LOCAL GOVERNMENT RATES EXEMPTIONS FOR INDIGENOUS ORGANISATIONS: THE COMPLEXITIES OF A STATE-BY-STATE SYSTEM

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I Introduction

Local government rates are imposed in every state and territory of Australia through either the ownership or occupation of land.[1] Land subject to local government rates may be owned or occupied by many different types of Indigenous entities. For example, native title is recognised by a determination under the *Native Title Act 1993* (Cth) ('*NTA*').[2] Native title may cover a range of interests in land: in some cases the interest is exclusive possession akin to freehold title;[3] in others it may only comprise the right to hunt or fish.[4] In *Western Australia v Ward*[5] the High Court likened native title to a 'bundle of rights'.[6]

If the recognised native title is akin to freehold title, or the entity representing the native title claimant group (the Prescribed Body Corporate – 'PBC')[7] occupies the land, then this entity will be liable for local government rates imposed by the Local Government Act or Rates Act applying in the relevant state or territory. Many other Indigenous organisations also own or hold land in such a manner that they are prima facie liable for local government or council rates. They may, for example, own land in order to provide low-cost housing to Indigenous people,[8] or run a cattle station under a pastoral lease.[9]

Local government rates can be a significant liability. Their payment can be extremely detrimental to the ability of Indigenous organisations to operate effectively, and to provide services to the Indigenous peoples that they are established to assist. For example, in the 2007 decision of *Shire of Derbywest Kimberley v Yungngora Association Inc*[10] the local government rates liability for the 2004 year was $14 905.91.[11] This was a significant liability, particularly in view of the fact that the Association made an operating loss for this period of $120 022 after earning a gross income of $403 192. The seriousness and financial significance of the issue is also demonstrated by the number of cases in which Indigenous organisations have been denied exemption.[12]

The difficulty from a legal perspective is that local government rates are imposed under state or territory legislation. There is no legal or government policy requirement that these laws must be uniform, and their content reflects the public policy needs and issues that affect each individual state or territory.

This paper analyses the exemption from rates provisions of each state and territory that apply to Indigenous entities. The specific exemptions for Indigenous organisations, such as Land Councils, are very limited and are therefore summarised at the end of the paper. The focus of the paper is a consideration of the exemption provisions relating to 'charities'. Many Indigenous entities fall within the legal definition of charity and are recognised by the Australian Taxation Office ('ATO') as charities for the purposes of the income tax exemption and other Federal tax concessions.

First, this paper details the development of the common law definition of 'charity'. Secondly, it examines the rates exemptions for land under state or territory land rights legislation, and focuses in particular on the differences between using land 'for charitable purposes' and using land '*exclusively* for charitable purposes'. It also looks briefly at exemptions for land held under a State Land Rights Act, for land held in the Torres Strait Islands (where the Torres Strait Regional Authority is exempt from all taxes),[13] and for land held by community service organisations.

Overall, this paper demonstrates the complexities of applying exemptions in each jurisdiction by looking at

their similarities and differences, and how these impact on Indigenous organisations.

II Definition of Charity for the Purposes of Imposing Local Government Rates

There is no statutory definition of charity in any of the local government enactments that impose rates. There is, however, a body of English law that determines the legal concept of charity for the purposes of Australian law.

In 1601 an attempt was made in the Preamble to the *Charitable Uses Act 1601* (UK)[14] (commonly referred to as the Statute of Elizabeth) to classify or provide guidelines for identifying 'charitable purposes'. This Preamble set out a list of charitable purposes, including: relief of the aged, impotent and poor; maintenance of sick and maimed soldiers and mariners; aid to schools and scholars in universities; and the help of young tradesmen and handicraftsmen. However, the Preamble was not considered, even in its own time, to be exhaustive. Some obvious charitable areas were omitted, such as charities for the advancement of religion, and for some educational institutions.[15] Two hundred years later, the English courts ruled that for a purpose to be 'charitable' it had to be within the spirit and intendment of the Preamble and also for the public benefit.[16]

In 1891, Lord Macnaghten in *Pemsel's Case*[17] stated that the legal meaning of 'charity' could be classified into four separate divisions. He stated that a charity should be a trust for one of the following:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; or
- other purposes beneficial to the community.[18]

The classification of charitable purpose into these four areas was seen as a milestone, and has been consistently used in judicial considerations ever since.[19]

In 1974, the High Court of Australia confirmed the place of the Preamble to the Statute of Elizabeth in Australian law. In *Royal National Agricultural and Industrial Association v Chester*[20] it concluded that, in order for an institution to be charitable, it must be:

- within the spirit and intendment of the Preamble to the Statute of Elizabeth; and
- for the public benefit.[21]

This has been reaffirmed more recently by the High Court in *Central Bayside General Practice Association Limited v Commissioner of State Revenue of the State of Victoria*.[22]

