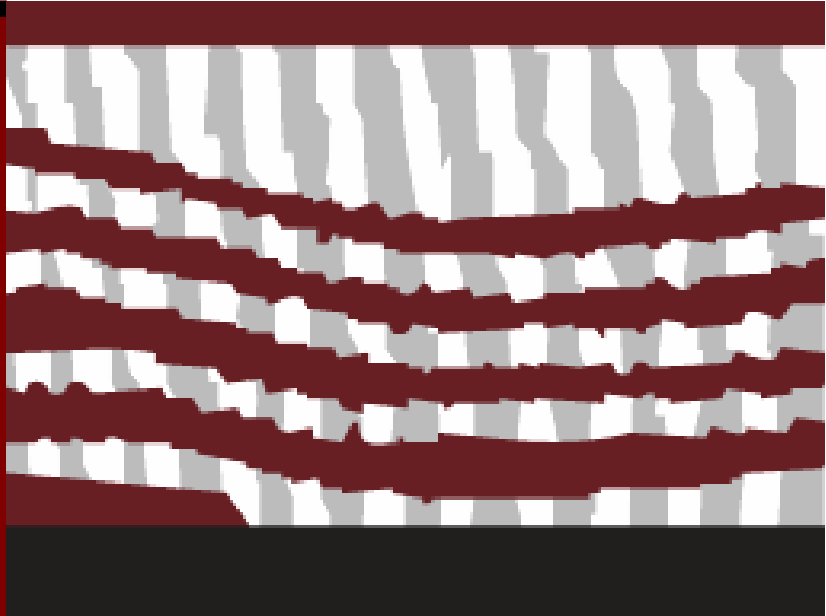


Taxation, trusts and the distribution
of benefits under native title
agreements

prepared by Lisa Strelein and Tran Tran



NATIVE TITLE RESEARCH REPORT
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Taxation, trusts and the distribution of benefits under native title agreements

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Contents

TABLE OF ABBREVIATIONS	III
ACKNOWLEDGEMENTS	IV
1. OVERVIEW OF NATIVE TITLE AGREEMENT MAKING, TAXATION AND TRUSTS – DR LISA STRELEIN	1
1.1 Ideal trust structures	2
1.2 Compliance issues	3
1.3 The role of NTRBs	3
1.4 Relationship between agreements and native title determinations	4
1.5 Additional tax obligations	4
1.6 Information services and support	5
1.7 Equity, conflict and abuse of power	5
2. CREATION OF TRUSTS: OBTAINING AND MAINTAINING CHARITABLE STATUS – ALEXANDRA RICHARDS QC	6
2.1 Tax implications for charitable trusts	6
2.2 What constitutes a charitable trust?	6
2.3 Relationship between trust structures and PBCs	8
3. PRACTICAL ISSUES FOR NATIVE TITLE HOLDERS IN ESTABLISHING CHARITABLE TRUSTS – ALISON MURPHY	9
3.1 Charitable v non-charitable trusts	9
3.2 Choosing to establish a charitable trust	10
4. SCALING AGREEMENTS: AUTONOMY AND AUTHORITY – KYM ELSTON ..	13
4.1 Example 1	13
4.2 Example 2	14
4.3 Example 3	14
4.4 Example 4	14
4.5 Example 5	14
4.6 Key considerations	15
5. ETHICAL OBLIGATIONS IN PRE-DETERMINATION NEGOTIATIONS – ROLAND COLINARD AND PHILIP HOPE	15
6. CREATING A DISTRIBUTION POLICY AND TAXATION ISSUES OF DISTRIBUTIONS – MURRAY HUTCHINGS	16
7. THE ROLE OF NTRBS IN THE DISTRIBUTION OF BENEFITS	17
8. FINAL REFLECTIONS AND ISSUES FOR CONSIDERATION	18
9. ISSUES FOR FUTURE CONSIDERATION	19

Table of abbreviations

ALRM	Aboriginal Legal Rights Movement
ATO	Australian Tax Office
CLC	Central Land Council
CQLC	Central Queensland Land Council
DGR	Deductible Gift Recipient
FACSA	The Department of Family, Community Services and Indigenous Affairs
FBT	Fringe benefits tax
FBTAA	<i>Fringe Benefits Tax Assessment Act 1986 (Cth)</i>
GLSC	Goldfields Land and Sea Council
ITAA 1977	<i>Income Tax Assessment Act 1977 (Cth)</i>
NLC	Northern Land Council
NQLC	North Queensland Land Council
NTA	<i>Native Title Act 1993 (Cth)</i>
NTRB	Native Title Representative Body
NTSP	Native Title Service Provider
NTSV	Native Title Services Victoria
OIPC	Office of Indigenous Policy Coordination
PBC	Prescribed Body Corporate

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Taxation, Trusts and the Distribution of Benefits

Taxation, trusts and the distribution of benefits gained under the native title scheme have created emerging issues for Native Title Representative Bodies. There is a need to develop protocols for dealing with post determination benefits that are culturally appropriate while also maximising the economic and social potential for claimant communities. At the Senior Professional Officers Workshop conducted at the University of New South Wales in September 2006, representatives from the national Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) network met and discussed the problems that have emerged, the legal options available to claimants and the outcomes this has produced.

This report is divided into the key discussion issues. It begins with an account of the major themes raised during a general discussion of the issues of taxation, trusts and the distribution of benefits that have arisen in the various NTRB service areas. This is followed by specific case studies and information sessions dealing with taxation, structuring of agreements, trusts and distribution policies. The report concludes by detailing the future directions for NTRB/NTSPs and how these emerging issues can be dealt with.

