



**IMPROVEMENTS TO THE TAX AND LEGAL ENVIRONMENT
FOR ABORIGINAL COMMUNITY ORGANISATIONS AND TRUSTS**

DISCUSSION PAPER

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EXECUTIVE SUMMARY

1. The Weekend Australian (July 21-22, 2007 page 11) reports under the heading "Advisers set Welfare Deadline for Aborigines", that a leaked report by the National Indigenous Council's Economic Independence Subcommittee says that current policies fail to create enough progress towards economic independence for indigenous people and suggests a **radical re-think**.
2. The report is quoted as saying that indigenous people should be economically independent and not reliant on welfare by 2015"(The vision) includes the opportunity to reach potential and professional aspirations ..."
3. A core objective of this paper is to contribute ideas and observations to the reframing of the national debate on Aboriginal Australia and to assist in shifting attitudes, thinking and language away from concepts of charity and welfare and towards concepts of national priority, incentivisation, partnership and engagement with the private sector.
4. This discussion paper gathers together some concepts and ideas developed by the writer as a result of working with Aboriginal trusts and corporations. There are many more ideas. The writer is not an expert in indigenous affairs and does not propose to speak for or on behalf of any particular group. There are many different approach and ideas that exist in this area and it is hoped that this paper will develop as a collaborative project with others.
5. This discussion paper focuses on the taxation and legal complications which, if improved, may contribute to accelerating Aboriginal economic development in Australia. The purpose of this discussion paper is to:
 - (a) recognise obstacles in the taxation legislative framework that impede the development of Aboriginal Economic Development ("AED");
 - (b) identify existing taxation legislative frameworks that are currently in place in Australia that could be modified to accelerate AED;
 - (c) make recommendations for an appropriate taxation framework for AED;
6. The obstacles in the current taxation system include:
 - (a) Tax deductibility or access to upfront capital expenditure or ongoing tax losses are recognised for a range of specific worthwhile essential expenditure such as research and development but no such recognition is given for expenditure on capacity building within Aboriginal organisations.
 - (b) The tax legislation recognises many worthwhile causes through specific categories of tax exempt entities that do not fit the technical legal meaning of charity and do not rely on concepts of welfare and poverty. No such category exists for Aboriginal trusts.
 - (c) Tax concessions designed to encourage long term accumulation of funds is recognised in Australia, for example superannuation, the Future Fund and

private foundations but similar concessions are not available to encourage accumulation of funds for the future of Aboriginal communities.

- (d) Tax exemption to encourage venture capital investment is granted for specific emerging businesses even a tax exemption for non-residents exists, yet no clear venture capital opportunity exists to encourage AED.
7. The initiatives for capacity building, individual development and community engagement should be treated separately from initiatives around AED. Each stream of development is essential for the other stream to succeed. A parallel approach is necessary to ensure progress for each stream. This paper makes 2 recommendations for each initiative. This paper makes two core community focused recommendations and one AED focused recommendation.
8. The Key Community Focused Recommendations are:
- (a) **Aboriginal Community Foundations – an alternative to charitable trusts**

Amend Division 30 & 50 of the Tax Act to establish a new category of tax exempt deductible gift recipient called Aboriginal Community Foundations for use by Aboriginal Communities for the growth and development of their specific Aboriginal community (that does not entrench concepts of welfare and poverty);

Grant an amnesty to existing trusts that wish to “convert” to an Aboriginal Community Foundation.
 - (b) **Tax Incentive for Funding Capacity Building**

Permit immediate tax deductibility (on a flow through basis) for expenditure incurred on specific capacity building and community infrastructure expenditure, regardless of who incurs the expense;
9. The Key AED Recommendations are:
- Tax Incentives for AED**

Introduce the Aboriginal Venture Capital Limited Partnership granting flow through tax treatment coupled with tax exempt income and capital gains for all partners provided that the ASVCLP has a minimum percentage (say 15%) of Aboriginal ownership at the commencement with an obligation to allow that ownership to increase to at least 50%;
10. This Discussion Paper is divided into 2 parts: part 1 is the substantive discussion and part 2 is further background information on ideas raised in part 1.

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CHARITABLE TRUSTS IN ABORIGINAL AUSTRALIA

1. Background

- (a) A number of Aboriginal communities have secured capital, land and income streams, usually from Indigenous Land Use Agreements.
- (b) It is common for these communities to choose to hold these funds in a charitable trust (or public benevolent institutions) for use in the advancement and development of the relevant Aboriginal Community. To the extent that communities have chosen to use charitable trusts, a number of taxation and structural difficulties have arisen.
- (c) Aboriginal communities select a variety of different entities to meet the various needs of that particular community. There is complication and confusion within various communities regarding the appropriate legal structure for representing the community and its individuals in relation to its growth, development and support (ie active organisations). This is opposed to the role of a trust fund which, traditionally, is a conduit of funds to support specified purposes.