The 2007 decision of *Yungngora Association* applies the legal concept of 'charity' in the context of local government rates. In that case, the Western Australian Court of Appeal followed the line of cases on the common law meaning of charity. It held that, in order to be charitable, an institution's purpose must be within the spirit and intent of the Preamble, and of benefit to the public as explained in *Pemsel*.[23] Importantly, the Court accepted that the advancement of Australian Indigenous peoples was a charitable purpose.[24]

In the earlier case of *Toomelah Co-operative Limited v Moree Plains Shire Council*,[25] the New South Wales Land and Environment Court applied the examples in the Preamble and the line of cases following *Pemsel* to an organisation that was established to assist Indigenous people in the Toomelah and Boggabilla areas. This case considered the issue of whether the organisation was a Public Benevolent Institution ('PBI')[26] or charity for the purposes of gaining an exemption from local government rates on land that it owned and used to provide housing for Indigenous people in the area. The Court considered that the aim of fostering and developing Aboriginal and Torres Strait Islander identity and culture was within the ideals of a PBI or public charity.[27] Furthermore, the Court decided that the aim of promoting land rights and other legal and cultural rights of the Indigenous community was charitable within the fourth category set out in *Pemsel's Case*, and possibly even the first category (for the relief of poverty).[28]

III Exemption from Rates because the Land-Owning Entity is a Charity or Charitable Institution

None of the state or territory local government legislation imposing rates on the ownership or occupation of land exempts the landowner merely because it is a charitable entity. All the acts require something in addition to land ownership or occupation.

A Exemption from Rates where the Land is used for Charitable Purposes

In New South Wales and Queensland the current local government legislation exempts an entity from rates where the land is used or occupied for charitable purposes. In New South Wales, land that belongs to a PBI or public charity will be exempt from rates where it is used or occupied by the institution or charity for the purposes of that institution or charity.[29] The wording indicates that, as long as the land owner is a 'public charity', occupation for its charitable purposes will satisfy the exemption. A similar provision to New South Wales applies in Queensland through the operation of Local Government legislation and its regulations.[30] The provision requires a resolution by the relevant local government.

(i) The meaning of land used or occupied for charitable purposes

There have been several cases across the jurisdictions where the Indigenous entity has appealed from the decision of the local government refusing the exemption from council rates. The following are examples of cases involving an Indigenous organisation where the legislation required that the land was used or occupied by a charity for charitable purposes.

In *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation*,[31] land was leased by certain Aboriginal-controlled associations and used or occupied for the purposes of 'town camps'. This meant that the organisation was in effect providing housing for Aboriginal people in Alice Springs. The Court held that this use was sufficient to fulfill the requirement (under earlier Northern Territory legislation) that the land was used or occupied for the purposes of a charity. Similarly, in *Aboriginal Hostels Ltd v Darwin City Council*[32] the court held that a Commonwealth-controlled company, which provided accommodation for Aboriginal people and charged a fee for doing so, was using or occupying the land for the purposes of a 'public charity'. Both these decisions were made under earlier Northern Territory legislation, which required that land be 'used or occupied for the purposes of ... [the] charity'.[33]

There are several relevant cases dealing with the New South Wales provisions. Two of the earliest in respect of Indigenous entities are *Toomelah* and *Gumbangerrii Aboriginal Corporation v Nambucca Council*.[34] *Toomelah* involved land used by a community advancement society for Aboriginal housing and employment projects. The court held that the land was used or occupied for the purposes of a 'public charity'. *Gumbangerrii* concerned an Aboriginal not-for-profit corporation that owned houses on land in the Nambucca region, which it rented to Aboriginal people on the basis of need. This was considered to be used for benevolent purposes[35] and, therefore, qualified for the rate exemption.

In 2000 the issue again came before the New South Wales Land and Environment Court in *Murray Darling Community Care Incorporated and Coomealla Aboriginal Housing Company Ltd v Wentworth Shire Council*.[36] The court accepted that each entity was a PBI. The purpose of each entity was to relieve the poverty, sickness, destitution, distress, suffering, misfortune or helplessness of needy members of the local Aboriginal or Torres Strait Islander communities. The entities rented houses on the land to members of the community who were Aboriginal or Torres Strait Islanders and in need of shelter. The rent charged was below market value. The tenant's need in each case was established by the directors of the relevant entity. It was held that the land was used for the purposes of the PBI and therefore exempt.