1. Overview of native title agreement making, taxation and trusts – Dr Lisa Strelein

Agreement making has evolved as a feature of the native title scheme. However, with the exception of the *Jango v Northern Territory of Australia*¹ decision, compensation payments within the native title context are rarely tested. There is little public information available on agreement benchmarking nor are there consistent methods of documenting agreements employed by NTRBs and NTSPs. Further, the more abstract implications of economic gains, cultural recognition, employment and training benefits on claimants communities are often difficult to quantify.

Key questions have emerged as to how these issues can be assessed in order to develop best practise models as well as gauge the implications of these agreements. The sustainability of agreements had also emerged as a central issue and ancillary to this, the proper role of NTRBs, governments and private parties in ensuring that claimants have the knowledge and resources to adequately manage, distribute and maximise their native title benefits.

¹ [2006] FCA 318 (*Jango*).

Key discussion themes:

- What is the interrelationship between funding and governance structures of Prescribed Bodies Corporate (PBCs) such as in the case of the Tanami agreement.²
- Who constitutes the ‘claim group’ and qualifies to benefit from the claim?
- Should intergenerational benefits be the main thrust of agreements? How can agreements be structured to benefit both the current community and future generations?
- Where trusts are employed to manage funds from an agreement, which models are ideal and what are the benefits and detriments of adopting a particular model?
- How should payments be characterised? What taxation principles apply for these characterisations? (For example, can some payments be considered compensation for the loss of amenity such as in the context of personal torts?)
- Do taxation regimes drive the structure and content of agreements? How do the rights under agreements, benefits and goals of agreements influence their final form?

A number of key issues emerged from the discussion of NTRBs following the presentation by Dr Lisa Strelein:

- Ideal trust structures
- Compliance issues
- The administrative burden of administering trusts
- The relationship between agreements and a native title determination
- Dealing with additional taxation issues

1.1 Ideal trust structures

While many agreements have been reached without a clear rationale for the holding and distribution of benefits in mind, the model trust structures employed were based on both philosophical and pragmatic considerations. There were general issues in relation to maximising the benefits for the entire community and the need to ensure that administrative costs and taxation obligations were kept to a minimum.

One of the preferred trust structures was a charitable trust which can maximise the benefit available to claimants since it has the least taxation implications. However, some NTRBs warned that charitable trust structures can be inflexible

² National Native Title Tribunal, ‘Registered ILUA Summary’ (2006) *Indigenous Land Use Agreements* <http://www.nntt.gov.au/ilua/1032847790_3268.html> at 18 October 2006.

and paternalistic. They preferred to avoid the ‘welfare’ mentality despite the tax implications of other trust structures. Others perceived that charitable trust structures failed to serve the needs of clients or attracted too much scrutiny. (The discussion of Charitable Trusts was taken further in later sessions).

One NTRB pointed out that a distinction needs to be made between pre-determination and post determination trust structures. The former often involved greater uncertainty around the beneficiaries of the agreement whereas the latter involved Prescribed Bodies Corporate (PBCs) guided by a determination under the *Native Title Act 1993* (Cth) (NTA).

Trust structures were also chosen based on the scale of agreements. Some NTRBs raised the need for alternative trust structures that would maximise the utility of only small amounts of money. For example, the Central Land Council (CLC) said that where smaller payments were involved, community based models for pooling funds could be used to minimise the administrative burden and ensure that the utility of the funds was not diminished. Other NTRBs suggested that a consolidated trust can be used in such circumstances and subdivided to reflect the varied needs or interests of the community. Others said that where benefits were minimal, a bare trust account was ideal to allow the funds to accrue interest.

The level of detail and consideration given to designing trust structures also varied significantly. The Northern Land Council (NLC) noted that trust structures should be sensitive to the internal dynamics of the claim group. Where governance structures emulated traditional structures of social authority they were more likely to be sustainable and less likely to lead to disputes within the claim group. (See for example the Miriuwung Gajerrong and Argyle Diamond Mines agreements). In contrast, other NTRBs said that they had no control over trust structures since they are determined within commercial environments.

1.2 Compliance issues

The inability to monitor compliance was a significant issue for many NTRBs. The Goldfields Land and Sea Council (GLSC) said that it was often difficult to collect data on the implementation and compliance levels of agreements. Other NTRBs are considering employing a compliance officer to ensure that the terms of agreements were met.

1.3 The role of NTRBs

There was a wide divergence on the perceived role and involvement of NTRBs in the management and distribution of benefits. Some said that they were extensively involved in negotiating, designing and implementing final agreements. Others refused to be involved in the process noting the burden and liability this placed on the NTRB. Some NTRBs warned that poor drafting can lead to further litigation and create an administrative burden.

Some participants said that NTRBs have an interim role in assisting traditional owners but the final responsibility lay with native title groups to manage their own affairs. Both the Aboriginal Legal Rights Movement (ALRM) and Native

Title Service Victoria (NTSV) noted that there was a significant administrative burden associated with setting up trusts especially, in the case of NTSV, where only small scale agreements were involved. NTSV noted that they did not have the expertise to manage trusts and were reliant on outsourcing the administrative requirements of managing trusts.

