

PRACTICE NOTE

Tax Scenarios – Tax Masterclass

Prepared by Lisa Strelein, David Yarrow and Richard Potok

A three-day NTRB Legal Masterclass was held in Sydney in July 2007 to focus on specific aspects of law which experienced NTRB staff had previously identified as pivotal to their native title work. The Masterclass included half-day sessions on: mining and resources law; law and practice of native title transactions; taxation and trusts. It concluded with a Native Title forum, which focussed on recent developments in native title law, particularly significant full Federal Court decisions and the implications of the decisions.

The key facilitators of the program were Sean Brennan (University of New South Wales), Lisa Strelein (AIATSIS) and David Yarrow (Monash University). They were supported by a variety of guest speakers with expertise in the specific topics, including a special guest speaker, Justice Murray Wilcox. Staff from 10 NTRBs attended the Masterclass.

One session which participants found particularly useful was Alexandra Richards QC's presentation of Monday 30 July regarding the interaction of the law of trusts with Native Title. The following is a summary of that session.

PBCs and related entities

The issue that arose was:

“Can a PBC that administers the rights of native title holders (a Trustee PBC), or a PBC that represents native title holders (an Agent PBC), transfer all or part of the assets arising from a native title transaction, or proceeds from the divestiture of those assets, to another entity without consideration eg transferring proceeds from a future act into charitable trust in order that the income stream and disbursements are exempt from tax?”

1. **Status of a PBC.** The rights of common law holders of native title are held and/or managed by the PBC under a trust or agency arrangement appointed by the Federal Court. The functions and powers of PBCs are prescribed by the NTA (ss56-58) and the PBC Regulations. Trustee PBCs are the predominant PBC structure and are clearly a form of statutory trust. Agent PBCs, due to the prescriptions imposed by the NTA are either a form of statutory trust or, at least, the proceeds from native title transactions would be held by an Agent PBC on trust.
2. **Problems with transferring assets to another entity.** There are four main problems:
 - a. For a Trustee or Agent PBC to transfer funds to an entity without due consideration or proper authorisation from the native title group is prima facie a breach of fiduciary duty. Beneficiaries or the native title group may authorise and direct the disposal of assets.

- b. A PBC is restricted by the PBC Regulations in how it may make decisions affecting native title. If native title holders were not consulted and did not make a decision to divest assets based on traditional law or custom or another process under their rules, then the trustee/agent PBC would be acting outside power and the transfer would be beyond power (ultra vires).
- c. The restrictions cannot be avoided by transferring operations/assets to another vehicle. Any receiving body would hold assets/proceeds in trust and dealing with assets or funds in a manner inconsistent with the NTA would be a breach of fiduciary duty.
- d. The rights and interests of common law holders of native title that are administered by the PBC are rights for a number of individual persons whereas a charitable trust is a trust for purposes rather than for individuals.

The case in point here is *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council* (2006) 203 FLR 394, [2006] NSWSC 1008. In this case the administrator appointed to a Local Aboriginal Land Council (LALC) challenged four transfers of funds, resulting from the sale of land by the LALC to a developer, to a corporate trustee operating a charitable trust. The administrator claimed that the transfers were beyond the statutory powers of the LALC. The NSW Supreme Court confirmed that:

- a. 'In all cases where a corporation owes its existence to a statute, it is open to the corporation to do only those things that the statute contemplates are to be done by it'. The judge commented that an entity's powers and capacity are constrained by its statutory authority and functions. That is 'statutory corporations are created for purposes and are given powers calculated to enable them to perform their statutory functions in pursuit of those purposes'.
- b. The LALC, by making the four transfers, put the funds out of the LALC's power to control and direct the future disposition of the moneys transferred into the ownership of the corporate trustee. It was not suggested that the trustee contracted with the LALC at the time of receipt to ensure that the trustee would apply the moneys received in particular ways or would deal with them only as the LALC requested or directed. Any such contract may, in any event, have involved an impermissible fettering of the discretions of the trustee. Nor did the terms of the charitable trust require the trustee to obey any instructions of the LALC, a non-beneficiary whose members were also non-beneficiaries. Once received by the corporate trustee, the moneys from the LALC came under the sole control of the trustee and it was the trustee alone who could determine what was to be done with them, subject always to the constraints and duties to which it was subject as a trustee (and, as to income, to having regard to any recommendation of the LALC), see para.[106].
- c. This finding would not constrain the LALC, in conformity with expressed wishes of members, to acquire, establish and operate

enterprises through companies wholly owned, controlled and managed by the LALC, see para.[114].

A critical issue is the placing of funds outside the control of the PBC, so that the funds are no longer directed to the statutory purpose of the funds to benefit the common law native title holders and avoiding the statutory scheme for the exercise of power over the rights and interests of the common law holders, in particular, avoiding the need to consult with the native title holders over decisions.

3. Proposed solutions to avoid these issues.

- a. One solution would be for all of the holders of native title to make a declaration of trust for a particular charitable object or purpose. This may require more specific instructions than may be current practice in relation to, for example authorising an ILUA/future act.

Note that there may be issues around identifying the common law holders and whether 'authorisation' or the decision-making processes of the PBC are sufficient for disposal without consideration/compensation.

If the trust created does not satisfy the requirements for the valid creation of a charitable trust, the disposition of an asset may fail and the assets would then go back to the PBC under a resulting trust.

Note also, the limitations of charitable trusts more generally (ie beneficiaries of the trust would be different from the group of native title holders).

- b. An alternative structure may be a company/entity, wholly owned by the PBC. Here again all the common law holders of native title would have to agree to the transfer of assets from the statutory trust administered by the PBC to the company limited by guarantee and/or with requirements for the company to act according to direction given by the PBC. Although this structure would not benefit from the tax advantages of a charitable trust, the structure may be less complex (and therefore less costly) and the recipients of the benefits would continue to be native title holders.

- 4. Final comment.** Deductible Gift Recipient (DGR) status and Tax Exempt Public Benevolent Institution (Tax Exempt PBI) status should not be confused with charitable trust status. DGR and Tax Exempt PBI status result from an assessment and approval by the ATO ('endorsement'). An entity with DGR status allows a contributor of funds to the entity a tax deduction. An entity with Tax Exempt PBI status is not generally liable to pay income tax. One benefit of ATO endorsement of a PBI for fringe benefits tax purposes is that it allows the PBI to provide tax benefits to staff that helps the organisation attract and retain staff.

This commentary does not constitute legal advice.