In all these cases the court took a two-stage approach to determining whether or not the exemption applied. First, it considered whether or not the entity was a charity or PBI.[37] As discussed earlier, the courts have followed the common law concept of 'charity' as illustrated in *Pemsel's Case*. Once the entity satisfied this test, the courts then looked at whether or not its use of the land was in accordance with its charitable purposes (whatever they may be). This second limb was satisfied by the relevant court considering both the Constitution of the entity, as well as the activities that it undertook on the land. The courts in several cases, including in *Gumbangerrii*,[38] approved Nader J's statement in *Aboriginal Hostels Ltd v Darwin City Council*[39] that:

> The question whether the land is *used or occupied for the purposes* of a public charity is determined by comparing the purposes of the trust as evinced in the relevant instruments with the actual use to which the land is put. If the land were used for purposes falling outside the ambit of the trust it could not be said to be used for the purposes of the charity even though its legal title might be vested in the trustee[.][40]

These cases indicate that, once the relevant organisation has been recognised as a 'charity' or PBI, the exemption from rates

will be granted as long as its use of the land is in accordance with its charitable objects.[41] The major unsuccessful case, *Dareton Aboriginal Land Council v Wentworth Council*,[42] failed because some of the Land Council's functions were not charitable.[43]

B States and Territories that Require Use of the Land that is 'Exclusively' for Charitable Purposes

Victoria, Western Australia, Tasmania and the Australian Capital Territory require that the land is 'exclusively' used for charitable purposes. The Victorian *Local Government Act 1989* (Vic) exempts any part of land used exclusively for charitable purposes.[44] The Act further restricts this exemption by providing that land is not exempt if:

(a) it is separately occupied and used for a purpose which is not exclusively charitable;
(b) a house or flat on the land
  (i) is used as a residence; and
  (ii) is exclusively occupied by persons including a person who must live there to carry out certain duties of employment;
(c) it is used for the retail sale of goods;
(d) it is used to carry on a business for profit (unless that use is necessary for or incidental to a charitable purpose).[45]

Thus, for example, an Indigenous organisation that runs a shop or has a residence on the land would not be entitled to the exemption. It also fails the test if, although owning the land, the organisation does not occupy and use it for an exclusively charitable purpose.

In Western Australia, the *Local Government Act 1995* (WA) similarly grants an exemption from rates for land used 'exclusively' for charitable purposes.[46] The Tasmanian legislation also exempts land or part of land owned and occupied exclusively for charitable purposes.[47] The sites of benevolent institutions and buildings used exclusively for public charitable purposes are also exempt in the Australian Capital Territory from rates under s 8(1) of the *Rates Act 2004* (ACT). A distinction in this legislation is drawn between 'sites' of benevolent institutions and 'buildings used exclusively for public charitable purposes'. For the purposes of this discussion, I will concentrate on the issue of exclusive use for charitable purposes.

(i) Use of land by charity for non-commercial purposes

In the Northern Territory, s 144(1)(f) of the *Local Government Act 2008* (NT) provides that land used for a 'non-commercial' purpose by a PBI or a public charity is exempt from rates. The provision goes on to state that the issue of whether or not the land is used for a commercial or non-commercial purpose depends on the nature of the use, and not the fact that the user of the land is a charity or PBI.[48] The section further states that if land is used for two or more different purposes, and one or more but not all the purposes are exempt, the exemption will not apply unless the non-exempt purpose is merely incidental to the exempt purpose.

The following example from the section explains what is intended by this restriction:

> An allotment consists of a public museum containing a cafeteria. The existence of the cafeteria would not negative the exemption. However, if it were a restaurant attracting customers in its own right, it would do so.[49]

(ii) Exclusively for charitable purposes

Two Western Australian cases illustrate how the stricter Western Australian provisions have been interpreted in respect of two very different Indigenous entities. In *Shire of Ashburton v Bindibindi Community Aboriginal Corporation*,[50] the court accepted that the advancement of Aboriginal people generally was a charitable purpose.[51] The court also held that the activities conducted upon the land in question were exclusively charitable, and therefore that the exemption applied. The land was used to provide low-cost rental housing for economically disadvantaged Indigenous people. The proceeds were used by the corporation to pay bills, cover office costs and generally further the objects of the organisation, but not in order to generate a profit. A number of not-for-profit projects were undertaken upon the land, which aimed to improve living conditions, keep people occupied, stop them drinking excessive amounts of alcohol, create self respect, and (theoretically) generate income to further the corporation's objects.[52]

By way of contrast, the 2007 decision of *Yungngora Association* held that an Aboriginal association operating a cattle station was not entitled to the exemption as the land was not used 'exclusively' for charitable purposes as required by the Western Australian provision.

In *Yungngora Association*, the respondent was an organisation representing local Aboriginal people and holding a pastoral lease from the Crown. This pastoral lease, known as the Noonkanbah pastoral station, is situated in the far north-west of Western Australia. The Association conducted a pastoral enterprise of approximately 3500 head of beef cattle through the Noonkanbah Rural Enterprises Pty Ltd (NRE), a company controlled by the office-holders of the Association. The land was also part of a settled claim under the *NTA*.