2. Positive Attributes

The operation of well functioning aboriginal trusts and other organisations requires the following key elements:

- (a) good governance, process and procedures;
- (b) community engagement, development and capacity building;
- (c) clarity around the making of cash payments to individuals;
- (d) the ability to accumulate a reasonable capital base within the trust, the income from which can be applied towards the trust purposes in perpetuity;
- (e) a tax friendly environment to maximise funds available for the trust purpose; and
- (f) tax incentives to encourage the private sector to develop and support AED.

3. Division 50 of the Tax Act

- (a) Division 50 of the *Income Tax Assessment Act 1997* ("the Tax Act") provides a very detailed regime for tax exempt entities.
- (b) The government policy behind granting tax exemption is that the activities undertaken by these entities are beneficial to the community and worthy of taxpayer support. The exemption boosts the entity's funds otherwise available to meet their objectives.

4. **Expanding the Categories of Tax Exempt Entities**

- (a) There is a very broad range of funds, institutions, societies, associations, clubs, trusts and other entities that are tax exempt which means that no tax is paid on revenue received by the entity. [See Note 1]
- (b) The Federal Government has regularly recognised when the existing categories of tax exempt entities (beyond the categories of charity) are insufficient to meet the needs of the community and introduced new categories. [See Note 2]

5. **Extending the Definition of Charity**

- (a) As the needs of society change, the items under the various tables in Division 50 have also changed. The table (Section 50-5) dealing specifically with charities has undergone changes itself. [See Note 3]
- (b) The Government has shown a willingness to “extend” the concept of charity when it is shown that worthwhile causes do not fit the technical legal definitions of charity. [See Note 4]
- (c) It is in the public interest that Aboriginal communities grow and prosper. The difficulties of fitting within the definition of charity creates unnecessary impediments. [See Note 5]
- (d) One possible solution to this limitation is to amend the statutory extension to the definition of charity in the *Extension of Charitable Purposes Act 2004* to remove difficulties in satisfying different aspects of the definition of charity.
- (e) **However this is not recommended as tax exemption can be achieved without tagging this national priority as a charitable endeavour.**

6. **A Place for Aboriginal Communities**

- (a) There is no specific class of exempt entity that deals with the tremendous challenge faced by Aboriginal communities to assist them to reach individual and community economic independence. Aboriginal trusts are forced to rely upon the concept of charitable trusts and institutions as the only path to exempt status.
- (b) The charitable concept of altruism is difficult to reconcile with Aboriginal communities that seek to take responsibility for their own well being that does involve aspects of altruism, poverty relief and charitable purpose but must also extend towards economic independence, self reliance, recognition of family networks, traditional law and custom and self preservation.
- (c) Consequently, a range of trusts and other entities are currently in existence within Aboriginal Communities which must traverse (not always successfully) the "charities definition minefield" whilst attempting to achieve the stated aims of the growth and development of these communities.
- (d) The legal structural issues may also contribute to reinforce stereotypes, prejudices and attitudes around welfare and charity whilst no such requirements exists for sports, culture, film, employees and just about every other sector of the economy which are able to access tax exemption without the badge of charity.

- (e) Reframing the debate starts here. The purpose of the promotion and development of specific Aboriginal communities does not and should not be required to fit the strict definition of charities.
- (f) **The development of Australia's Aboriginal communities and Aboriginal economic development should be independently present in Division 50 as a Tax Exempt Entity.**

7. Division 30 – Deductible Gift Recipients

- (a) Division 30 of the Tax Act sets out the rules for working out tax deductions for certain gifts and contributions made to specified funds, authorities or institutions that operate in a range of 17 different areas of society.
- (b) The ATO have an endorsement process to recognise if an entity is a deductible gift recipient (“DGR”) and thus entitles it to receive **tax deductible donations** from the public, provided certain special conditions are met.
- (c) Additional tax benefits arises for some DGRs, for example, the fringe benefits tax concessions that apply for public benevolent institutions, hospitals and health promotion charities which makes it possible for these entities to offer a more attractive salary package to attract and retain talented employees.
- (d) Having regard to the categories that do receive DGR status, it seems appropriate to include a category specifically addressing Aboriginal Australia. [See Note 6]
- (e) **Any modification to Division 50 should include a similar modification to Division 30.**

NEW CATEGORY FOR ABORIGINAL COMMUNITY FOUNDATIONS

1. Introducing a New Category

- (a) Historically, the introduction of new categories within Division 50 and Division 30 have been achieved in two ways. Either including a class of entities within the existing tables which permits the entity to "self assess" their tax exempt status. If that entity is also a charity, a formal endorsement process by the ATO is required.
- (b) Alternatively, a register of organisations is established and maintained by the relevant Ministry such as the registers for cultural organisations, environmental organisations, scientific organisations and prescribed private foundations which provide a streamlined process for application, endorsement, annual reporting and oversight. This latter model has merit and indeed, an existing register framework could be expanded to include this new category.
- (c) It seems appropriate to introduce a new category of tax exempt entity that does not rely on strict concepts of charity but rather focuses on the broad objectives of the growth and development of Aboriginal communities.
- (d) Regardless of the location within the Tax Act, further discussion is required to

- (i) properly phrase a definition for ACFs; and
- (ii) identify special conditions, limitations and restrictions that should apply to the ACFs.

