 Martin, "Prescribed Bodies Corporate under the Native Title Act" (2007) 30 *UNSWLJ* 713.

7 *Re Comptom; Powell v Comptom* [1945] Ch 123 and *Oppenheim v Tobacco Services Trust Co* [1951] AC 297.

8 *Scarisbrick; re Cockshott v Public Trustee* [1951] Ch 622 at 637, 640; *Thompson v Federal Commissioner of Taxation* (1959) 102 CLR 315 at 321-3.

9 *Downing v Federal Commissioner of Taxation* (1971) 125 CLR 185 at 200.

9. The public benefit requirement seeks to distinguish organisations that look outward and provide public benefits from those that are inward looking and self-serving for private benefit. The distinction ensures that persons not use charity's privileged treatment in revenue law to secure private benefit or pursue private purposes. But public benefit may exist if, although there is a personal nexus between the persons to benefit from the object or purpose, the class of persons can be described otherwise than by reference to that personal nexus.[10]

10. Thus far Australian courts have not considered that links of common descent would deny to a trust that benefits a group of Aboriginals charitable status.[11] Also, a trust of that kind may be seen as involving the relief of poverty, bearing in mind that "poverty" is a relative condition[12] and does not equate to destitution; the object of being self-supporting can involve relief of poverty.[13]

11. Nevertheless, there remains the chance that a *Comptom-Oppenheim* type argument could be used as preventing recognition of a trust for the benefit of a group of Aboriginal peoples as a charitable trust. It is, I understand, a point that has been taken by the Federal Commissioner of Taxation in the context of tax exemptions.

12. The argument assumes, wrongly in my view, that descent from common ancestors is the criterion which is the quality or characteristic that joins together the members of the group (a clan or so forth) to be benefited and distinguishes them from other members of the public. The assumption is wrong because the relevant link is the acknowledgment and observance of traditional laws and customs by the group in relation to a tract of country. That link is the tie that binds members of the group together. And the connection that Aboriginal peoples have with country is essentially

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10 *Strathalbyn Show Jumping Club v Mayes* (2001) 79 SASR 54 at 74 [96]; Warburton, *Tudor on Charities* Ninth Edition at [1-010] referring at fn (73) to *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 at 205 (subsequent appeal *Latimer v Commissioner of Inland Revenue* [2004] 1 WLR 1466 at 1477 [37].

11 Dal Pont, *Law of Charity* (2010) at [3.11].

12 *Maughan v Federal Commission of Taxation* (1942) 67 CLR 388 at 395.

13 Dal Pont, *Law of Charity* (2010) at [8.7] referring at fn (29) to *Re Central Employment Bureau for Women* [1942] 1 All ER 232 at 233.

spiritual.[14] Hence, just as a trust for religious purposes is presumed to involve public benefit, so too should a trust directed to maintenance of that traditional connection.

13. Bearing in minding that it is the past dispossession of Aboriginal people, and the harmful social consequences that flow from that disposition, that provide the common quality or characteristic that makes Aboriginal people an appreciable section of the community in need,[15] a trust designed to address that disadvantage should not fall outside the scope of charity simply because the people concerned have familial ties. What is (or should be) involved is a broader proposition that a trust that has as its object improvements in the social, economic and educational status of a group (or section of the public) recognised as being disadvantaged in Australia society is within the legal conception of a charitable trust.[16]

14. For these reasons, it is submitted that there is merit in clarifying the requirement of public benefit in charity law in connection with trusts designed to address the disadvantaged position of Aboriginal peoples.

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14 *Milirrpum v Nabalco* (1971) 17 FLR 141 at 167; *Western Australia v Ward* (2002) 213 CLR 1 at 64 [14].

15 *Gerhardy v Brown* (1985) 159 CLR 70 at 143 dealing with land rights legislation as a special measure under the *Racial Discrimination Act 1975* (Cth).

16 *Public Trustee v Attorney-General (NSW)* (1997) 42 NSWLR 600 at 612.