The Association objected to the Shire's decision that the relevant land was rateable land. It claimed that it was exempt under s 6.26(2)(g) of the *Local Government Act 1993* (WA). This provision very specifically states that the exemption will only apply if the land was 'used exclusively' for charitable purposes. The Shire disallowed the objection on the ground that the land was used for a commercial cattle station, and that any charitable purposes for which it was used were incidental to its commercial use. The Association applied to the Western Australian State Administrative Tribunal to review the Shire's decision and was successful.[53] The tribunal considered that the dominant use of the land was charitable as the rationale was to improve the economic position, social condition and traditional ties to the land of the local Aboriginal community. This usage was held not to be compromised by any collateral or non-charitable use.[54]

When the matter came before the Court of Appeal of the Supreme Court of Western Australia, the court took a more literal view of the words of the section and concluded that the land was not used exclusively for charitable purposes. Newnes AJA on behalf of the court stated that

> [t]here is, however, a distinction between, on the one hand, the use of land for a charitable purpose and, on the other, its use for the purpose of making what is derived from the activities on the land available to be applied for charitable purposes. Accordingly, it has been held that land is not used for charitable purposes where the land is used for the purpose of raising funds to be used for charitable purposes.[55]

The Court unanimously agreed that the running of a cattle station, even though all its funds were used for the charitable purpose of assisting local Indigenous peoples (including funding native title claims, providing them with meat from the cattle and supporting a diabetes health clinic), meant that the actual land itself was not used for a charitable purpose. This reasoning follows earlier decisions such as *Nunawading Shire v Adult Deaf & Dumb Society of Victoria*[56] and *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation*,[57] which make the distinction, based on the wording of the relevant statutory exemption, between the use to which the land is put, and the fact that this usage raises funds used for charitable purposes by a charitable organisation. This rationale is discussed in detail below.

(iii) Does *Word Investments* change the interpretation of state and territory local government legislation where a charity also carries on a business?

The most recent High Court decision on the issue of whether or not an organisation is a 'charity' is the 2008 decision of *Commissioner of Taxation v Word Investments*.[58] This case involved a company claiming exemption as a charity from Federal income tax. The High Court's decision is therefore relevant, but does not deal with the same legislative provision as any of the State or Territory rating acts.

Word Investments was a not-for-profit company that was part of the Wycliffe group of companies. Wycliffe was a charity on the basis that its purpose was to teach Christianity by translating the bible into the local language of various nationalities that were previously unaware of the teachings of Christ. In order to facilitate this purpose, Word Investments undertook commercial activities for profit, but then used all of this profit to further their charitable objectives. Word Investments' articles of association were all charitable objectives that furthered the charitable objectives of the Wycliffe group.

In deciding that Word Investments was a charity, a majority of the High Court stated that

> [t]he inquiry, so far as it is directed to activities, must centre on whether it can be said that the activities are carried on in furtherance of a charitable purpose. So far as the actual activities of Word in furtherance of its purposes are relevant, it is plain that ... the funds paid out by Word were paid to bodies fulfilling charitable purposes. The activities of Word in raising funds by commercial means are not intrinsically charitable, but they are charitable in character because they were carried out in furtherance of a charitable purpose.[59]

For the purposes of deciding whether or not an entity is charitable, the High Court has therefore concluded that the entity can still undertake commercial activities, so long as all

the funds from these activities are used in order to further its charitable objectives. However, the question arises: does this decision aid charities that are faced with statutory provisions requiring exclusively charitable use of the land?

In *Yungngora Association Inc v Shire of Derbywest Kimberley*,[60] the Western Australian State Administrative Tribunal held that the Association did use the land in question exclusively for charitable purposes. The rationale for this was that the purpose of the Association in holding and operating the pastoral lease was directed to

> the most direct or outward manifestation of all of the charitable purposes that we have identified: namely those related to the social, economic and 'traditional' advancement of a relevant group, currently in need, by their use of that lease (and the consequent use of the subject land).[61]

When looking at the organisation's commercial activity, the Tribunal took a broad view of what is 'exclusively charitable'. The relevant commercial activity of the organisation was operating a cattle station in accordance with the terms of a pastoral lease. The lease was granted over land that was also subject to a settled native title claim under the *NTA*. The relevant land was purchased in 1976 by the Commonwealth Aboriginal Land Fund with the express object of 'allow[ing] the traditional people of Noonkanbah to return to their homelands'.[62] Furthermore, some 10 local Indigenous people worked on the station (with an additional 8-10 during mustering times). The total local community was approximately 350 Indigenous people. During the relevant year the station had gross income from cattle sales of just over $400 000, although it made an operating loss of $120 022. The Tribunal considered all these facts, and in particular the history of the station, and held that returning the land to the traditional owners was really the true purpose of the pastoral operation.[63]

Unfortunately for the Yungngora Association, the Court of Appeal considered the issue from the narrower perspective of the *actual* usage of the land. It concluded that the usage must also be charitable, as opposed to a commercial operation that used its profits for charitable purposes, or even that the commercial purposes were ancillary to the charitable purposes.[64] The Court followed older High Court decisions that dealt with similar statutory provisions.[65]

The earliest decision relied upon in the *Yungngora Case* was a 1921 decision, *Nunawading Shire v Adult Deaf & Dumb Society of Victoria*.[66] In that case the High Court looked at the literal interpretation of the word 'exclusively' in the rating provision. It held that, because the Society used the land in question for two purposes (the second being carrying on a business of growing and selling flowers to assist in the upkeep of the institution) it failed the exclusively charitable test.