2. Possible Definition and Special Conditions

- (a) One possible definition of Aboriginal Community Foundation (“**ACF**”) is:

“A trust established by an Aboriginal Community [agree definition] for the purpose of providing money, property or benefits for the promotion, development, advancement and maintenance of that Aboriginal Community, their Traditional Owners, their land and people, now and into the future.”

- (b) **Special Conditions** that are currently required to be met in order to be endorsed as a DGR can be modified to ensure the ACF is operated in a manner to best achieve the stated aims for the ACF. Here are four important issues that can be covered by special conditions.

3. Special Condition 1: Concept of Accumulation

- (a) The concept of accumulation is well recognised within the philanthropic community as a means by which a benefactor could place a large capital amount on trust to be preserved with the income generated from that preserved amount available for the trustees to use to further the specified trust purpose.
- (b) In the context of charitable or tax exempt trusts, the ability to generate a sufficient capital reserve (particularly when the trust is experiencing financial success) to provide a sufficient flow of income to support the tax exempt entity’s activities should be seen as prudent behaviour.
- (c) There are many examples of this behaviour currently operating within Australia including: [See Note 7]
 - (i) Prescribed Private Funds;
 - (ii) Superannuation;
 - (iii) The Future Fund; and
 - (iv) The Higher Education Endowment Fund.
- (d) Notwithstanding the immediate severe financial hardship experienced by individuals within the Aboriginal communities, there are a number of communities interested in accumulating funds to create a capital base to provide for future generations. These communities seek to achieve what every individual Australian is entitled to achieve through superannuation and what the Government has chosen to achieve for the Australian people through Future Funds and the like.
- (e) Australian Aboriginal communities should be permitted, if they choose, to accumulate funds over an extended period of time to achieve their stated target capital base to provide a strong financial foundation for the advancement, growth and development of their communities into the future.

- (f) Accumulation limits are appropriate in order to ensure funds are applied towards today's communities as well as providing for the future. These limits should be set having regard to the:
 - (i) very low financial starting base;
 - (ii) uncertainty of the timing of and the amount of funds received in their Trust;
 - (iii) current and projected future needs of the relevant Aboriginal community; and
 - (iv) specific objectives identified by that community.

4. **Special Condition 2: Individual Payments**

- (a) The nature of individual payments made by Aboriginal charitable trusts is worthy of consideration to ensure that payments can be made, without complication to members of the Aboriginal communities in a manner that supports the growth and development of these individuals within the community. The taxation status of these payments and the impact these payments have on social security require careful consideration.
- (b) An ACF should have the right to make annual untied payments only to individuals or families of the target aboriginal community for use as they see fit but coupled with an integrity measure that limits the amount of such payment to a CPI indexed amount of between \$3000 to \$5000, based on age of the individual, such amount being excluded from income and social security threshold calculations.
- (c) A special condition of this nature is akin to an early release of superannuation or merely a windfall and avoids the need to claim poverty or other special needs, and allows members of the target community to proudly benefit from the success of their ACF.
- (d) Individual payments are not related to valid distribution of trust proceeds for trust purposes, in accordance with due process and subject to strict integrity measures otherwise applicable to tax exempt entities.
- (e) Individuals should be encouraged to ensure that income from other sources be properly accounted for as assessable income and tax paid accordingly, just like any other Australian citizen.

5. **Special Condition 3 - Model Trust Deed**

- (a) The PPF legislation was introduced with an accompanying model trust deed which covered those provisions and obligations including integrity measures deemed essential by the Government for a PPF to be endorsed as a DGR.
- (b) The model trust deed includes provisions that require:
 - (i) Independent responsible persons to sit on the board
 - (ii) No uncommercial transactions - integrity measures
 - (iii) Annual audits in accordance with the Corporations Act.
 - (iv) Annual returns to the ATO.

- (c) A great deal of time and costs will be saved if a special condition requires the use of a culturally appropriate model trust deed.

6. Special condition 4: Class of Beneficiaries

- (a) It is critical to clearly identify the aboriginal community or communities intended to benefit from the ACF. Such identification should follow traditional law and custom and endorsement as an ACF should not be dependent on the number of people within that group.
- (b) Whilst other aboriginal people and communities should be able to benefit from the activities of an ACF. The particular community for whose benefit the ACF is established must have an integral role in the ACF. Distributions by Trustees should require consultation with the Elders in order to be valid.