One NTRB noted that formal compliance issues were not within the realm of NTRBs. Even if they were a part of the functions of the NTRB they noted that it would be preferable to deal with compliance issues on a case by case basis rather than adopt one whole of NTRB approach. Some NTRBs explicitly stated that they did not give taxation advice and saw their role as being limited to reaching a determination or agreement rather than ensuring successful implementation and compliance.

1.4 Relationship between agreements and native title determinations

Concerns were also raised as to the sustainability of agreements where a native title determination failed to eventuate. However one NTRB noted agreements that included a clause to ensure that the agreement would continue even where there was a determination that native title does not exist in the claim area. This is generally consistent with the intention of the parties to the agreement. Such issues may be less problematic in the long term where overlapping claims have been resolved. In contrast, the difficulties inherent in the Burrup Agreement where a determination was reached that reflects a different group dynamic to that enshrined in the agreement can cause friction within/between groups.

1.5 Additional tax obligations

All NTRBs acknowledged that the taxation arrangements for native title agreements were highly uncertain and unsatisfactory, both in determining the tax effect of the agreement, for example in valuing the agreement, as well as the taxation implications once the agreement is implemented and that taxation of the down stream flow of benefits. Some NTRBs noted that they have no internal expertise in this area and are reliant on pro bono advice, while others revealed that they have been refused advice on more complex tax structures because of the lack of certainty in this area of law.

The taxation burden of some agreements, as discussed below, can be debilitating, to the point that agreements must be refused. For example, the content of agreements such as land transfers can create additional taxation burdens on claimants, which are beyond the means of the claimant group to meet. In instances where native title is surrendered for freehold land, some claimants face the burden of paying for council rates, capital gains tax and stamp duty and would be forced to sell the asset in order to meet the debt.

GLSC representatives noted that there would be taxation obligations such as stamp duty ancillary to heritage agreements that would need to be borne by the claimants as income recipients. However, other NTRBs noted that taxation issues could be a matter of the contractual clauses themselves. For example tax

obligations can be a part of standard heritage agreements (such as those in Queensland that offer a set amount of jobs, payments and fees) that are contingent on proponents being responsible for taxation. Similarly, agreements can include clauses that ensure that the mining company is liable for stamp duty, just as they are for the Mining Withholding Tax (as per the legislation). Further the agreement can also place responsibility on the proponent for the valuation of the agreement.

Best practice in this area seems to be dominated by ‘least worst’ options – including reliance of charitable trusts and deflecting responsibility for taxation to proponent parties.

1.6 Information services and support

A number of NTRBs recognised that there was often little information available to measure the ‘success’ of the agreements reached. They suggested that a database detailing the content and scope of agreements and records of whether the agreed outcomes of agreements have been reached would be useful. While the ATNS database was noted, there was a need for more detailed information about clauses and issues arising from agreements that raised difficult confidentiality issues, especially for a public site like the ATNS site.

1.7 Equity, conflict and abuse of power

The structures of an agreement or trust can create opportunities for conflict within groups, perceived or real inequities in distribution or abuse of power. Some pointed to the complications that can arise when communities do not fully understand the implications of certain agreements and how they may or may not be able to access the benefits agreed. For example, funds can be tied in trust funds managed by the mining company which will not be released for a significant amount of time. These conditions imposed by mining companies when negotiating agreements has meant that in one example, claimants have had to wait for two and a half years before being able to access funds.

There were also some concerns raised that the terms of the agreements themselves would be unfair. The Department of Family, Community Services and Indigenous Affairs (FACSIA) (formerly the Land Branch of the Office of Indigenous Policy Coordination (OIPC)) noted that it had received several complaints concerning unfair distribution policies and power abuses. Further it noted that trust law can be limited in its ability to protect beneficiaries in the process.

In order to create equity, some NTRBs suggested pigeonholing funds based on different purposes that meet the needs of the community. Further these issues should be decided before the value of the benefits is known in order to avoid disputes within claimant groups (see further discussion in Part 6.) Other NTRBs noted that disputes over legitimacy of identity and entitlement in claim groups can actually fracture the community that is meant to benefit from the trust.

2. Creation of trusts: Obtaining and maintaining charitable status – Alexandra Richards QC

2.1 Tax implications for charitable trusts

Charitable trusts have significant taxation benefits and have become a common model for managing the benefits received by native title groups under native title agreements. There are two key endorsements from the Australian Taxation Office (ATO) that are relevant to tax exemptions.³ First, a ‘charitable’ entity is exempt from income tax under Division 50 of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997) and, second, Division 30 allows for tax deductions for gifts made to certain entities endorsed by the Commissioner of Taxation as ‘deductible gift recipients’ (DGR).

Some trusts will qualify as both tax exempt charities and DGR, these generally fall into the category of ‘public benevolent institutions’ or a ‘public fund’ for the relief of persons in necessitous circumstances. The ITAA 1997 therefore draws a distinction between a charitable institution, which is called into existence for, and with objects directed to, a charitable purpose, on the one hand; and on the other, a charitable fund, which is a pool of money that trustees distribute in accord with the terms of an instrument. Thus, in order to receive full taxation benefits of DGR the charitable trust must be operated as a ‘public benevolent institution’. There is no definition of a ‘public benevolent institution’ in the ITAA 1997. This definition is applied according to the circumstances of the case.⁴

Charitable trusts are also given tax concessions under fringe benefits legislation. The *Fringe Benefits Tax Assessment Act 1986* (FBTAA) allows for a benefit provided to an employee of a public benevolent institution to be exempt from the fringe benefits tax (FBT). Concessions may also be made under other tax legislation. For example State and Territory pay-roll tax, land tax and duties and local government rates and charges.

