

Productivity Commission
Resources Sector Regulation
ONLINE SUBMISSION: www.pc.gov.au

5 August 2020

Dear Commissioners

Resources Sector Regulation – Information Request 10.3

We make this submission on behalf of the Centre for Mining, Energy and Natural Resources Law at the University of Western Australia Law School (<https://www.uwa.edu.au/able/research/cmenrl>). The Centre has been engaged in mining, energy and natural resources law research for over 30 years, with a particular emphasis on practical engagement with industry and professional stakeholders.

Our submission concentrates on information request 10.3.

Information Request 10.3

There are four reasons for reforming the current charitable trust rules for the use of native title funds and permitting the removal of those funds to a new structure. They are set out in more detail in the Appendix, but in summary:

- 1) Despite taxation law and charity law developments over the last few decades material ambiguity remains:
 - a. Over the precise scope of activities that a charity may legitimately pursue in furtherance of a charitable purpose focused on economic development for an Indigenous community.
 - b. About whether the charity law public benefit test permits a charitable trust to be limited to the benefit of a native title claim group (as *Charities Act* reforms do not apply to the question of validity for state law purposes) and the extensive range of officeholder positions for Indigenous community members who receive benefits under charitable trusts poses material risks for the not-for-profit aspect of the public benefit test – an issue that has received scant attention in past inquiries or academic writing.
- 2) Achieving practical resolution of the above ambiguity is difficult without legislative reform as:
 - a. The material consequences of failure (invalidity of a charitable trust would be even more material than the already serious consequences of

- loss of income tax exempt status) mean that certainty needs to be obtained upfront, not after the event.
- b. Individual court declarations or test cases will be time consuming and expensive.
 - c. General administrative guidance is likely to prove tricky in such a novel area, as demonstrated by the Australian Charity and Not-for-profit Commission's (**ACNC**) Commissioner's Interpretation Statement on the Provision of Housing by Charities and, in any event, is not binding on the ACNC (which is less than ideal for some of the larger Indigenous charitable trusts with multi-million dollar multi-year expenditure programs) and would also be required from state and territory attorneys-general, who retain oversight of charitable trusts.
- 3) While it is possible to combine charities and non-charities in structures that receive, manage and distribute native title funds, this adds material complexity.
- 4) Some of the complexity arises not just from the use of multiple entities, but from the sui generis nature of the charitable trusts and other entities that form Indigenous benefits management structures. Those entities are essentially expected to perform a social enterprise function, which brings with it all the uncertainty around scope of controller duties and prioritisation of social mission versus distribution of native title funds surpluses to community members.

The Appendix also examines several mechanisms through which funds might be removed from Indigenous charitable trusts, highlighting:

- 1) The PBC Economic Vehicle Status proposal of the Minerals Council of Australia and the National Native Title Council has a number of advantages in resolving the above technical and administrative charity law ambiguity that go beyond the very real benefit of a change in language from 'charitable' to 'development' purposes.
- 2) However the PBC Economic Vehicle Status proposal needs further refinement to better deal with the social enterprise nature of Indigenous benefits management structures so as to more clearly prioritise community purposes versus individual distribution of surplus.
- 3) If the PBC Economic Vehicle Status is adopted, the question of legacy charitable trusts will arise and would potentially necessitate amendments to state and federal legislation to permit assets to be applied for non-charitable purposes and to avoid potential tax events on the transfer of non-cash assets.

We would be very happy to discuss any of the research further with the Commission.
If you would like to do so, please contact Ian Murray _____ or
John Chandler _____

Yours faithfully

Ian Murray

John Chandler