The second High Court case relied upon was the 1952 decision of *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation*.[67] In that case, the High Court found in favour of a charity that carried on a farming business wherein delinquent boys were housed and given vocational training and education in farming. Importantly, the judgment of Fullagar J cast some doubt over the earlier *Nunawading* case. He pointed out that, at the time that case was decided, it was considered that the word 'charitable' in the relevant rating act was used in its everyday sense, rather than the broader legal sense, and that this had coloured the decision. The joint judgment of Dixon, Williams and Webb JJ did not draw this distinction, and stated the principle that:

> If the land is used for a dual purpose then it is not used exclusively for charitable purposes although one of the purposes is charitable. But if the use of the land for a charitable purpose produces a profitable by-product as a mere incident of that use the exclusiveness of the charitable purpose is not thereby destroyed.[68]

The dividing line between dual use that prevents the organisation from gaining the exemption, and a charitable purpose that produces a 'profitable by-product', is not always clear. It may depend on how profitable the second use of the land is: in *Nunawading* the use of the land for flower growing was very profitable, whilst in *Fern Tree Gully* only five of the Institution's 52 years of operation had been profitable.[69] It also depends on the type of activity that is carried out. The organisation in *Fern Tree Gully* was successful as it was able to demonstrate that the operation of the farm was part of the boys' rehabilitation, and therefore integral to its charitable purpose.

Word Investments clarifies the position that charities can undertake business activities and not lose their charitable status. Unfortunately for many charities that also carry out businesses, the specific wording of the provisions requiring 'exclusively charitable purposes' will prevent such charities gaining the rates exemption unless the business is somehow integral to their charitable purpose. If the cattle

station in *Yungngora Association* had used the business for apprenticeships and vocational training of Indigenous youth (on a larger scale than it actually did), it may have been successful.

IV Other Exemptions

A Exemption from Rates where Land is Held under State Land Rights Act

New South Wales, Queensland, the Northern Territory and Tasmania all provide exemption from local government rates where the land is held under some form of statutory land rights regime. There is also an exemption from tax for the Aboriginal Council of the Jervis Bay Territory located in the Australian Capital Territory.

In New South Wales, s 555(1)(g) of the *Local Government Act 1993* (NSW) states that land will be exempt from rates where it is vested in the New South Wales Aboriginal Land Council or a Local Aboriginal Land Council, and is the subject of a declaration under Division 5 of Part 2 of the *Aboriginal Land Rights Act 1983* (NSW).

In Queensland, s 93(3)(d) of the *Local Government Act 2009* (Qld) provides that Aboriginal land under the *Aboriginal Land Act 1991* (Qld), or Torres Strait Islander land under the *Torres Strait Islander Act 1991*(Qld) (other than the part of the land that is used for commercial or residential purposes), is exempt from rates.

In the Northern Territory, s 144(1)(k) of the *Local Government Act 2008* (NT) provides for a specific exemption for land owned by a 'Land Trust' or an 'Aboriginal community living area association' unless it is land designated in the regulations as rateable, land subject to a lease or licence conferring a right of occupancy, or land used for a commercial purpose.[70] 'Land Trust' is defined as an Aboriginal Land Trust established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).[71] Section 3 defines an 'Aboriginal community living area association' as an incorporated association in which an Aboriginal community living area is vested. This area is either an area granted as an Aboriginal community living area under Part 8 of the *Pastoral Land Act 1992* (NT) (or the corresponding previous legislative provisions), or an area that the Minister designates by *Gazette* notice as an Aboriginal community living area.

In Tasmania, s 87(1)(da) of the *Local Government Act 1993* (Tas) exempts from rates Aboriginal land, within the meaning of the *Aboriginal Lands Act 1995* (Tas), which is used principally for Aboriginal cultural purposes.

Additionally, the Aboriginal Council for the Jervis Bay area is exempt from rates and taxes in respect of land held under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth).[72]

B Limitations of the Exemption

Queensland and the Northern Territory are similar in that the exemption is overridden where there is a commercial or residential use of the land. This limitation severely limits the use of the land, such that the exemption is lost if housing is built on it, or if it is used for some commercial purpose such as a cattle station, retail premises, art gallery or office premises.

The Tasmanian limitation also seriously restricts the use of the land as it is unlikely that cultural purposes would include, for example, residential accommodation, farming, retail or office premises.