2.2 What constitutes a charitable trust?

There are strict requirements associated with gaining and maintaining charitable trust status. To achieve tax exempt charitable status a charitable trust must be established for a ‘charitable purpose’. It is not sufficient to include among the purposes of the trust that it is ‘established for public charitable purposes’, its purpose must also be charitable in the ‘strict legal sense’. According to the Taxation Ruling TR 2005/21, which is the key Taxation Ruling in this area,⁵ the

³ These endorsement do not apply only to trusts but any organisation (for example, what are commonly called not-for-profit organisations) that meets the purposes set out in the Act.

⁴ *NSW Barristers Trusts Association* [2002] FCA 1474 (Gyles J).

⁵ [Taxation Ruling TR 2005/21](#) re: Income tax and fringe benefits tax: charities. Note should also be made of [TR 2005/22](#) re: Income tax: Companies controlled by exempt companies, and [TR 2000/11](#) re: Endorsement of income tax exempt entities.

term ‘charitable’ is still based on the 1601 Statute of Elizabeth and the common law.⁶ The purposes falling within the legal description of a charity are:

- The relief of poverty;
- The advancement of education;
- The advancement of religion;
- Other purposes beneficial to the community.⁷

The ATO suggests that the trust must benefit the whole community or an appreciable section of the community. This often referred to as the ‘public benefit requirement.’ However, where a trust is established simply for the relief of poverty, this public benefit test does not apply, nor in circumstances where a purpose is deemed charitable, for example in the case of childcare. In particular, as the Tax Ruling specifically highlights, if the purposes of the trust seek to benefit specific persons (other than in their capacity as members of the public) then that will not be meet the public benefit test. That is, the purpose of the trust will be seen as for private benefit.

It should be noted that the case law has evolved against the grain of the rulings of the Tax Commissioner. For example, public benefit has been held to apply not to an appreciable section of the whole community but to an appreciable section of a needy or important class of persons in the community. Indigenous peoples have been recognised by the judiciary as a class of persons in need of assistance. In *Re: Matthew*⁸ the court noted that Aboriginal people are ‘notoriously a class of a community in need of protection and assistance’, which is within the meaning of the Statute of Elizabeth definition of charity.⁹

In *Trustees of the Indigenous Barristers Trust v Commissioner of Taxation*¹⁰ the court considered broader demographic trends such as statistics of poverty and life expectancy as a part of the context in which the charitable status of the trust are considered. The decision also considered the public benevolent status of the fund with regard to the proportion of secondary funding, training and employment supported by the trust and found that it did satisfy the public benevolent objective. Central to this finding was the fact that the trust benefited the Indigenous community as a whole, even though only a few people would receive direct support.

⁶ *Commissioners for Special Purposes of Income Tax v Pemsell* [1891] AC 531 at 583.

⁷ [Taxation Ruling TR 2005/21](#), [12-13].

⁸ (1951)VLR 226 (O’Brien J).

⁹ This was affirmed in *Shire of Ashburton v BindjBindi Community Aboriginal Corporation* [1999] WASC 108, [19], also noting a long line of supporting authority at [20]. The case concerned exemption from rates under the *Local Government Act 1995* (WA). Wheeler J held that land is not rateable because it is being used ‘exclusively for charitable purposes’ (see note 11 and accompanying text below). The Supreme Court decision took judicial notice of the fact that the advancement of Aboriginal people generally is a charitable purpose.

¹⁰ [2002] FCA 1474 (Gyles J).

Operating commercial activities can compromise the DGR status of charitable trusts. However in some cases commercial activities may be regarded as a way of financing the core charitable activities of the trust. The Tax Commissioner has applied the ‘incidental’ purpose test in order to determine whether a tax exemption still applies. Providing that non-charitable activity is *only incidental* to the purpose of the trust then commercial activities do not compromise the charitable trust status of the organisation. The objects of the trust become relevant here. They need to be broad enough to include commercial activities but cannot be purely commercial.

In *Bindi Bindi*¹¹ this was determined according to the activities supported by the trust. It was largely found that even though individual activities may not be charitable, they were only ancillary to primary objects of the trust and did not detract from the charitable nature of the trust, including its characterisation as ‘exclusively charitable’. In particular, the court considered that the rent paid was below market or low cost; and the activities funded by the trust, such as the operation of a kitchen for the benefit of pensioners, recreation facilities and rehabilitation programs; as well commercial activities such as the sale of trees, art programs and administrative services, vehicle repair and maintenance services were all ancillary. Therefore, it is not a matter of assessing each activity as charitable or not, but to look at the relationship between the activities.

In drafting the objects:

- don’t exclude commercial activities
- be clear about the role of the Trustee
- don’t cut off development into new areas of activity.

To maintain charitable status, the trust must be a ‘public service’ organisation and not a lobbying body. But, like commercial activities, where lobbying or advocacy is only incidental – a means to the charitable purpose – it should not threaten the status for taxation purposes (this should be distinguished from any risk to any government funding).