7. Recommendations

- (a) **Aboriginal Community Foundations should be a new category of DGR introduced into the Tax Act subject to:**
 - (i) **Special condition – Accumulation;**
 - (ii) **Special condition – Individual Payments;**
 - (iii) **Special condition – Model Trust Deed; and**
 - (iv) **Special condition – Class of Beneficiaries.**

CAPACITY BUILDING AND IMPLEMENTATION

1. Internal Capacity Building and Implementation

- (a) Aboriginal communities experience difficulties in securing the necessary skills and experience, on the ground, to assist in the operation of community projects and organisations including where individuals attempt to develop economic enterprise.
- (b) Aboriginal economic development remains a high priority for many of these trusts but the ability of specific aboriginal individuals, groups or communities to develop and present an appropriate business plan for support by the relevant trust remains a challenge. Capacity issues also inhibit the ability of these groups to participate in partnership with the private sector in economic enterprises.
- (c) There are many organisations including land councils, PBCs, Aboriginal Corporations and the like that are established for clearly defined purposes but often with inadequate funding to provide for capacity building.
- (d) Capacity building, community development, individual education and training, community economic development and individual economic independence are all goals which must be targeted at the same time.

2. Incentives for Funding Supporting Activities

- (a) A radical rethink is needed in order to engage the private sector to assist in Aboriginal economic growth, development and sustainability (“**Core Activities**”) in a manner that not only includes but requires capacity building, training, cultural exchange and community development (“**Supporting Activities**”).
- (b) Turning to **Supporting Activities**, tax incentives to encourage various supporting activities already exist. By way of example, companies that incur expenditure on **Research and Development** may claim a range of generous tax concessions linked to very specific types of “R&D Supporting Activities”. [See Note 8]
- (c) the immediate deduction for any tax payer that incurs specified expenditure on Supporting Activities (to be defined) along the lines of the R&D concessions is essential for successful aboriginal enterprises and trusts.
- (d) **The costs of providing Supporting Activities within any aboriginal organisation or enterprise should be treated as an immediate 125% tax deductible expenditure granted to any taxpayer that provides funding for that purpose.**

ABORIGINAL ECONOMIC DEVELOPMENT

1. The Challenge

- (a) One of the striking difficulties faced by Aboriginal communities around Australia is attracting and retaining the best and brightest individuals and corporations to work in partnership in the challenge of creating economic independence for Aboriginal people.
- (b) Turning to the **Core Activities**, the provision of tax concessions and incentives to encourage the private sector to embrace Aboriginal economic development may provide the essential framework necessary if the national goal of successful Aboriginal economic development is to be achieved within a reasonably short timeframe.
- (c) A further refining of the national debate is necessary and this can be achieved by recognising Aboriginal economic development as equally important as the development of our resources, film, research, agricultural and other industries.

2. Using Tax Incentives

- (a) Many countries around the world have created a highly attractive taxation environment using tax concessions. Tax deductibility for specific expenditure as well as tax exemption on earnings are tools used to develop successful new industry. Countries like Ireland and Israel are noted for these efforts.
- (b) There are also many examples where the Federal Government seeks to reduce the risk for the private sector of engaging in particular industries and endeavours and incentivising the financial returns which flow from those prepared to commit time, skill and resources towards achieving those goals.

- (c) A few examples [See Note 9] include:
 - (i) Film and Television Sector;
 - (ii) Mining and Agricultural Sector;
 - (iii) Non Residents investing in Australia;
 - (iv) Venture Capital and Emerging Businesses.

3. **Need for Tax Incentives for Aboriginal Economic Development**

- (a) Like all growing industries, there needs to be tax concessions that:
 - (i) mitigate the high risks and dangers associated with emerging industries;
 - (ii) provide clear guidelines that clarify the outcomes that are sought to be achieved from those industries; and
 - (iii) provide financial reward for participants for achieving these outcomes.
- (b) Tax incentives for the emerging industry of AED can take the form of:
 - (i) **Incentive 1:** immediate tax deductibility for approved expenditure in Core Activities or Supporting Activities;
 - (ii) **Incentive 2:** tax exemption or concession on profits made from activities undertaken in the emerging AED for a defined time period.

**INCENTIVE 1
CORE AND SUPPORTING ACTIVITIES**

1. Supporting Activities and the need for tax deductibility is discussed earlier. Essentially, the additional costs for Supporting Activities not otherwise present in economic enterprises should be offset to not only neutralise the effect of these costs but positively encourage the Supporting Activities.
2. To encourage an immediate deployment of skill and resource towards AED and to accelerate AED, immediate tax deductibility for equity investment or capital works is required. A similar approach, exists in the Forestry Sector which resulted in exponential growth and development.
3. This initiative will substantial assist in the development of strong Aboriginal Community Foundations and at the same time assist AED by encouraging positive behaviours.

INCENTIVE 2
ABORIGINAL VENTURE CAPITAL LIMITED PARTNERSHIPS
(AVCLP)