C *Aboriginal and Torres Strait Islander Act 2005* (Cth)

The *Aboriginal and Torres Strait Islander Act 2005* (Cth) ('*ATSIA*') is designed to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of relevant government policies. It also aims to promote the development of self-management and self-sufficiency amongst Aboriginal and Torres Strait Islander peoples, further their economic, social and cultural development, and ensure co-ordination in the formulation and implementation of relevant policies.[73]

Section 142 establishes the Torres Strait Regional Authority ('TSRA') and s 144Z provides that the TSRA is not subject to taxation at either the Commonwealth, State or Territory level. It will therefore be exempt from local government rates on any land that it holds.

The ATSIA provides for an Indigenous Land Corporation to hold land.[74] This corporation is also exempt from all Commonwealth, State and Territory taxes.[75] Furthermore, ATSIA establishes Indigenous Business Australia[76] and exempts this entity from all taxes.[77]

D Exemptions from Rates for Community Service Organisations or Organisations which Provide a Benefit or Service to the Local Community

South Australia's local government act has no specific provision relating to exemption from rates for charities or charitable purpose entities. However, it does allow for a rebate from rates where the land is predominantly used for service delivery and administration by a community service organisation.[78] There is also a discretionary rebate of rates where the 'land is being used by an organisation which, in the opinion of the council, provides a benefit or service to the local community'.[79]

In order to be a 'community service organisation', the organisation must be not-for-profit and for the benefit of the public, provide community services without charge (or for a charge that is below the cost to the body of providing the services), and provide services to persons who are not its members.[80]

An organisation is not a community service organisation if it has an objective of engaging in 'trade or commerce'.[81]

Section 161(4)(c) provides examples of 'community service organisations'. These include organisations that provide: emergency accommodation; food or clothing for disadvantaged persons; supported accommodation; essential services, or employment support, for persons with mental health problems or intellectual or physical disabilities; legal services for disadvantaged persons; drug or alcohol rehabilitation services; community education about diseases or illnesses; and the provision of palliative care.[82]

Many of the Indigenous charities discussed above would come within this type of organisation, although the range of activities that community service organisations can undertake is much narrower than charities.

V Conclusion

There are many reasons why a charity needs to engage in commercial activities. In the current economic environment of limited government assistance there is pressure for not-for-profit organisations (including charities) to engage in income-generating activities due to the following:

- an economic climate of increasing cost pressures and reduction in government funding;
- demand for services exceeding the level which can be met by current levels of government funding;
- increasing competition for funds from philanthropic grants and other non-government sources;
- government expectations that non-government organisations will find alternative sources of funds to subsidise service provisions, this is particularly so for indigenous entities such as PBCs;[83]
- governments increasing their reliance on non-government service providers but not agreeing to fully fund these organisations; and
- a growing trend towards economic development, self reliance and being entrepreneurial by non-government organisations.[84]

Australian governments recognise that not-for-profit organisations must be self-sufficient and entrepreneurial to attract and manage a diversity of income streams that are necessary for their future charitable operations. They also recognise that the income streams may be from business or business-like activities.[85]

This paper has highlighted the complexity and inconsistency that surrounds the liability for local government rates on land owned or occupied by Indigenous organisations. Such complexity is an added burden on these organisations, which need to ensure that the rights and interests of their members are protected. This complexity has often led to engagement in costly litigation in order to clarify their legal liability to local government rates. This burden is made even greater due to the fact that many states and territories have different exemption rules, not only relating to charities but also to Aboriginal land rights organisations.

It is contradictory to state on the one hand that Indigenous organisations should be self-sufficient in providing services to their disadvantaged community members, and on the other to impose tax on the ownership of land which they have fought so hard to regain, and which is essential to their economic future.[86]

Current research indicates that the potential liability to local government rates is preventing Indigenous organisations from entering into Indigenous Land Use Agreements under the *NTA*.[87] If this practice becomes widespread then it will be another hurdle to Indigenous organisations reclaiming the land that was taken away from them and that should be returned. It is strongly argued that the view of the Western

Australian State Administrative Tribunal in the *Yungngora* case is the more equitable approach, and one that takes into account the holistic view that the economic advancement of Australia's most disadvantaged group is also exclusively charitable: not in a pejorative or protectionist sense, but in the legal sense of being a significant benefit to the community. Such an approach would also be consistent with the High Court's approach in the *Word Investments* case, which stresses the importance of the objects of a charity over its activities.

It is time the Federal Government thought about a consistent and equitable approach to exemptions from local government rates for Australian Indigenous organisations that also encourages their economic advancement.

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1 The relevant acts are: *Local Government Act 1993* (NSW); *Local Government Act 2009* (Qld); *Local Government Act 1989* (Vic); *Local Government Act 1995* (WA); *Local Government Act 1993* (Tas); *Local Government Act 1999* (SA); *Local Government Act 2008* (NT); *Rates Act 2004* (ACT).

2 *Native Title Act 1993* (Cth) s 87.