2.3 Relationship between trust structures and PBCs

A distinction should be made between pre-determination and post determination trusts. Pre-determination trusts can take any form whatsoever subject to commercial and other consideration such as setting up affairs to maximise the benefits to the community. In practical terms this also means exploring options to minimise additional taxation requirements such as stamp duty. In contrast, post-determination trust structures are critically affected by the existence of the PBC. Section 56 of the NTA expressly confers or creates a statutory trust for the benefit for the group holding the common law native title who have nominated the PBC to be either their agent or the trustee of native title rights and interests.¹² This has

¹¹ *Shire of Ashburton v BindiBindi Community Aboriginal Corporation* [1999] WASC 108, [38-40].

¹² Alexandra Richards QC made the argument that even PBCs who elect to be agents for the native title holders are constructive statutory trusts.

significant implications for PBCs which are conferred with a trust status under the NTA, but cannot gain charitable status.¹³

PBCs who adopt the trustee model over the agency model are statutory trusts and cannot meet the requirement for a charitable trust to be ‘called into existence’ for a charitable purpose. Section 56 NTA creates a trust for the benefit of the group of common law native title holders. The critical distinction here is that a charitable trust must be for *purposes* rather than *persons*. While a separate charitable structure may be established, a PBC is not at liberty to invest the assets of the PBC into a charitable trust because to do so would be an alienation of native title rights and interests. There are further issues involved with how income received by a PBC can be gifted to a charitable trust.

3. Practical issues for native title holders in establishing charitable trusts – Alison Murphy

In some instances the structures of a charitable trust may not suit the needs of the clients. Alison Murphy presented a paper prepared by herself and Katie O’Bryan from NTSV, sharing their experiences in trying to develop a trust structure that maximised the benefits gained while also ensuring that claimants retained control over how the benefits of the trust were to be distributed. The Native Title Foundation was established in 2005 on behalf of a native title claim group who received \$1 million worth of compensation payable under a Future Act agreement. In 2006, its first year of operation, there were approximately 200 beneficiaries, mostly children. The group did not want to have implications for personal tax and social security. Under the agreement, the purposes of the trust were restricted to the provision of education, training and scholarships. The claim group needed to establish a trust to manage the moneys in a way that was consistent with past future act agreements as well as the future needs of the claim group.

3.1 Charitable v non-charitable trusts

The primary decision that the native title group had to decide was whether to opt for a charitable trust. The following key factors were identified:

Charitable Trust	Non Charitable Trust
The objects are limited to charitable purposes in the charitable discretionary trust.	A non-charitable discretionary trust can have a wider ranging set of objects (eg which can be determined by the claimant group) and do not have to be limited to charitable purposes.

¹³ Charitable trusts, in order to qualify under the community purpose arm of the test, must operate for the benefit of an appreciable section of the community. See note 14 below.

The beneficiaries cannot be limited to the claimant group only in a charitable discretionary trust. They can however be limited to Aboriginal people living in a particular area, and may be able to give preference to the claimant group.	Beneficiaries can be limited in a non-charitable discretionary trust to the claimant group.
A charitable discretionary trust receives certain tax and stamp duty benefits/exemptions.	A non-charitable discretionary trust is not eligible for tax and stamp duty benefits/exemptions.
A charitable discretionary trust does not have to file tax returns.	A non-charitable discretionary trust is required to file tax returns (increasing administration costs).
Charitable discretionary trusts do not have to be wound up after 80 years.	A non-charitable discretionary trust is subject to the perpetuity period. It must be wound up after no more than 80 years.
Beneficiaries of charitable discretionary trusts are not taxed on the benefits they receive from the trust (but note they may affect social security payments).	Beneficiaries of non-charitable discretionary trusts are taxed on the benefits they receive from the trust.
Charitable discretionary trusts are subject to supervision (i.e. intervention and legal action if necessary) by the Attorney-General.	Non-charitable discretionary trusts are not subject to supervision by the Attorney-General.

Table 1. Charitable v non-charitable

(Source: Alison Murphy and Katie O'Bryan, 'The practical issues for native title holders in establishing charitable trusts', Powerpoint presentation, Senior Professional Officer's Workshop, Sydney, 19 September 2006).

3.2 Choosing to establish a charitable trust

In this case the native title claim group did not want to limit the purposes of the trust to the relief of poverty and needed to ensure that it could pass the public or community benefit test in order to remain a charitable trust.

One of the major issues was restricting the beneficiaries under the trust. The Tax Office has refused to limit the beneficiaries to ancestral descent.¹⁴ This meant that the claimants had to include 'resident indigenous persons' who were long term residents in the claim area who were not a part of the native title claim group.¹⁵

¹⁴ The ATO confirmed that it will not endorse organisations as charitable where the claim group consists of only descendants of particular ancestors or other persons accepted by the elders as having acquired responsibilities of custodianship of country. This is reflective of their ruling TR2005/21

¹⁵ A preference clause was included in the trust deed so that the Trustees may benefit the claimants over the resident Indigenous persons.

Accordingly, the beneficiaries under charitable trusts could not be limited to the native title claim group. This raised the issue of forgoing tax advantages under a charitable trust structure or maximising the perpetuity and intergenerational effect of the compensation gained by broadening the group of beneficiaries to include members of the local Indigenous community.