1. Tax Incentives for Emerging Businesses

- (a) Government support of emerging business is well recognised worldwide and many schemes exist to encourage venture capital funds and other investors to take the risk of investing in emerging business.
- (b) In the 2006 Federal Budget, the Government announced a batch of measures to increase activity in the venture capital sector. These measures varied the *Venture Capital Act 2002* and the *Taxation Laws Amendment (Venture Capital) Act 2002* which introduced a tax effective investment vehicle to raise capital and make equity investments in relatively high risk start up and expanding Australian companies.
- (c) These vehicles are called Venture Capital Limited Partnerships and the government programme originally aimed to increase investment in the Australian venture capital industry by tax exempt non residents (like pension funds) from Canada, France, Germany, Japan, UK and the USA. The registered VCLPs are entitled to flow through taxation treatment for gains made on eligible venture capital investments. These gains are exempt from capital gains tax.
- (d) The 2006 measures introduced a new **Early Stage Venture Capital Limited Partnership (“ESVCLP”)**. The new ESVCLP replaced the old Pooled Development Funds (“PDS”) in July 2006.
- (e) ESVCLPs are:
 - (i) tax flow through vehicles;
 - (ii) for investing in early stage Australian businesses;
 - (iii) the income and capital gains earned by an ESVCLP are exempt from any Australian tax;
 - (iv) this exemption applies to both residents and non-residents;
 - (v) A number of restrictions apply. [See Note 10]
- (f) The limited partnership is the preferred form of business association for venture capital investors internationally for two principal reasons. First, they allow the liability of investors to be limited. Second, unlike corporations, income from limited partnerships can flow through to the partners.

2. **Adopting a Venture Capital Model for AED**

In order to accelerate Aboriginal economic development and harness the skills and resources of the private sector in a short period of time (say 10 years), an appropriate partnership model is necessary and a modified ESVCLP model may represent an excellent starting point for achieving that goal.

3. **Aboriginal VCLP or AVCLP**

An Aboriginal Venture Capital Limited Partnership (“**AVCLP**”) may have the following attributes:

- (a) the **permitted investments** can be described around Aboriginal economic development initiatives. This may have a variety of categories including development on Aboriginal land, development in joint venture with Aboriginal owned entities etc;
- (b) A focus on requiring and monitoring Core Activities and Supporting Activities as a condition of registration is essential to stimulate appropriate partnering with, rather than exploitation of, Aboriginal groups;
- (c) tax flow-through of income and capital gains to the partners and tax exemption on income and capital gains earned by those partners;
- (d) a compulsory minimum equity participation for Aboriginal entities (SAY 15%) within the AVCLP (and within the companies that are established by an AVCLP) together with an obligation for the private sector partners to sell down equity to Aboriginal groups over a specified period thus building strong viable and profitable Aboriginal owned economic enterprises;
- (e) the added bonus for Aboriginal entities (that participate in an AVCLP) is the receipt of tax exempt profits from activities in which the entity has a direct ownership interest and involvement. These tax free profits can be utilised by the Aboriginal community for whatever means that are deemed appropriate by that community whether that includes contribution to their Aboriginal community foundation, ownership of shares in Aboriginal businesses or payment to individuals for their own use and benefit, creating individual wealth.

4. **Targeted Outcomes**

In this way, the private sector has an incentive to grow profitable businesses in conjunction with Aboriginal organisations and if successful, obtain attractive profits on the income from the business or sale of either the equity interest in the AVCLP or the underlying investee businesses and an incentive to undertake effective capacity building, cultural exchange and knowledge sharing with Aboriginal organisations.

5. **Timing is Critical**

- (a) The current resource boom in Australia provides an immediate opportunity for the development of businesses that feed into the supply chain necessary to maintain Australia’s resource industry. An AVCLP platform will encourage the already busy private sector to mobilise resources that are focussed on that supply chain to include local Aboriginal communities and allow for the capacity building and development of Aboriginal economic enterprise.

- (b) The major Government commitment to Aboriginal infrastructure and housing in 2007 is yet another immediate opportunity that could form the basis for AED through AVCLP.

6. **Cross-over With Aboriginal Community Foundations**

- (a) Indeed, the successful growth and development of Aboriginal Community Foundations that accumulate and invest funds wisely may lead to sizeable reserves, some of which may be utilised in the future to acquire successful businesses developed by these AVCLPs.
- (b) If the risk of AED is mitigated, profitable new businesses can be developed that may also be attractive as an investment sector for the Australian Superannuation Funds Industry, investing alongside Aboriginal Community Foundations.

CONCLUDING OBSERVATIONS

1. The introduction of Aboriginal Community Foundations (with Special Conditions) and the provision of tax concessions for expenditure on Supporting Activities like capacity building offers a chance to accelerate Aboriginal Community independence and opportunity. More talented Aboriginal leaders and organisations will begin to emerge.
2. At the same time, the introduction of tax concessions for expenditure on Core Activities and the creation of AVCLPs allows for accelerated Aboriginal Economic Development creating profitable enterprises that can sustain communities and lead to economic independence and a convergence with the outcomes above.
3. Best of all, these initiatives all exist today in a similar form, in other sectors of our society and economy. Why not apply them to this critical national initiative.

This Paper was prepared to stimulate discussion and does not constitute legal advice. It is general in nature.

We welcome your input, feedback and contributions.

FOOTNOTES AND SUPPORTING INFORMATION

NOTE 1 : DIVISION 50 ENTITIES

1. Division 50 is divided into tables and each table is further divided into items and each item is accompanied by special conditions (if any) that apply to that item. The tables include:
 - 50-5 charity, education, science and religion;
 - 50-10 community service;
 - 50-15 employees and employers
 - 50-20 funds contributing to other funds
 - 50-25 government
 - 50-30 health
 - 50-35 mining
 - 50-40 primary and secondary resources, and tourism
 - 50-45 sports, culture, film and recreation.