3 Lisa Strelein, *Taxation of Native Title* Agreement (AIATSIS Native Title Research Monograph 1/2008) 6.

4 For a general discussion of the scope of native title see Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Thomson Reuters, 4th ed, 2009).

5 (2002) 213 CLR 1.

6 (2002) 213 CLR 1, 91-2.

7 See *Native Title Act 1993* (Cth) ss 55, 56, 57. Once the details of a PBC are entered on the National Native Title Register, the body then has the status of a 'Registered Native Title Body Corporate', which is recognised under *Native Title Act 1993* (Cth) s 203AD. The term PBCs will be used throughout this paper to refer to both PBC and RNTBC phases.

8 *Toomelah Co-operative Limited v Moree Plains Shire Council* [1996] 90 LGERA 48.

9 *Shire of Derbywest Kimberley v Yungngora Association Inc* [2007] WASCA 233.

10 [2007] WASCA 233 ('*Yungngora Association*'). Local government rates are generally calculated using a formula that is related to the unimproved land value. The formula and valuation will vary depending on the statutory regime and the locality.

11 *Yungngora Association* [2007] WASCA 233 [10].

12 For example, in New South Wales, in the period 1994 to 1996 there were four appeals to the Land and Environment Court by Indigenous entities against the disallowance of the exemption from rates. These are: *Maclean Shire Council v Nungera Co-operative Society Ltd* [1994] 84 LGERA 139; *Dareton Local Aboriginal Land Council v Wentworth Council* [1995] 89 LGERA 120; *Toomelah Co-operative Limited v Moree Plains Shire Council* [1996] 90 LGERA 48; *Gumbangerrii Aboriginal Corporation v Nambucca Council* (1996) 131 FLR 115. This is a significant number of cases in view of the high cost of litigation and the reluctance of organisations to be exposed to adverse publicity through the judicial process: see Myles McGregor-Lowndes, 'Australian Charity Law Reform Proposal' (2002) 5(1) *International Journal of Not-for-Profit Law* 6.

13 See *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 144Z.

14 43 Eliz I c 4.

15 For a complete discussion see Hubert Picarda, *The Law and Practice Relating to Charities* (Bloomsbury, 3rd ed, 1999) 72; F M Bradshaw, *The Law of Charitable Trusts in Australia* (Butterworths, 1983) 2.

16 *Morice* v *Bishop of Durham* (1805) 10 Ves 522; 32 ER 947.

17 *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531 ('*Pemsel's Case*').

18 *Pemsel's Case* [1891] AC 531, 583.

19 See, *Salvation Army (Victoria) Property Trust v Shire of Fern Tree Gully* (1952) 85 CLR 159, 173; *Ashfield MC* v *Joyce* (1976) 10 ALR 193.

20 *Royal National Agricultural and Industrial Association v Chester* [1974] 48 ALJR 304.

21 *Royal National Agricultural and Industrial Association v Chester* [1974] 48 ALJR 304, 305; that this is the law in Australia was originally decided by the Privy Council in *Chesterman v Federal Commissioner of Taxation* (1925) 37 CLR 317.

22 (2006) 228 CLR 168, 178-179. This principle was also recognised by the High Court in the earlier decision of *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation* (1952) 85 CLR 159.

23 *Yungngora Association* [2007] WASCA 233, [44]–[46].

24 *Yungngora Association* [2007] WASCA 233, [54]–[58].

25 (1996) 90 LGERA 48 ('*Toomelah*').

26 A public benevolent institution is 'an institution organised for the relief of poverty, sickness, destitution, or helplessness': *Perpetual Trustee Co Ltd v Commissioner of Taxation (Cth)* (1931) 45 CLR 224, 232 (Starke J). The test is similar to that of a charity although narrower. The Australian Taxation Office recognises PBIs as a subset of charities: 'Taxation Ruling TR 2003/5 Income Tax and

Fringe Benefits Tax: Public Benevolent Institutions' [24]. As the exemption from rates for 'charities' is more widespread than for PBIs, and as the test for PBI status is more onerous, the author has concentrated on the case law specifically relating to charities.

27 *Toomelah* [1996] 90 LGERA 48, 57-58 (Stein J).

28 *Toomelah* [1996] 90 LGERA 48, 59 (Stein J).

29 *Local Government Act 1993* (NSW) s 556(1)(h). New South Wales also allows an exemption for public charities from special rates for water and sewerage. This exemption is subject to the discretion of the council: s 558(1)(c).

30 *Local Government Act 2009* (Qld) s 93(3)(g)(ii) and *Local Government Regulation 2005* (Qld) sch 4 reg 2, which states that land used for charitable purposes is exempt if the relevant local government has, by resolution, decided the land should be exempt.

31 (1997) 139 FLR 236.

32 (1985) 75 FLR 197.

33 *Local Government Act 1985* (NT) s 97(1)(d).

34 (1996) 131 FLR 115 ('*Gumbangerrii*').