The claimants also debated whether an institutional trustee should be appointed or whether the claimants should themselves set up a company. It was understood that the institutional trustee would have the administrative capacity to manage the trust as well as bring their knowledge and transparency to the process. However this will also affect the claimants' independence and control over how the funds should be used. Alternatively, if the trustees opted to retain control over the trust, this would lead to reduced administrative fees. Where the claimants acted as directors, this lacked accountability systems and infrastructure which could potentially expose the directors to criticism and personal liability. With independent trustees claimants cannot be accused of conflicts of interests. (This is summarised below in Table 2)

	Independent Trustee	Company with claimant directors	
Advantages	<p>Independent - claimants can't be accused of favouring their own families, as they don't make the final decision. No conflicts of interests.</p> <p>Independent Trustee Companies have years of experience in managing trusts, eg in making relevant investment decisions for capital funds etc.</p> <p>Trustee companies have the administrative facilities in place for efficient reporting, financial auditing etc which is important for accountability.</p> <p>Independent Trustee companies know what the legal requirements are in managing a trust.</p> <p>Less likely that the trust would be challenged in court, and therefore hold up the distribution of benefits to the beneficiaries.</p>	<p>Directors may be accused of favouritism, conflicts of interests etc.</p> <p>Directors are likely to have less experience than the Independent Trustee in managing the trust.</p> <p>Directors are unlikely to have the financial accounting, accountability systems and infrastructure in place.</p> <p>Difficulties may be encountered in complying with all the relevant laws.</p> <p>Possibility that the Trust will be challenged in Court, thus holding up the disbursements to the beneficiaries.</p>	Disadvantages

Disadvantages	<p>Claimants don't have the final say on how the funds are distributed</p> <p>There are fees for having an Independent Trustee manage the Trust (but note that in Victoria, fees are capped by legislation).</p>	<p>Claimants are in control of their affairs as decisions of the Trust are made by the claimants</p> <p>Reduced cost? This might not ultimately be the case as the Trust would seek legal, financial, accounting assistance – would probably need to employ someone to do the accounts etc.</p>	Advantages
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Table 2. Advantages and disadvantages of different trust management styles

(Source: Alison Murphy and Katie O'Bryan, 'The practical issues for native title holders in establishing charitable trusts', Powerpoint presentation, Senior Professional Officer's Workshop, Sydney, 19 September 2006).

On balance the claimants considered the benefits of the independent trustee outweighed the disadvantages. They resolved to appoint a trustee company and establish an instructing committee. This meant that claimants would still have a measure of input in the distribution of funds without assuming the full responsibilities as a director of a Trust. The Trustee has discretion as to how trust money is applied provided that it is in a manner that is charitable. This included:

- Education (such as vocational training and economic and enterprise training with scholarships and bursaries);
- The promotion of art and culture;
- Relieving, alleviating or preventing their disadvantage or affliction; and
- The protection and enhancement of the natural or heritage environment of the native title lands.

Prior to exercising any discretions under the trust the Trustee is required to seek the recommendations of the instructing committee. The trust deed also provides that the claimants can remove the Trustee. That is, the Trustee can be replaced if the Trustee consistently doesn't follow the recommendations of the claimant instructing committee. The instructing committee was made up of the claim group members who had powers under the trust deed to resolve all questions of fact or interpretation in relation to whether or not a person was a member of the claim group or was a long term Indigenous resident of the claim area and its decisions are binding on all parties interested in the trust.

Once established, problems arose in the implementation and structures for distribution that had not been foreseen. For example, even though payments to beneficiaries are income tax exempt, they may have implications for welfare payments. Beneficiaries were reluctant to accept the funds granted under a scholarship where they threatened their government entitlements such as Abstudy. Also, funds that were distributed through schools required people to volunteer personal details which created further difficulty. More importantly, the administrative burden of providing a small benefit to a large number of people

over making a significant difference to a smaller number needed greater consideration.

4. Scaling Agreements: autonomy and authority – Kym Elston

Kym Elston from the North Queensland Land Council shared his experiences in negotiating agreements. In particular, he detailed the major pitfalls and benefits of engaging an independent custodial trustee in each case and discussed how decisions related to the most appropriate trust structures were decided based on the circumstances of the particular case. The central issue was how to balance the interests of large companies with those of the claimants. Often it was a matter of choosing between transparency and accountability on one hand and the autonomy of the claimants on the other. Other issues also emerge in relation to sourcing funding for smaller scale agreements.

4.1 Example 1

The first agreement discussed involved an Indigenous Land Use Agreement (ILUA) which was formulated after extensive negotiations between the State Government, 12 Traditional Owner groups and a multi-national mining company. The agreement included business opportunities, scholarships and the return of land under pastoral leases.

More notably the agreement also involved the payment of a substantial sum of royalties over 100 years, the estimated life of the mine. This meant that the projected royalty income was upwards of \$500m (subject to the London Base Metal price for the subject year).

In this instance the miner had insisted on a charitable trust structure in contrast to the wishes of the traditional owners who wished to be paid directly. This was resolved with the formation of a working group with two traditional owners from each group to advise the trustee.

The mining company had further insisted on a custodial trustee as a matter of risk management and reputation to ensure that the compliance with trustee obligations. A custodial trustee is a third party commonly associated with a commercial firm experienced in managing trust funds.

This was approached with caution given the high costs that would be charged for the services of a custodial trustee and the limiting effect this would have on the power of native title groups to control how the money would be used. There is also the potential for conflict. On a number of occasions the native title groups were told they couldn't do what they wanted to do, for example, decision of the custodial trustee to purchase community buses rather than 4WDs to meet the terms of the trust.