NOTE 2 : EXPANDING THE CATEGORIES OF TAX EXEMPT ENTITIES

1. Examples of new categories in the Tax Act:
 - (a) **Cultural Organisations** whose main purpose is the promotion of a cultural activity such as literature, visual, community, performing or Aboriginal or Torres Strait Islander arts, music, crafts, design, television, video, radio, film or moveable cultural heritage. Cultural Organisations are approved by the Minister for the Arts and Sport and the Treasurer to be appointed to the Register of Cultural Organisation which is administered by the Department of Communications, Information Technology and the Arts;
 - (b) In 1992 the Register of **Environmental Organisations** was established (Item 6.1.1 subsection 30-55 of the Tax Act). The principal purpose of an environmental organisation must be the protection of the natural environment;
 - (c) Section 50-40 contains a long list of **primary and secondary resources and tourism** categories for promoting development in those areas. This includes agricultural, aquacultural, aviation, fishing, horticultural, industrial, manufacturing, pastoral, tourism and viticultural resources. In 2000 the category of information and communications technology was introduced;

- (d) public authorities, municipal corporations and **local governing bodies** established for the purpose of promoting and providing essential services within our community are tax exempt;

NOTE 3 : EXPANDING THE CONCEPT OF CHARITY

1. On 22 June 2000, the Treasurer announced the introduction of a new charitable institution category for Health Promotion Charities being for organisations whose principal activity is to "promote the prevention or the control of disease in human beings";
2. On 29 August 2002, the Federal Government announced a number of changes to the tax laws in response to the recommendations in a report of the Inquiry into the Definition of Charities and Related Organisations introducing a new type of charity called "**harm prevention charities**". Harm prevention charities are charitable institutions with the principal activity of promoting the prevention or the control of behaviour that is harmful or abusive to humans.
3. The abovementioned report identified that the existing definition of charity permitted the provision of direct relief from harmful or abusive behaviour but not the promotion and prevention of that harmful or abusive behaviour.
4. A harm prevention charity is in fact a deductible gift of recipient under Division 30-F of the Tax Act. Division 30 is for tax exempt entities that are worthy of additional taxpayer support. Inclusion within the categories of entities in Division 30 entitles the entity to receive tax deductible donations above \$2.00. These entities are known as "deductible gift recipients".

NOTE 4 : EXTENDING THE DEFINITION OF CHARITY

1. This is not the first time that difficulties with the definition of charity have arisen. The ***Extension of Charitable Purposes Act 2004*** was introduced by the Federal Government to provide a statutory definition to the common law meaning of charity for the purposes of all Commonwealth legislation.
2. In the explanatory memorandum to the Extension of Charitable Purposes Bill 2004 at paragraph 1.7 it reads:

*"Some institutions or funds that the Government considers should be treated as charities are either uncertain about, or have difficulty satisfying different aspects of this criteria. As a result, this Bill allows certain **childcare and self-help groups**, and **closed or contemplative religious orders** to meet various aspects of the criteria".*

NOTE 5 : DIFFICULTIES WITH THE DEFINITION OF CHARITY

1. **Meaning of Charity**

Consequently, Aboriginal trusts are forced to fall within the definition of "charity" in table 50-5. A charity is an entity established for altruistic purposes that the law regards as charitable. The criteria for deciding what is a charity have been established by case law. The characteristics of a charity are:

- it is an entity that is also a trust fund or an institution;
- it exists for the public benefit or the relief of poverty;
- its purposes are charitable within the legal sense of that term;
- it is non-profit; and
- its sole purpose is charitable.

2. **Class of Beneficiaries**

- (a) Many Aboriginal communities find it difficult to obtain endorsement by the ATO as a charitable trust or charitable institution because charities must be altruistic and exist for the benefit of the community or the relief of poverty which is not always consistent with the desire for Aboriginal economic independence and self responsibility.
- (b) If an entity places limits on those who can benefit from its activities then it may still be a charity if those limits are only to enable it to better carry out its charitable purposes. Charities sometimes limit their activities to a particular segment of the community;
- (c) The ATO states that "Such groups include residents of a particular geographical area, people who practice a particular religion, or suffers of a particular disability or condition. If the nature of the benefits provided by an organisation is compatible with such a limit, the purpose can be charitable."
- (d) If the section of the community that is capable of benefiting from the charity is numerically small then this may prevent the trust from being a charity (paragraph 55 of Taxation Ruling 2005/21). If entry into the class of beneficiaries is dependent upon some personal ties like being a member of a family or group which is based on personal relationships to particular persons, the ATO states:

"Limitation to large groups of the community - residents of a particular geographic area, the adherence of a particular religion, those following a particular calling or professional, or sufferers of a particular disability or condition - are consistent with the public requirement, unless the limits are incompatible with the nature of the benefit ..."
- (e) Some Aboriginal communities are very small and membership of those communities is based on traditional law and custom. This means of identification is considered inappropriate for endorsement as a charity by the

Australian Tax Office, unless the class of beneficiaries is described by reference to a geographic area.