35 A narrower test than required for the entity to be 'charitable', see discussion in above n 26.

36 [2000] NSWLEC 236.

37 The court held in *Gumbangerrii* that the corporation was a PBI and therefore did not need to decide if it was also a charity: (1996) 131 FLR 115, 123 (Stein J).

38 (1996) 131 FLR 115, 122-123 (Stein J); also approved in *Toomelah Co-operative Limited v Moree Plains Shire Council* [1996] 90 LGERA 48, 56 (Stein J) and *Murray Darling Community Care Incorporated and Coomealla Aboriginal Housing Company Ltd v Wentworth Shire Council* [2000] NSWLEC 236 [11].

39 (1985) 75 FLR 197.

40 (1985) 75 FLR 197, 210.

41 In *Maclean Shire Council v Nungera Co-operative Society Ltd* [1994] 84 LGERA 139, a decision of the New South Wales Court of Appeal, the only issue was whether or not the Society was a PBI as the Shire Council conceded that the land was used or occupied by the Society: 141.

42 [1995] 89 LGERA 120.

43 In particular, the general clause in s 12(k) ('such other functions as are conferred or imposed on it by or under this or any other Act') was held by Bignold J to not be charitable, which meant that the Land Council was not a charity: *Aboriginal Land Council v Wentworth Council* [1995] 89 LGERA 120, 126.

44 *Local Government Act 1989* (Vic) s 154(2)(c).

45 *Local Government Act 1989* (Vic) s 154(4).

46 *Local Government Act 1995* (WA) s 6.26(2)(g).

47 *Local Government Act 1993* (Tas) s 87(1)(d).

48 *Local Government Act 2008* (NT) s 144 (3).

49 *Local Government Act 2008* (NT) s 144 (2).

50 [1999] WASC 108 ('*Bindibindi*').

51 *Bindibindi* [1999] WASC 108 [25].

52 *Bindibindi* [1999] WASC 108 [35].

53 [2006] WASAT 378.

54 [2006] WASAT 378 [63].

55 [2007] WASCA 233 [65].

56 (1921) 29 CLR 98.

57 (1952) 85 CLR 159.

58 [2008] HCA 55 ('*Word Investments*').

59 *Word Investments* [2008] HCA 55 [26].

60 [2006] WASAT 378 ('*Yungngora Association*').

61 *Yungngora Association* [2006] WASAT 378 [63].

62 *Yungngora Association* [2006] WASAT 378 [17].

63 *Yungngora Association* [2006] WASAT 378 [63].

64 *Yungngora Association* [2007] WASCA 233, [70]. [76].

65 *Yungngora Association* [2007] WASCA 233, [71]-[76].

66 (1921) 29 CLR 98 ('*Nunawading*').

67 (1952) 85 CLR 159 ('*Fern Tree Gully*').

68 *Fern Tree Gully* (1952) 85 CLR 159, 165.

69 Certainly McTiernan J in the *Fern Tree Gully Case* considered that the size of the operation in the *Nunawading Case* contributed to the decision that the land was used for a second purposes that was commercial and non-charitable: (1952) 85 CLR 159, 179.

70 *Local Government Act 2008* (NT) s 144 (1)(k).

71 *Local Government Act 2008* (NT) s 3.

72 *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) s 45.

73 *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 3. The section specifically provides that the objects of the Act are in recognition of the past dispossession and dispersal of the Aboriginal and Torres Strait Islander peoples and their present disadvantaged position in Australian society.

74 *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 191A(2)(c).

75 *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 193P.

76 *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 145.

77 *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 188.

78 *Local Government Act 1999* (SA) s 161(1).

79 *Local Government Act 1999* (SA) s 166(1)(j).

80 *Local Government Act 1999* (SA) s 161(3).

81 *Local Government Act 1999* (SA) s 161(4)(a)(i)(B).

82 *Local Government Act 1999* (SA) s 161(4)(c)(i)-(vii).

83 Toni Bauman and Tran Tran 'First National Prescribed Bodies Corporate Meeting Canberra Issues and Outcomes' (AITASIS Research Report 3/2007); Jessica Weir 'Native Title and Governance: The Emerging Corporate Sector Prescribed for Native Title Holders' (2007) 3(9) *Land, Rights, Laws: Issues of Native Title* 1, 9.

84 Ian Sheppard, Robert Fitzgerald and David Gonski, *Report of the*

Inquiry into the Definition of Charities and Related Organisations (2001) 223 <http://www.cdi.gov.au/html/report.htm> at 8 July 2010.

85 Submissions by Commonwealth Department of Health and Aged Care and Queensland State Government to ibid.

86 Brian Wyatt 'Opening Plenary Address' (Speech delivered at National Native Title Conference, 3 June 2008, Perth, Western Australia); *Yungngora Association* [2006] WASAT 378, [63] (Barker J).

87 Interview with representatives from AIATSIS and the Office of the Registrar of Indigenous Corporations (2010).