4.2 Example 2

The agreement again involved a multinational company infrastructure project. The agreement did not reach a conclusion, which raised other issues about the expectations raised by large agreements, the effort expended by NTRBs and the need for an exit strategy. The proposal covered some areas in which there had been a determination of native title. The agreement involved approximately 20 to 30 traditional owner groups and covered equity matters as well as compensation.

The proponent again insisted on a custodial trustee and again, reputation was the key. A custodial trust was envisaged given the diversity of groups, the size of the development and the money involved. An institutional corporate trustee is ideally placed to approach the market, bring their expertise to the process and ensure transparency which is often sought by commercial parties in negotiations. However this can also compromise the independence of traditional owners.

4.3 Example 3

Some claims can generate a significant degree of intra-indigenous conflict. In one particular agreement, a significant degree of conflict arose where there was not an independent institutional trustee. The agreement involved six traditional owners, with only one traditional owner as a trustee. It contained provisions for the payment of royalties retained in the trust for five years for business and employment opportunities.

4.4 Example 4

The use of institutional trustees, while creating transparency and limiting intra Indigenous disputes may be inappropriate in smaller scale agreements. For example in an agreement involving state government, shire council, and a single native title group over a transfer of half a million dollars of freehold land, it was decided that an institutional trustee would not be employed. This was based on the prohibitive costs associated with custodial trustees along with rates and taxes, transfer fees, stamp duty and GST. It was agreed that management issues were better dealt with through workshops to provide advice from experts on set up, tax status and obligations, etc, directly to the group.

The charitable trust was still preferred and tax concessions were negotiated with the State Government. In particular, a discretionary exemption from remittance of rates for four years to allow the Indigenous claimant group to meet the expenses of managing the property.

4.5 Example 5

Some agreements are also negotiated independently of determinations of native title such as tourism infrastructure projects. In one case scenario there were royalties of \$250 000 per annum likely to be paid to one group of traditional owners over a project life of 60 years. This was primarily an intergenerational agreement involving the development of a tourist kiosk area, training rangers and

operating other ancillary tourist operations. Traditional owners also received adjacent freehold land to develop an interpretive centre.

In this instance a custodial trust was considered but was eventually decided unnecessary. There was a well managed corporation, the State and shire were not insisting. The custodial Trustee would unnecessarily restrict the autonomy of the group

4.6 Key considerations

These examples illustrate a number of key considerations when deciding upon the most suitable trust structures:

- The circumstances of each case will determine the trust structure that should be employed.
- Regardless of the trust structure employed, expertise external to the parties involved in the agreement making process and the agreement itself will need to be employed (usually from commercial firms), including due diligence, to ensure that the most effective structure is decided upon.
- Trust structures can result in restrictions on the autonomy of traditional owner groups. This is a commercial reality in larger scale projects where large firms will seek to protect their own interests and ensure transparency and accountability in the process. This should be explained to traditional owners who perceive that they will make all the decisions in order to avoid future dispute and conflict.
- NTRBs should be clear about their role in negotiating and implementing agreements, including having a policy in place. The scope of this role throughout the various stages of the agreement making process is not easily defined and takes away from core business.

5. Ethical obligations in pre-determination negotiations – Roland Colinard and Philip Hope

The negotiation of agreements prior to reaching a native title determination involves a number of ethical obligations for NTRB lawyers. This session explored whether there were circumstances where NTRB lawyers may risk breaching their professional conduct rules or creating a civil liability. Central Queensland Land Council (CQLC) lawyers examined two hypothetical cases where ethical duties of disclosure by client or representative may arise. These discussions remain confidential.

6. Creating a Distribution Policy and Taxation Issues of Distributions – Murray Hutchings

The way that funds are administered and managed can raise issues of accountability and transparency. There is no set template for the distribution of funds which varies according to the characteristics and objectives of the claimant group. There are often initial difficulties in designing the most appropriate trust structures especially where resourcing issues can affect the frequency in which claimant groups can meet with NTRBs and how involved the claimant group is in negotiating the agreements particularly in light of template exploration agreements. Prior to a determination, issues of authorisation also arise in determining who should and could make decisions for the claimant groups. Changes in the characteristics of the claim group itself can also affect the dynamics of distribution.

GLSC has 12 native title groups and the region receives 10-15 Future Act notices every day. Issues have arisen in the Goldfields in relation to the administration of funds from a large number of agreements of small scale payments where funds remain in legal trust accounts. Most are not actively attracting interest. One particular claim group was charged \$15,000 to administer a trust fund worth \$40,000. Often this is not within the control of the NTRB which can only request the particularisation of fees. This appalling outcome is mostly due to a combination of high fees, lack of oversight and poor/non-existent distribution policies resulting in high volume of small transactions out of the trust account.

GLSC had historically taken a hands off approach after agreements had been finalised. However, in reviewing the management of agreements found poor compliance by proponents and poor distribution practices (where funds were being released at all). The GLSC utilised the working parties who are responsible for the day to day management of the claims and negotiation of agreements to establish a distribution policy in each group. The GLSC found that it was most useful to determine specific purposes for the funds and allocate funds to them (a 'pigeon hole' approach). An example of this distribution policy is illustrated in Figure 1 below.