3. Other Definitional Issues

There are a number of additional difficulties with the definition of charity. These concerns include:

- (a) Accumulation;
- (b) Economic development;
- (c) Capacity and implementation;
- (d) Relationship with traditional community; and
- (e) Nature of payments, received by individuals.

NOTE 6 : DIVISION 30 – DEDUCTIBLE GIFT RECIPIENTS

1. The tables of recipients for deductible gifts are set out in subdivision 30-B. Similar to Division 50, entities are either specifically named (for example Item 7.2.4 in Section 30-65 names the Voluntary Service to Indigenous Communities Foundation) or simply described (for example Item 12.1.1 of Section 30-100 describing Cultural Organisations or Item 4.1.1 of Section 30-45 describing public benevolent institution).
2. The tables include the following categories:
 - 30-20 Health;
 - 30-25 Education;
 - 30-30 Gifts that must be for certain purposes;
 - 30-35 Gifts to a public fund established to benefit a rural school hostel building;
 - 30-37 Scholarship, etc, funds;
 - 30-40 Research;
 - 30-45 Welfare and rights;
 - 30-46 Australian disaster relief funds;
 - 30-50 Defence;
 - 30-55 The Environment;
 - 30-60 Gifts to National Parks body or conservation body;
 - 30-65 Industry, trade and design;
 - 30-70 The Family
 - 30-75 Marriage education organisations;

- 30-80 International affairs;
- 30-85 Developing country relief funds;
- 30-86 Developing country disaster relief funds;
- 30-90 Sports and recreation;
- 30-95 Philanthropic trusts;
- 30-100 Cultural organisations;
- 30-102 Fire and emergency services;
- 30-105 other recipients.

NOTE 7 : CONCEPT OF ACCUMULATION

1. Concept of Accumulation - PPF

- (a) On 30 March 2001 the Prime Minister announced a significant step to encourage private philanthropy with the release of guidelines for Prescribed Private Funds (PPF), a new form of charitable trust enjoying tax deductibility for donations made to it. These new trusts provide businesses, families and individuals with greater flexibility to start their own trust funds for philanthropic purposes.
- (b) Families and individuals can donate to a trust of their own, which then disburses funds to a range of other gift deductible recipients, creating opportunities for private philanthropy.

"By creating opportunities for private philanthropy, the Government is building up the social coalition, in which Government, business, community organisations and individuals work together on social issues".(Extract from Prime Minister's press release of 30 March 2001.)

- (c) PPFs are endorsed by the ATO and provide a simple annual return to the ATO outlining the source of funds, and the payment of funds. Whilst there are limits that apply to the accumulation of money within the fund, the Government recognises that it is appropriate to set targets for the accumulation of funds in order to reach a sustainable target capital base, the income from which can be used for charitable purposes.
- (d) There are limits applied to the accumulation strategies to ensure that funds are not retained indefinitely but rather used for the charitable purposes for which they were originally donated. Accumulation strategies beyond 10 years are generally not acceptable to the ATO.
- (e) The ATO, under the PPF Regime also provides a model trust deed. This attribute is worthy of consideration.

2. Accumulation – Charitable Institutions

- (a) Other charitable trusts and institutions are subject to limitations on accumulation policies while others are not. Many of the largest tax exempt

entities are holders of substantial asset bases which are maintained and invested to provide a solid financial basis for the continued operation of those entities, without restrictions on the strategy.

- (b) Generally, charitable trusts and charitable institutions are subject to an ATO administrative policy broadly expressed as the "80/20 Policy". This encourages the distribution of 80% of all donations or other income for the charitable purpose and the retention and accumulation of only 20% of donations or income.
- (c) Many tax exempts have **NO** restrictions on accumulation.

3. **Accumulation - Superannuation**

- (a) **Superannuation** is a core government policy. In fact, compulsory employer superannuation contributions and superannuation tax concessions have been accepted as core government policy in order to:
 - (i) ensure all Australians have security and a certain standard of living in retirement, in light of Australia's increasingly aging population;
 - (ii) encourage the building of wealth for Australians through private savings for retirement from an early age;
 - (iii) reduce the physical strain caused by the Australian population's reliance on government pensions and thereby;
 - (iv) grow the economy and a prosperous future for all Australians.
- (b) Superannuation funds are long term accumulation funds provided for individual persons where accumulation is permitted for an extended period in order to provide benefits for individuals upon certain conditions of release being satisfied.
- (c) Superannuation Industry (Supervision) Regulations 1994 made under the *Superannuation Industry (Supervision) Act 1993*. The conditions of release are: retirement; death; temporary or permanent incapacity; permanent departure from Australia; severe financial hardship; attaining the age of 65; on compassionate grounds.