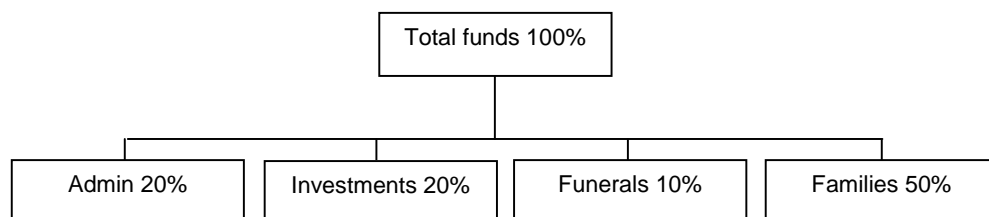


Figure 1. Distribution policy used by the Goldfields Land and Sea Council

The involvement of the claim group in the process of determining categories, percentages and processes requires some flexibility in the model to meet the needs of the group. Administration monies could accumulate and be used for set up and administration of native title corporations. In practice funds can be moved

between the various allocations where necessary or amended over time because the distribution is based on a policy adopted by the group not set out in the instrument establishing the trust. The kinds of distributions possible under these types of trusts are very different to those under a charitable trust arrangement. The trusts operate as discretionary or bare trusts and attract normal taxation arrangements, including income tax in the hands of the recipients and impact on any social security or means-testing for government programs and services. Centrelink has taken a greater interest in the receipt of native title payments in recent years.

At this stage GLSC is playing a role in establishing distribution policies for claimant groups and monitoring compliance. This is currently a hands on approach acting as a communication link between claim groups and diverse trustees, although all decisions about distribution are made by the group themselves. Eventually the Land Council will be able to step out and allow groups to take responsibility for the management of their funds.

Other models were also highlighted in discussion. The experience of NTRBs in the Northern Territory involved both native title and *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) agreements, and consequently have additional duties in the distribution of mining royalties. In its negotiations during the Mirriuwung Gajerrong agreement, the NLC sought to design governance structures that emulated the nature of the rights and interests held, who they were held by and the decision making processes of traditional claim groups when setting up the trust structure. For example, traditional owners with greater rights/numbers were given greater weight when voting.

7. The role of NTRBs in the distribution of benefits

There were extensive discussions over the role of NTRBs in the distribution of money particularly in relation to the level of control and responsibility that they should retain. There were significant concerns over where this role began and ended especially where claimants lacked the ability to deal with complex financial and legal matters. This debate brought into focus the different approaches in both the willingness and capacity of NTRBs to assist claimants in post agreement administration. On one end of the scale some NTRBs refuse to engage in the issues because of the expertise required, the workload and the risk of getting involved in the internal dynamics of the claimant groups. External advice however, also raised issues. Most NTRBs noted reliance on pro bono advice on such matters, which often does not extend to direct transfer of knowledge/advice from expert to claim group. More problematic is the reliance on proponents for advice on structures for receiving and distribution of benefits. In such circumstances, advice relates on to a single agreement resulting on a potential proliferation of trusts without proactive corporate planning and at the expense of the aggregation of benefits over time.

However, other NTRBs argued that failing to participate in this process could also exacerbate the internal disputes that occur within a region. The idea of regional

Indigenous trusts, Indigenous custodial trustees/companies or broader administrative assistance was raised as a possible solution to this problem. The idea of Indigenous custodial trustees received strong support as a way of overcoming some of the philosophical and psychological resistance to giving up autonomy and authority over native title benefits. In this context the CLC also reiterated the value of pooling funds to give aggregated investment power in the region as well as attracting investment and potential philanthropic and corporate interest.

8. Final reflections and issues for consideration

The workshop was concluded with the participants contributing their final reflections on the issues raised and matters that would be relevant for further research. The key themes included:

- The proliferation of trusts and where/how they may be most appropriately employed.
- The role of NTRBs in the negotiation and implementation of agreements and the relationship this has with the core functions of the NTRB (ie is it within the scope of NTRBs to ensure the social welfare of claimant groups; are there sufficient funds within NTRBs to carry out these functions?).
- The ability of NTRBs to initiate and sustain negotiations where they are engaged in time consuming and resource intensive preliminary claim issues such as connection, authorisation, overlaps and court and mediation schedules.
- The level of necessary independence and transparency required when designing trust structures and the way that this may conflict with the goals and needs of the claimant group.
- The need to develop the capacity of the parties involved in negotiations to make good decisions. This includes the capacity of traditional owners to make informed decisions and avoid conflict and within and between claimant groups as well as the capacity of mining companies to deal with Indigenous claimants appropriately and effectively.
- Developing consolidated approaches to managing funds (such as resource pooling) in order to develop capacity of Indigenous bodies.
- The need for further research detailing the scope of agreements and the financial and taxation arrangements involved throughout the various regions.
- The sustainability of PBCs and sources of funding available.
- Ways of creating and sustaining an interface between traditional owner groups and other parties they may deal with and how this can be supported without compromising the independence of the traditional owners.

- The need to develop strategies to pool resources and knowledge in order to source specialist skills and knowledge. (For example, through sourcing funds to hire expertise to service a region of NTRBs).

9. Issues for future consideration

The workshop raised a number of significant issues that will need to be followed up in the future. The following key research needs emerged:

- Identify the best sources of funding PBCs into the future
- Identify the scope and variety of distribution policies of NTRBs
- How authority, autonomy and empowerment is dealt with through current trust arrangements and what is the best practice to ensure that these principles are not diminished
- Explore models for consolidated/regional approaches to trusts and investment
- Develop a road map of agreement structures, trusts, tax treatments, characteristics and the best circumstances for their use
- Seek opinions on 3-4 common tax scenarios
- Explore idea of pool of Indigenous custodial trustees
- Establish a panel for pro bono expert advice