4. **Accumulation – The Future Fund and HEEF**

- (a) The Australian Government announced in the 2005-06 budget that it would create the **Future Fund** with the defined purposes of long term accumulation of sufficient financial assets to offset the Australian Government's unfunded superannuation liabilities by 2020. The *Future Fund Act* received Royal Assent in March 2006. As at the start of May 2007 the fund's balance is around \$51 billion. (Joint press release by The Hon. Peter Costello MP and Senator The Hon. Nick Minchin, 5 May 2006).
- (b) On 8 May 2007, the Australian Government announced an unprecedented investment for the future of Universities by establishing a new, perpetual Higher Education Endowment Fund (HEEF) with an initial investment of \$5 billion from the 2006-07 budget surplus. The capital of this fund is protected in perpetuity and the income is made available for use by Universities for capital works and research facilities. (Media release BUDB03-07 from Minister Bishop's office dated 8 May 2007).

NOTE 8 : R&D EXPENDITURE

1. Tax Concessions for R&D

Companies that incur expenditure on **Research and Development** may claim a number of tax concessions including:

- (a) an accelerated rate of deduction (generally 125%) subject to a \$20,000 threshold is allowed for wages, salaries and other labour costs and expenditure incurred directly on R&D activities;
- (b) a 100% deduction is allowed for expenditure incurred in acquiring rights to pre-existing core technology;
- (c) an incremental concession (175% rate of deduction) applies where companies increase their level of R&D expenditure;
- (d) a refundable tax offset, equivalent to the R&D deduction is available for small companies. In effect, this amounts to a refund in relation to the tax deduction which is necessary if the company has no other income against which to apply the deduction.

2. Research and Development Activities

- (a) There are two categories of research and development activities which are defined in Section 23B(1) of the Income Tax Assessment Act 1936. The definitions are reproduced because they offer a helpful insight into a mechanism to define appropriate expenditures in relation to Aboriginal economic development. The two categories are Core Activities and Supporting Activities and they are outlined below:
 - (i) **Core Activities** – ie Systematic, investigative and experimental activities that involve innovation or high levels of technical risk and are carried on for the purpose of:
 - A. acquiring new knowledge, regardless of whether it will be a specific practical application (ie basic as well as applied research is covered); or
 - B. creating new or improved materials, products, devices, processes or services (ie experimental development).
 - (ii) **Supporting activities**, ie other activities carried on for a purpose directly related to the carrying on of core activities. Supporting activities include:
 - A. industrial design;
 - B. engineering design;
 - C. production engineering;
 - D. operations research;
 - E. mathematical modelling and analysis;

- F. psychological research;
- G. the design, construction and operation or prototypes;
- H. feedback R&D directed at problem-solving beyond the R&D phase;
- I. computer software development; and
- J. product development briefs for commencing R&D.

Further discussion is encouraged around concepts of Core Activities and Supporting Activities for AED.

NOTE 9 : TAX CONCESSION IN OTHER INDUSTRIES

1. Other Industries

- (a) **Film and Television Sector** - The Australian Government's film programme is designed to enhance the development of Australian culture and Australian artistic expression through support for the local film and television production industry. Government intervention through this programme enables the production of local film and television drama and documentaries that would not otherwise be competitive in the Australian market place, on the basis that there is cultural benefits through support for Australian productions of this type.
- (b) The **Mining Sector** and the **Agricultural Sector** benefits from a range of specific tax concessions, exemptions and incentives.

2. Tax Incentive for Non-Residents

- (a) Last year, the Federal Government announced sweeping changes to the taxation system to encourage foreign investment in Australia. Foreign businesses can now invest in Australian businesses (that do not hold an interest in Australian real property) in circumstances where the sale of shares in those Australian businesses attract no Australian tax in relation to the capital gains made in relation to the sale of those shares. This represents a huge tax incentive for foreign companies to invest in Australian business.
- (b) If tax exemption is available to encourage foreign business to invest in Australia's economic development, a similar approach should apply to AED.

NOTE 10 : RESTRICTIONS ON ESVCLPS

1. Integrity Measures - Restrictions

The significant concessions are available subject to a range of restrictions and they are broadly:

- (a) the maximum size of the fund administered by an ESVCLP is \$100 million;

- (b) ESVCLPs will not be able to invest in investee entities having total assets exceeding \$50 million;
- (c) once the total assets of an entity invested in by an ESVCLP exceeds \$250 million, the ESVCLP must divest itself of that entity;
- (d) losses from ESVCLPs will not be deductible by the partners (the justification given by the government being that, as revenue and capital gains are not taxable, losses should not be deductible).
- (e) Investments in certain fields are precluded, including property development, insurance, infrastructure and certain financial services.

2. **Why Use a Limited Partnership?**

- (a) Unlike normal partnerships, a limited partnership has two kinds of partners: general partners and limited partners;
 - (i) The general partners are just like the partners of a normal partnership. They take part in the management of a limited partnership and have unlimited personal liability for the limited partnership's financial obligations.
 - (ii) The limited partners, on the other hand, have their liability for the financial obligations of the partnership limited to the extent of their capital contribution to the partnership. In this respect, limited partners are like shareholders in a company.